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Administrative Law Controls on the Delegate

7.1 Introduction

As with the ability of human rights obligations to reach private delegations, when surveying the different jurisdictions it becomes immediately apparent that the ability of ‘administrative law’ to reach private delegates of governmental power also depends on the criteria for its applicability.¹ Again, certain applicability criteria will simply be more conducive to extension of administrative law to private delegates than others. If the exercise of power or, as in the human rights discussion, performance of function, per se, generated administrative review—regardless of the institutional identity of the power-holder—then administrative law could potentially extend with ease to private delegates. Alternatively, if administrative review only attached to the actions of institutional governmental actors, private delegates would not even be within its vision. Thus, in many ways, the same question is being asked in this chapter as in the last, namely, determining when traditional ‘public law’ constraints apply to private delegates. That said, though, the answer to this question in administrative law has evolved quite differently, at least in England and the US, from how it has evolved in the human rights context in each jurisdiction,² albeit that in the English context the two questions are beginning to converge.³

Structurally, Part One of this chapter (ie, section 7.2) will present a short overview of the variety of sources of administrative law in the three jurisdictions. Part Two (section 7.3) then deals with the content of administrative law, in terms of the relevance of the general values of administrative law in responding to the challenges posed by private delegation, as presented in Chapter Three. Part Three (section 7.4) then reviews the four primary applicability criteria found in the US, England, and the EU: institutional identity, procedure, source of power, and

² In England, separation of the applicability of human rights from that of administrative law has been advocated by the House of Lords: Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2004] 1 AC 546 [52].
³ See below 7.4, text to nn 65–70.
function. What is meant here by ‘institutional identity’ is narrow: it refers to a test that requires the identification of a body as a governmental institution—‘agency’, ‘department’, ‘bureau’, ‘board’, and so on—before applying administrative law principles. During the identification process, it may be necessary to consider the source or nature of the body’s power, but primarily the aim is to categorize the power-holder before applying substantive administrative law. A ‘procedure’ trigger envisages a correlation between the procedure for applying for an administrative law remedy and the reach of administrative law. A ‘source of power’ trigger focuses on how the private delegate is created, whether through contract or statute; while a ‘function’ trigger, as was shown in the previous chapter, will apply administrative law according to the presence of a particular type of power.

Insofar as the EU is concerned, it will actually be discussed in relatively little detail in this chapter. Although, as has just been noted, the discussion of the last chapter and of this differ in England and in the US, in the EU everything that was said in Chapter Six regarding the reach of human rights applies with equal force to the reach of administrative law obligations. Private delegates may be bound because administrative law obligations are directly horizontally effective; or they may be bound by administrative obligations of the ECJ’s jurisprudence or the Charter of Fundamental Rights of the European Union (‘the Charter’) due to the Meroni doctrine or due to a broad understanding of the reach of the Member State. Consequently, for the most part, when the EU is considered within the framework of this chapter, it will be with a cross-reference to Chapter Six. Finally, in Part Four (section 7.5) of this chapter, a very brief comment will be made regarding the application of freedom of information legislation to private delegates.

7.2 Sources of Administrative Law in the Jurisdictions

It is important to clarify our understanding of the term ‘administrative law’ for, as is well-accepted, when asked what ‘administrative law’ is, lawyers of different legal systems are likely to identify administrative law in different ways and speak of different things.⁴ The three jurisdictions present a variety of sources of administrative law. In England, although the procedure for applying for administrative law remedies has been codified,⁵ the content of administrative law is still governed by judge-made common law.⁶ In the EU, administrative law principles

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⁵ Civil Procedure Rules Pt 54.

have the same sources as human rights principles: in the Treaties and legislation, in the ECJ’s jurisprudence, and in the Charter. A number of administrative law principles are found in the Union’s fundamental source of law, the Treaty, such as the duty to give reasons of the Parliament, Council, and Commission,⁷ the duty to act proportionately,⁸ and the enumeration of the substantive grounds for review.⁹ Insofar as principles of administrative law are contained in secondary legislation, they tend to constitute—aside from the example of the Financial Regulation examined in Chapter Five¹⁰—what Nehl has described as a ‘patchwork codification tailored to the specific requirements of sectorial policy implementation’.¹¹ Often, when the EU is legislating to regulate a particular area, it will include administrative procedures that apply only to that area.¹² Sometimes, indeed, an entire regulatory scheme will essentially involve an elaboration of procedural protections, such as in competition regulation,¹³ the control of national subsidies,¹⁴ or the administrative law relating to the Community’s civil service.¹⁵ The Charter also contains a right to good administration in Article 41. However, as Schwarze has noted:

by far the greatest number of legal principles governing administrative activity recognized today in Community law originate in the creative law-making and decision-making process of the European Court of Justice.¹⁶

Many of the principles of administrative law found in the EU legal order have first been recognized in the ECJ’s case law: in particular, proportionality, equality, and legitimate expectations.¹⁷

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⁷ EC Treaty Art 253.
⁸ Ibid Art 5.
⁹ Ibid Art 230.
¹⁵ The staff regulations for officials and conditions of employment of other servants of the European Community are set out in Council Regulation (EEC, Euratom, ECSC) 259/68 of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission [1968] OJ L56/1.
¹⁶ Schwarze (n 12) 4–5.
¹⁷ A Arnull and others, Wyatt and Dashwood’s European Union Law (5th edn, Sweet and Maxwell, London 2006) 236 [7-003].
At the US federal level, the predominant source of administrative law, the Administrative Procedure Act 1946 (‘APA’), is codified.¹⁸ This Act regulates federal agencies in two primary ways: first, by prescribing procedures which must be followed by agencies in respect of rule-making, adjudication, and publication;¹⁹ and, second, by listing the grounds of judicial review of agency action.²⁰ Even though the Act has codified administrative law, in practice it seems to serve as no more than an ‘underlying decisional guidepost’ which has actually resulted in a ‘modern common law of the administrative process’.²¹ At most, the APA provides skeletal heads of review—for instance, arbitrary or capricious decision-making—and the substance of what this actually means is provided by the courts. There is, however, no separate body of common law administrative law principles at the US federal level.

The explanation for this situation is complex and can only be considered in very basic terms here. As was discussed in Chapter Two, Article III of the federal Constitution grants Congress discretion to create lower federal courts and to define the jurisdiction of the tribunals it establishes.²³ As a result, a federal court may only adjudicate a case if there is both constitutional and statutory authority for federal jurisdiction—the latter requirement deriving from Congress’s power to determine the jurisdiction of lower federal courts.²⁵ Even where federal jurisdiction is established, federal courts operate under a partially self-imposed prohibition on creating ‘federal common law’. The term ‘“federal common law” . . . refers to any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional’.²⁶ The prohibition on the development of federal common law derives from judicial interpretation of the Federal Rules of Decision Act, placed in the judicial code by the Judiciary Act 1789, which, in turn, made the first statutory grant of jurisdiction to federal courts. The Act remains largely unchanged to this day and states that ‘the laws of the several states, except where the Constitution or treaties of the US or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply’.²⁷

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¹⁸ 5 USC §§ 551 et seq. ¹⁹ 5 USC §§ 551–9.
²⁰ 5 USC §§ 701–6. Graham and Prosser also note that the Act has the further purposes of requiring agencies to keep the public informed of their organization, procedures, and rules and providing for public participation in the rule-making process: C Graham and T Prosser, Privatizing Public Enterprises: Constitutions, the State and Regulation in Comparative Perspective (Clarendon Press, Oxford 1991) 220.
²⁵ Chemerinsky (n 24) 260–61 § 5.1. ²⁶ Field (n 24) 890.
²⁷ 28 USC § 1652. See also Chemerinsky (n 24) 354 § 6.1.
Initially, the term ‘laws of the several states’ was interpreted to refer to state legislation only, thereby creating the possibility of development of federal common law.²⁸ Although uniformity was a justification for this decision, there was no suggestion by Justice Story, who articulated the position,²⁹ that states would actually be bound to follow federal law, just that they may be persuaded by it.³⁰ However, in the case of *Erie Railroad v Tompkins*³¹—in a deliberate re-thinking of earlier case law³²—the Supreme Court decided that ‘laws of the several states’ also included common law of the states. A number of reasons were advanced for the holding, including the fact that the states had failed to follow the federal position in such a way as to actually achieve uniformity.³³ The Supreme Court also reasoned that to permit federal courts to develop federal common law was inconsistent with the federal Constitution. In essence, ‘Congress has no power to declare substantive rules of common law applicable in a State . . . And no clause in the Constitution purports to confer such a power upon the federal courts’.³⁴ Even post-*Erie*, federal courts have created federal common law in a number of situations, such as where they have discerned a ‘uniquely federal interest’ or where a statute has conferred federal jurisdiction that the courts have deemed to require the creation of substantive federal law.³⁵ Moreover, the reluctance of federal courts to develop federal common law has varied at different times.³⁶ However, as a general principle, federal courts, unlike the ECJ, do not develop common law administrative rules, due to this controversial and much-debated, self-imposed prohibition on the development of federal common law.³⁷

At the state level in the US, in contrast to the federal situation, there are both codified and judicial sources, with administrative procedure acts (‘APAs’) and, in most states, a judicial jurisprudence surrounding the traditional prerogative remedies of certiorari, mandamus, and prohibition, derived from English law.³⁸ In the absence of a federal administrative common law, this state judicial jurisprudence to a large extent develops and evolves independently of federal administrative law.

²⁸ *Swift v Tyson* 41 US 1 (1842).
²⁹ Ibid 19.
³⁰ Field (n 24) 900–01.
³¹ 304 US 64 (1938).
³² The issue was not argued by counsel: see Field (n 24) 902.
³³ Note 31, 73–7.
³⁴ Ibid 78.
³⁶ Weiser (n 35) 1705–15.
³⁸ See, eg, 6 NY Jur 2d *Article 78 and Related Proceedings* § 1 (2007); 14 Am Jur 2d *Certiorari* § 1 (2007); 52 Am Jur 2d *Mandamus* § 2 (2007).
7.3 Content of Administrative Law in the Jurisdictions

In England, the traditional purpose of the courts’ supervisory jurisdiction has been identified as ‘not to vindicate rights as such, but to ensure that powers are exercised in accordance with basic standards of legality, fairness and rationality’.³⁹ In its most basic form, the procedural propriety element of judicial review protects the two maxims of *audi alteram partem* and *nemo judex in causa sua*, although a detailed jurisprudence regarding representation, the giving of reasons, and the protection of legitimate expectations, both procedural and substantive, has also evolved.⁴⁰ Legality of decision-making requires that decisions are not based on irrelevant considerations, or made for improper purposes, in bad faith, or in violation of human rights protections,⁴¹ while the rationality requirement is intended to ensure reasonable and proportionate decision-making.⁴² A similar set of values is protected in US administrative law, at both state and federal level. The judicial review chapter of the federal APA, on which most state versions are modelled, contains a clause indicating that the scope of review shall be to set aside, inter alia, decisions taken in an arbitrary or capricious manner or in abuse of discretion,⁴³ contrary to constitutional rights,⁴⁴ in excess of jurisdiction,⁴⁵ without observing procedures required by law,⁴⁶ unsupported by substantial evidence⁴⁷ or unwarranted by the facts.⁴⁸ In the EU context, examples of the types of administrative law principle protected include the requirement of administration through law,⁴⁹ the principle of fair legal process,⁵⁰ legal privilege,⁵¹ good administration,⁵² the rule of law,⁵³ the right to a hearing,⁵⁴ proportionality,⁵⁵ legitimate

⁴⁰ See generally Craig (n 6) 407–73.
⁴¹ Ibid 551–604.
⁴² Ibid 609–86; *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [2005] 2 All ER(D) 283.
⁴³ 5 USC § 706(2)(A).
⁴⁴ Ibid § 706(2)(B).
⁴⁵ Ibid § 706(2)(C).
⁴⁶ Ibid § 706(2)(D).
⁴⁷ Ibid § 706(2)(E).
⁴⁸ Ibid § 706(2)(F).
⁵³ Ibid.
⁵⁵ See, eg, Case 114/76 Bela-Mühle Josef Bergman KG v Grows-Farm GmbH & Co KG [1977] ECR 1211 [5]; Case C-453/03 R (ABNA Ltd) v Secretary of State for Health [2005] ECR I-10423 [67]–[69]. The principle of proportionality is now also recognized in EC Treaty Art 5.
expectations,⁵⁶ non-discrimination,⁵⁷ effective judicial protection,⁵⁸ legal certainty,⁵⁹ the right to a hearing before an adverse decision is taken by a public authority,⁶⁰ and the emergent transparency principle.⁶¹

Such a supervisory jurisdiction, if applied to private delegates of governmental power, would contribute significantly to addressing many of the concerns expressed in relation to private delegation in Chapter Three. Exposing private actors to administrative law supervision automatically increases their legal accountability. Less obviously, perhaps, this may also increase their political accountability, because if administrative law is applied to private delegates a direct route is created for the citizen to hold the private delegate to account. In other words, direct or external accountability to the public is enhanced. This in turn relates to the ability of administrative law to counteract the undermining of democracy that private delegation can entail: the actual process of litigation can be seen as a form of participation, thereby furthering the aims of participatory democracy.⁶² On another level, requirements of procedural propriety have a more immediate result by allowing participation by citizens in decisions that affect them. Civic republican democracy concerns can also be allayed somewhat by requirements of legal and rational decision-making—such requirements increasing the likelihood that decisions are made in the public interest. Finally, both free-standing and procedural rights protections can be furthered by administrative law—in England, judicial review includes a common law human rights jurisprudence⁶³; while in the US administrative procedure acts, constitutional rights are usually expressly protected.⁶⁴ Moreover, in all jurisdictions, hearing requirements obviously protect procedural rights.

7.4 Applicability of Administrative Law to Private Delegates

Before considering the specific factors which have been used to determine amenability to judicial review, it is necessary to make three comments regarding the

⁵⁷ See, eg, ABNA (n 55) [62]–[66].
⁵⁸ Case 222/84 Johnston v Chief Constable of the RUC [1986] ECR 1651 [18]–[19].
⁶³ R v Secretary of State, ex p McQuillan [1995] 4 All ER 400 (QB) 421–2; R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115 (HL) 131.
⁶⁴ See, eg, 5 USC § 706(2)(B).
English jurisprudence in particular. The primary amenability test in English law is set out in the Civil Procedure Rules (‘CPR’), rule 54.1, which states that a claim for ‘judicial review’ means a claim to review the lawfulness of an enactment or a decision, action or failure to act ‘in relation to the exercise of a public function’. The test is therefore formulated slightly differently from section 6(3)(b) of the Human Rights Act 1998 (‘HRA’), which, as will be recalled, refers to a ‘function of a public nature’.⁶⁵ The extent to which these two tests are converging is, however, somewhat unsettled. On the one hand, some argue that the two tests are different, since the use of ‘public function’ in the CPR context is ‘shorthand for a sophisticated set of principles that were in the course of development well before the CPR came into effect’.⁶⁶ In the Aston Cantlow case, Lord Hope indicated that the judicial review jurisprudence may be ‘helpful’ in understanding section 6 of the HRA, but not ‘determinative’⁶⁷; while Lord Hobhouse put the point even more strongly and stated that answers to the interpretation of the HRA were to be ‘found in Human Rights law not in Community law nor in the administrative law of England and Wales’.⁶⁸ On the other hand, even if the HRA test is not determined by the judicial review jurisprudence, the HRA jurisprudence is influencing the judicial review jurisprudence, and much of the recent lower court judicial review case law has assumed that the two tests are analogous.⁶⁹ The result is that two of the applicability criteria discussed here, procedure and source of power, which have been so important in the evolution of English administrative law, are ceding ground to an overriding test of ‘function’.⁷⁰ Nonetheless, it is important to review these criteria as they have had influential effect in cases relevant to private delegation and, as was demonstrated by the discussion on section 6(3)(b) in Chapter Six, the ‘functional’ analysis still retains strong elements of source of power concerns.

The second point to make here is also related to the English case law. Traditionally, the ‘procedure’ criterion has been enormously important in the English jurisprudence and is accordingly considered here, but its relevance may be waning. Recent important English cases have indicated that the substantive principles of administrative law may be applied even in private contract law disputes, and this issue will be considered further in Chapter Eight.⁷¹

⁶⁵ Above 6.3.2.
⁶⁶ D Oliver, ‘Functions of a Public Nature under the Human Rights Act’ [2004] PL 329, 346; see also, ‘Chancel repairs and the Human Rights Act’ [2001] PL 651 (cited with approval in Aston Cantlow (n 2) [52]).
⁶⁷ Aston Cantlow (n 2) [52] (Lord Hope).
⁶⁸ Ibid [87].
⁷⁰ See also Lord Woolf, J Jowell and AP Le Sueur, De Smith, Woolf and Jowell’s Principles of Judicial Review (Sweet and Maxwell, London 1999) 60 [3-012]–[3-013].
⁷¹ Below 7.4.2.1, 7.4.3.1(c), 8.2 and 9.1.1.
Third, a comment which arises in both the US and English context: many of the principles in this area have been developed in cases which have not involved delegation, in the sense discussed in this book at least, but rather have involved private regulatory associations, such as sporting associations. By discussing these cases here, the aim is not to assert that these associations necessarily constitute examples of delegation to private actors, but to review the principles developed in these cases, since they have obvious relevance to the delegation context.

7.4.1 The ‘institutional identity’ criterion

An institutional identity criterion which requires an obvious governmental actor is very restrictive, and only seems to be found in highly codified systems, such as the US state and federal APAs and in limited specific contexts in the EU. It does not feature prominently in English jurisprudence. In the US, as a result of what could almost be described as a contrivance between statutory definition and judicial interpretation, systems of administrative law dependent on ‘institutional identity’ are not very effective in controlling private delegates and their reach, as found in their definitions of ‘agency’, is often too narrow to encompass many clearly public actors, never mind private actors. Even where there is a definition of ‘agency’ that could apply comfortably to a private contractor, the courts usually deprive it of any impact by their interpretive methods.

7.4.1.1 United States: The federal APA

The federal APA provides an interesting example of statutory wording which could, in theory, extend to private delegates of governmental power. Under the federal APA, if seeking judicial review of an entity it is a pre-requisite that the entity constitute an ‘agency’. In the Act itself the term ‘agency’ is defined as each authority of the Government of the US, whether or not it is within or subject to review by another agency, but does not include Congress, the courts, and other exceptions. In practice, uncertainty as to the meaning of an ‘authority of the government’ has made the “law on the simple question of what is an agency . . . quite complex”. Most of the litigation on the issue has actually arisen in the context of the definition of ‘agency’ in the Freedom of Information Act (‘FOIA’), which is closely related to the definition in the APA, but which was amended in 1974 to result in a broader definition than is found in the APA.

72 See, eg, Incorporated Village of Great Neck Plaza v Nassau County Rent Guidelines Board 418 NYS2d 796, 799 (NY App Div 1979) (county board not subject to state APA).
73 5 USC § 702.
74 5 USC § 701(b)(1). See also 5 USC § 551(1); 2 AmJur2d Administrative Law § 467 (2007).
77 FOIA expands on the APA definition of ‘agency’ by including ‘any executive department, military department, Government corporation, Government controlled corporation, or other
Delegation of Governmental Power to Private Parties

To be categorized as an ‘agency,’ a body must have sufficient authority to act with the sanction of the government behind it,⁷⁸ and the form or functions assigned to the agency are of secondary importance.⁷⁹ The tests have ranged from requiring ‘substantial independent authority in the exercise of specific functions’⁸⁰ to requiring that it has ‘authority in law to make decisions’.⁸¹ There has not been any Supreme Court decision setting out a test⁸² and, indeed, most Circuits reject the merit of establishing a test, insisting that when confronted with one of the myriad organizational arrangements for getting the business of the government done…[t]he unavoidable fact is that each new arrangement must be examined anew and in its own context.⁸³

While flexibility in the application of judicial tests is often to be welcomed, interestingly, in the context of reaching private delegates of governmental power, a simple test focusing on the entity’s ‘authority in law to make decisions’, as seemingly requested by the statutory wording, might actually be preferable. As already noted, such a test, similarly to the function test discussed above in Chapter Six, has the potential to reach actors traditionally considered to be ‘private’. It appears to be genuinely unconcerned with the source of the body’s authority which, as will be seen later in the English situation, can render it very difficult to reach private actors. In practice, though, the courts, possibly uncomfortable with the potential reach of this formulation of ‘authority in law to make decision’, have limited its scope by adding the following:

because the organization in question [has] no authority to make decisions it [is] not a government agency, but the converse of that proposition may not always be true; that an organization makes decisions does not always mean that it is a government agency.⁸⁴


⁷⁸ Lassiter v Guy F Atkinson Co 176 F2d 984, 991 (9th Cir 1949); 73 Corpus Juris Secundum § 8 Public Administrative Law and Procedure (2007).
⁷⁹ Ibid.
⁸⁰ Soucie v David 448 F2d 1067, 1073 (DC Cir 1971).
⁸¹ Washington Research Project Inc (n 76) 248; JH Miles and Co Inc v Brown 910 FSupp 1138, 1159 (ED Va 1995); International Brominated Solvents Association v American Conference of Governmental Industrial Hygienists Inc 393 FSupp2d 1362, 1379 (MD Ga 2005). See also below 7.5.
⁸² Although the Supreme Court has held that the President is not included out of respect for the separation of powers and the unique constitutional position of the President: Franklin v Massachusetts 505 US 788, 796, 800–01 (1992).
⁸³ McKinney v Caldera 141 FSupp2d 25, 33 (D DC 2001) (internal citation omitted).
with the Department of Health, Education and Welfare under the Medicaid and Medicare programmes, was not found to be an agency for purposes of the FOIA.\textsuperscript{85} This was because, despite the fact that the body was independently run by private physicians and making conclusive decisions with direct implications for the federal Medicare and Medicaid programmes,\textsuperscript{86} a number of factors were considered to operate against finding it to be a federal ‘agency’: it was a corporation organized under state law, its Board of Trustees consisted of private individuals, its physician members were paid on an hourly fee basis and they were not government employees, and the body conducted its work pursuant to a contract with the Department.\textsuperscript{87} Writing in concurrence, one of the Circuit Judges noted that:

A galaxy of factors—which may include the nature of the function performed, the authority in law of the entity, the authority in fact of the entity, the nature of the entity, the portion of the entity’s business which is done by contract or grant with the government, the congressional intent concerning the status of the entity as evidenced by the legislation approving or authorizing the contract or grant, and the type and degree of control over the entity exercised by the government—must be evaluated and weighed.\textsuperscript{88}

Thus, by considering multiple factors, the Court was able to emphasize factors that operated against finding that the body should be subjected to the FOIA. It seems that the court added factors to the analysis that were not, at least on the face of it, required by the APA. As argued powerfully by the one dissenting judge in the \textit{Public Citizen Health} case, ‘[b]odies with the delegated authority to make significant decisions are agencies in their own right. They act in the place of a preexisting government body in the exercise of a central function’.\textsuperscript{89} To reject the sufficiency of this was wrong, as ‘requiring courts to strike a new balance of various factors of indeterminate number and significance in every case will lead nowhere’.\textsuperscript{90}

The courts also consider the extent of governmental supervision of the private actor.\textsuperscript{91} Recipients of federal assistance grants\textsuperscript{92}—both federally funded research agencies\textsuperscript{93} and federally funded non-profit organizations\textsuperscript{94}—have been found not to fall within the definition of ‘agency’ under the FOIA in the absence of detailed, extensive, and virtually day-to-day supervision. For example, private physicians and scientists, recipients of federal grants from the National Institute of Arthritis, Metabolism and Digestive Diseases (‘NIAMDD’), were not deemed to constitute

\textsuperscript{85} Ibid 538. \textsuperscript{86} Ibid 543–4. \textsuperscript{87} Ibid 543.
\textsuperscript{88} Ibid 545. \textsuperscript{89} Ibid 546. \textsuperscript{90} Ibid.
\textsuperscript{91} Feiser (n 77) 37.
\textsuperscript{92} Above 2.4.1.3 and 5.3.
\textsuperscript{93} \textit{Forsham v Harris} 445 US 169, 176 (1980); \textit{Ciba-Geigy Corporation v Mathews} 428 FSupp 523, 527–32 (SDNY 1977); \textit{Lombardo v Handler} 397 FSupp 792, 802 (DDC 1975).
\textsuperscript{94} \textit{State of Missouri, ex rel Garstang v US Department of Interior} 297 F3d 745, 750–51 (8th Cir 2002). See also \textit{Irwin Memorial Blood Bank of San Francisco Medical Society v American National Red Cross} 640 F2d 1051, 1055–7 (9th Cir 1981). See also \textit{Dong v Smithsonian Institute} 125 F3d 877, 881–3 (DC Cir 1997) (holding that the Smithsonian is not an agency for the Privacy Act (5 USC § 552a) which adopts the FOIA definition).
an ‘agency’ because, even though NIAMDD had a right of access and permanent custody of the documents, NIAMDD did not exercise these rights and generally left the day-to-day operations of the programme to the grantees.\(^9\) On the specific issue of access to information, much of this case law has been overtaken by the Shelby Amendment, which is discussed below\(^9\); but, given its consideration of the term ‘agency’, the jurisprudence is still relevant for present purposes. Further, even where there is financial funding and extensive oversight, performance of a governmental function is also required and so a railroad corporation created by Congress was not deemed to be a FOIA agency.\(^77\)

7.4.1.2 United States: state APAs

As a general matter, the definition of ‘agency’ in state APAs is often even narrower than the federal definition, and in reality state APAs generally apply to only some agencies, and to only some of the adjudications of these agencies.\(^9\) One obstacle to applying state APAs to private actors has been the term ‘state’ itself. In Texas and Minnesota, the state APA only applies to bodies with ‘state-wide jurisdiction’.\(^9\) In New York, there are even more limitations, and the reach of the APA is limited to departments, boards, and so on, ‘of the state’, at least one of whose members is appointed by the governor, and who is authorized by law to make rules or to make final decisions in adjudicatory proceedings.\(^10\) At times, this has resulted in the important functions performed by private actors being dismissed without much analysis. In *Motor Vehicles Manufacturers’ Association of US, Inc v State*,\(^10\) the New York Supreme Court concluded summarily that a private arbitrator was not a ‘state agency’, even though the arbitrator was conducting arbitration pursuant to one of the state ‘lemon laws’, which required disputes as to defects in cars to be settled by compulsory private arbitration and without access to a court.\(^10\)

Not only has the term ‘state’ appeared in the legislation though: it has also proven sufficiently vague and malleable to allow state courts to apply state APAs narrowly. So for instance, in New York, the phrase ‘of the state’ has been interpreted restrictively. In *Incorporated Village of Great Neck Plaza v Nassau County Rent Guidelines Board*, a county rent guidelines board was found to only be a

\(^9\) See also Feiser (n 77) 37–43.


\(^9\) For example, in *Motor Veh Manufacturers’ Assn of US, Inc v State* (n 98), the New York Supreme Court concluded summarily that a private arbitrator was not a ‘state agency’, even though the arbitrator was conducting arbitration pursuant to one of the state ‘lemon laws’, which required disputes as to defects in cars to be settled by compulsory private arbitration and without access to a court.
‘local’ entity ‘of a quasi-legislative nature’—even though created by state legislation, appointed by the state Commissioner of Housing and Community Renewal, and receiving staff assistance from the state.\textsuperscript{103} Extensive, detailed, and virtually day-to-day supervision is required to demonstrate that the agency is an ‘instrumentality of the State’.\textsuperscript{104}

Another technique used by state courts has been to impose sequential requirements that are not even self-evidently demanded by the statutory definition. In the Iowa case of \textit{Graham v Baker}, it was held that a non-profit organization that contracted with the state to perform farm mediation services on behalf of the Iowa Attorney General was not an agency.\textsuperscript{105} Admittedly, the definition of ‘agency’ with which the court started was quite narrow—an ‘administrative office or unit of the state’\textsuperscript{106}—yet, the interpretive method applied removed any hope of reaching the private delegate. The Court started promisingly, by stating that it was applying a ‘functional test’,\textsuperscript{107} but then considered a number of factors, unrelated to function: the scope of the putative agency’s authority, how it was administered and controlled, the source of its funds, the derivation of its rules, and the selection of its members.\textsuperscript{108} In spite of the fact that it was accepted that, had the Attorney General or Attorney General’s designee been conducting the mediation himself, he would have been a ‘state agency’,\textsuperscript{109} and that the contracting-out was not only permitted by statute, but required by it,\textsuperscript{110} the Court reasoned that ‘[i]t would be incorrect, however, to assume that all private contractors who perform services authorized by statute under contract with a state agency are themselves state agencies’.\textsuperscript{111} The Court then concluded that, because the mediation service did not enjoy ‘coercive authority’ to impose a solution on parties, it could not be considered to be an ‘agency’.\textsuperscript{112} Yet to only recognize as ‘state’ power, power that is ‘coercive’, is to adopt far too narrow an understanding of governmental influence. Moreover, to include within a ‘functional’ analysis, factors completely unrelated to function, is to render a finding of ‘agency’ more difficult.

There have been a few cases indicating that some courts are prepared to take a more expansive view of their APAs. In Connecticut for instance, four factors are considered—whether the entity performs a governmental function, the level of governmental funding, the extent of government involvement or regulation, and whether the entity was created by government—and it is stressed that ‘all relevant

\begin{footnotes}
\footnotetext[103]{Above (n 72) 798–9. See also \textit{League General Insurance v Catastrophic Claims} 458 NW2d 632, 639 (Mich 1990); \textit{Dorris v Missouri Substance Abuse Counselors’ Certification Board Inc} 10 SW3d 557, 560–61 (Mo Ct App 1999); \textit{Insurance Premium Finance Association v NY State Department of Insurance} 668 NE2d 399, 403 (NY 1996); \textit{Riggins v Housing Authority of Seattle} 549 P2d 480, 483 (Wash 1976).}
\footnotetext[104]{\textit{Insurance Premium Finance Association} (n 103) 402.}
\footnotetext[105]{447 NW2d 397, 399 (Iowa 1989).}
\footnotetext[106]{Iowa Code Ann § 17A.2(1).}
\footnotetext[107]{Above (n 105) 399.}
\footnotetext[108]{Ibid.}
\footnotetext[109]{Ibid.}
\footnotetext[110]{Iowa Code § 654A.3 (since repealed).}
\footnotetext[111]{Above (n 105) 399.}
\footnotetext[112]{Ibid.}
\end{footnotes}
factors are to be considered cumulatively, with no single factor being essential or conclusive’.¹¹³ Thus, a non-profit community economic development corporation was held to be an agency, because, although not funded by the government and not performing a governmental function, the entity was heavily controlled by, and ‘virtually an alter ego’ of, government.¹¹⁴ Moreover, occasionally, a state APA may have broader reach because it incorporates an unusual definition of ‘agency’. In South Dakota, the state APA defines ‘agency’ as including an ‘agent of the state vested with the authority to exercise any portion of the state’s sovereignty’.¹¹⁵ When a state agency, authorized by the legislature to adopt rules for ‘staff qualifications’, required that all of its staff members be certified by a non-profit corporation, the corporation was held to be a state ‘agency’. This was because, when the power to set staff qualifications was vested in the non-profit corporation, the corporation exercised the state’s sovereignty.¹¹⁶

In general, though, APAs seem ineffective in controlling private delegates of governmental power. This may be due, in part at least, to an intuitive sense on the part of the judiciary that the elaborate procedures contained in such acts—such as for publication of records, rule-making, or adjudication¹¹⁷—impose a heavy burden that should not be extended to private actors lightly. Turning again to the Iowa *Graham v Baker* case, it is interesting to note that although the Court was adamant that the mediation service was not an ‘agency’ for APA purposes, it was then happy to find that a suit for mandamus could nonetheless be filed against the mediation service.¹¹⁸ This was because the mediation service performed its duty as a result of statute, and because its duties, were ‘affected with a public interest’.¹¹⁹ Although mandamus was only used to compel the service to act according to statutory duty, clearly the existence of an alternative remedy to the APA was influential.

This reluctance to extend APAs to private actors is unsatisfactory, however. It seems to be derived from a misplaced apprehension that an APA must apply as a monolithic and onerous whole, and that if a body is subject to the judicial review provisions of the APA, it must also be subject to the rigorous procedural requirements of the APA.¹²⁰ In fact, the federal experience has indicated that an APA can be applied flexibly: specific acts of administrators have been held subject to the judicial review provisions of the Act, even though not subject to the


¹¹⁴ *Meri-Weather* (n 113) 1042–3.

¹¹⁵ SD Codified Laws § 1-26-1(1).

¹¹⁶ *Bruggeman v South Dakota Chemical Dependency Counselor Certification Board* 571 NW2d 851, 853 (SD 1997).

¹¹⁷ See, eg, 5 USC §§ 552–4.

¹¹⁸ Above (n 105) 401.

¹¹⁹ Ibid 400.

¹²⁰ Above 7.2.
procedural requirements of the Act. Moreover, there are many exemptions from the procedural requirements that would protect private delegates from excessive interference, such as the rule-making exception for rules of organization, procedure or practice. Thus, if it is a concern to protect private actors from what appears to be a rigorous regime of administrative obligations that drives these narrow interpretations of the scope of APAs, this seems unnecessary.

7.4.1.3 European Union
There are certainly many EU administrative law obligations, particularly those found in the Treaty, which are dependent on an ‘institutional identity’ criterion. The Article 5 EC obligation of proportionality rests on ‘the Community’, while the duty to give reasons in Article 253 EC rests on the Parliament, Council, and Commission. Moreover, insofar as administrative law obligations are found in the jurisprudence of the ECJ or the Charter, they only apply to EU institutions and Member States acting within the scope of Community law. Certain obligations attach to activities, which one would hope, in light of the Financial Regulation discussed in Chapter Five, a private delegate will never perform: Article 253, for instance, only applies to the adoption of regulations, directives and decisions. However, where there are obligations of potential relevance to private delegates, such as the general principle of legitimate expectations or non-discrimination, it is to be hoped that the Meroni reasoning, advocated above in the human rights context, would be considered. Indeed, in the Meroni case itself, it will be recalled that it was a failure to attach reason-giving duties to the activities of the Brussels agencies which resulted in the invalidation of the delegation. Furthermore, where private delegates of Member States are concerned, as will be considered below and as has been seen already in Chapter Six, the ECJ is usually not persuaded by narrow institutional understandings of the ‘Member State’, but adopts a broad and functional approach.

7.4.2 The ‘procedure’ criterion
The relevance of administrative law procedures in determining the applicability of administrative law has arisen in the jurisprudence surrounding the prerogative remedies. England, in particular, provides a unique example of how a particular procedure can have an enormous impact on the ability of administrative law to reach private delegates, albeit that, as was noted above, this influence is now waning.

¹²² 5 USC § 553(b)(A).
¹²³ Above 6.3.3.
¹²⁴ Above n 10 and 5.2.
¹²⁵ See generally Craig and de Búrca (n 61) 382–91.
¹²⁶ Above 6.3.3.3.
¹²⁷ Above 4.3.1.1–4.3.1.2.
7.4.2.1 England: Procedure determines applicability

Substantive law grows out of adjectival law... principles are born of procedures... the nature of a jurisdiction is conditioned by the remedies that can be granted within it.¹²⁸

When seeking access to substantive administrative law principles in England, it is first necessary to negotiate the special procedure governing application for judicial review. The current legal bases for this procedure are found in Part 54 of the CPR, as noted above, and also in the Supreme Court Act 1981, section 31. Part 54, which was introduced as part of the reforms based on the Woolf Report (‘the Woolf Reforms’),¹²⁹ states that a claim for judicial review means a claim to review the lawfulness of an enactment, or decision, action, or failure to act in relation to the exercise of a public function.¹³⁰ This is, in turn, based on the old 1977 Order 53, which constituted the first codified reform of the procedure for applying for judicial review. As is well-known, in English law, there are ‘three special remedies... available only against the government’¹³¹: they are the ancient prerogative remedies of certiorari, prohibition, and mandamus, now known as quashing order, prohibiting order, and mandatory order respectively.¹³² Two private law remedies—the remedies of declaration and injunction—have also played an important role in controlling the actions of governmental bodies. These two remedies are available both through the special procedure governing applications for judicial review and through proceedings outside the judicial review procedure.

The justification for a special procedure accompanying administrative law remedies is to protect public bodies from frivolous applications and delayed litigation—hence a short time limit,¹³³ a leave requirement,¹³⁴ and restricted fact-finding facilities.¹³⁵ Yet initially, due to the manner in which the application procedure was codified, if seeking either a declaration or an injunction there was a free choice as to which procedure to choose—the special procedure with public body protections, or the writ procedure with the longer time limit and without a leave requirement. This created the risk that the public body’s protections could be bypassed by an applicant’s use of the writ procedure. In light of the importance with which the public body protections are regarded, and in response to the risk to this protection created by the ‘loop-hole’ in the codification, in O’Reilly v Mackman, the English judiciary established a rule of procedural exclusivity, according to which an action involving public law issues can only be brought using the

¹³⁰ CPR 54.1(2)(a).
¹³² CPR 54.2(a)–(c).
¹³³ Ibid 54.5.
¹³⁴ Ibid 54.4.
¹³⁵ Craig (n 6) 793–4.
application for judicial review procedure. To do otherwise constitutes an abuse of process, depriving the public body of the protections designed specially for its benefit. However, additionally, and what is more relevant for present purposes, the ‘obverse’ of the O’Reilly rule has also been established, and it has been held that judicial review is inappropriate for an action not considered to be sufficiently ‘public’.

A focus on equality before the law led Dicey to deny the existence of a separate body of administrative or public law. Through a series of cases, however, a new public-private dichotomy was concretized in English law, and although the exclusivity rule has been qualified slightly from the O’Reilly position, the public-private distinction ‘remains of substantive analytical and practical significance in cases concerning the boundaries of judicial review’. The Woolf Reforms, giving rise to Part 54, although increasing the flexibility with which transfers can be made between proceedings initiated as judicial review proceedings and proceedings initiated by writ, have nonetheless retained the procedural exclusivity rule and the traditional remedies.

Even if it is accepted that the protections afforded public bodies by the procedure for application for judicial review are justifiable—although this is, of course, not without controversy—it is less easy to justify the ‘obverse’. It is not self-evident why litigants, having accepted the burdens of the judicial review procedure, must nonetheless be excluded from judicial review because their claims contain too many private law elements. Moreover, underlying claimants’ attempts to use the new Part 54 procedure is a desire to have the benefit of administrative law grounds of review and remedies. Accordingly, the transferability introduced by the Woolf Reforms is only useful to the extent that the public law grounds of review can apply outside the Part 54 procedure. Traditionally, at least, these principles did not seem to extend, at least in any consistent fashion, beyond the confines of judicial review, and consequently, to date, much of the focus of the courts in cases

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137 Ibid. See also: Mercury Communications Ltd v Director General of Telecommunications [1996] 1 WLR 48 (HL); Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988 (CA); Boddington v British Transport Police [1999] 2 AC 143 (HL).
138 R v East Berkshire Health Authority, ex p Walsh [1985] QB 152 (CA) 159.
139 Ibid 166, 173, 176.
140 J Beatson, ”Public” and “Private” in English Administrative Law’ (1987) 103 LQR 34, 34.
143 CPR 54.20.
146 Ibid.
147 Ibid.
148 See R v Association of British Travel Agents, ex p Sunspell judgment of 12 October 2000 [26], Keene J noting that ’nowadays it matters less than it once did which procedure is initially adopted,
involving private actors, has been on determining whether or not the defendant in judicial review proceedings can be considered to be a ‘public’ entity, and on whether or not the issues are sufficiently ‘public’. As Craig has put it:

In the United Kingdom system the question has arisen most recently in judicial decisions as to whether an institution is sufficiently public to have the public law procedures which are contained in section 31 of the Supreme Court Act 1981 applied to it. The assumption is then made that bodies which are felt suited to these procedures for seeking judicial review should also be subject to the procedural and substantive norms which comprise public law.¹⁴⁹

Thus, in English law, a procedural rule of exclusivity has had an enormous substantive impact on the ability of administrative law to respond to the challenge of delegation of governmental power to private parties. This is what Cane has characterized as the ‘traditional thinking’—where remedies are viewed ‘as a sort of procrustean bed into which life has to be forced before the law can deal with it’.¹⁵⁰ Perhaps what is even more disappointing is that the assumption that the judicial review procedure applies only to public bodies has ‘no express foundation in the legislation’¹⁵¹ It is a largely judicial creation.

All of this said, however, it must be stressed that the emphasis on procedure in English law does appear to be waning, and there have been recent indications that English courts will apply administrative law-like obligations outside the procedural context of Part 54.¹⁵² Increasingly, English courts have suggested that ‘choice of forum or of remedy cannot affect substantive law’.¹⁵³ In the contractual context, for instance, the courts have suggested that the disciplinary power of an association to fine a member ‘is subject to an implied term that the fine will not be unreasonable or excessive in all the circumstances’.¹⁵⁴ In the notable case of Bradley v Jockey Club, the Court of Appeal upheld an argument that a breach of contract claim could be brought against a body such as the Appeal Board of the Jockey Club, where the breach alleged was of an implied contractual obligation to act proportionately in imposing a disciplinary sentence.¹⁵⁵ However, this case was unusual, since the Appeal Board had itself accepted that it should act proportionately—and the issue

but the substantive law applicable to public bodies exercising public law functions remains significantly different from the private law of contract, although Keene J also noted at [22] that a duty to act proportionately could be pleaded as an implied contractual term in private law proceedings; see also below text to nn 152–167 and 8.2.

¹⁵⁰ P Cane, ‘The Constitutional Basis of Judicial Remedies in Public Law’ in Leyland and Woods (n 39) 242, 244.
¹⁵¹ Alder (n 39) 161. ¹⁵² This issue is also discussed in Ch Eight below (8.2).
¹⁵³ CF v Secretary of State for the Home Department [2004] EWHC 111 (Fam), [2004] 1 FCR 577 [25] (Munby J); see also M Fordham, Judicial Review Handbook (4th edn, Hart, Oxford 2004) [27.2.6]–[27.2.7].
¹⁵⁴ Sunspell (n 148) [22].
was not whether it could be forced to do so.¹⁵⁶ Rather, the focus was on the standard of review to be applied in determining whether it had in fact acted proportionately—an exercise described by Richards J in the High Court as being similar to the exercise conducted on judicial review.¹⁵⁷ The courts’ primary justification for intervening in such cases has been to protect individuals’ rights, such as in the case of Edwards v SOGAT, where the aim was to prevent an ‘unwarranted encroachment on a man’s right to work’.¹⁵⁸ In the employment context, English courts have even indicated that professionals could refuse to comply with employer’s directions that were not ‘reasonable’¹⁵⁹ or were ‘unlawful’ and have suggested, although not decided, that the administrative law test of Wednesbury unreasonableness could set the standard of unlawfulness.¹⁶⁰

Outside the contractual context, the courts have also exercised supervisory review on occasion. In the well-known case of Nagle v Fielden, at issue was the application by a woman to the Jockey Club for a trainer’s licence, which was refused due to the Jockey Club’s policy to refuse to grant a licence to any woman.¹⁶¹ Lord Denning insisted that the courts had power to grant a declaration that the rejection was invalid and an injunction requiring the association to rectify their error, although damages would not be available unless the claimant could show a contract or a tort.¹⁶² The holding in this case had been doubted on occasion,¹⁶³ but has now been bolstered by the decision in Bradley. Neither the Court of Appeal nor the High Court in Bradley went so far as to state that Nagle established an independent non-contractual ground of review. However, Richards J in the High Court noted that, even in the absence of contract, the court has a settled jurisdiction to grant declarations and injunctions in respect of decisions of domestic tribunals that affect a person’s right to work.¹⁶⁴ This jurisdiction has also been thought to be limited to cases involving the right to work or restraint of trade,¹⁶⁵ although, subsequent to Bradley, the jurisdiction has now been described more expansively. In the Mullins case, for example, it was deemed to be a ‘jurisdiction to review the lawfulness of disciplinary decisions of certain bodies that do not exercise a public function’.¹⁶⁶ Sir Stanley Burnton opined that

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¹⁵⁶ Ibid [14]–[15], [17]–[18]. See also Fallon v Horseracing Regulatory Authority [2006] EWHC 2030 (QB) [15].
¹⁵⁷ Bradley v Jockey Club [2004] EWHC 2164 (QB) [37].
¹⁵⁸ [1971] Ch 354 (CA) 377.
¹⁵⁹ Sim v Rotherham Council [1987] 1 Ch 216 (Ch) 248.
¹⁶⁰ Ibid 249. See also Cotran v Rollins Hudig Hall International Inc 948 P2d 412, 422 (Cal 1998).
¹⁶¹ [1966] 2 QB 633 (CA).
¹⁶² Ibid 646.
¹⁶³ See, eg, Siskina (Owners of cargo lately on board) v Distos Cia Naviera SA [1979] AC 210 (HL).
¹⁶⁴ Above (n 157) [35].
¹⁶⁵ See, eg, Mullins v McFarlane [2006] EWHC 986 (QB) [38].
¹⁶⁶ Mullins (n 69) [17]. There were two Mullins decisions: the first (n 69) determining whether judicial review was appropriate; and the second (n 165) determining whether declarations could issue pursuant to CPR 40.
the court’s supervisory jurisdiction was unrestricted and that the importance of the challenged decision to the claimant would be relevant to determine whether or not it should be exercised.¹⁶⁷

Although this jurisprudence reduces the importance of the procedural criterion, the parameters of the jurisprudence are far from settled. Insofar as a contractual relationship is required, there is often no agreement at all between the private delegate service-provider and the recipient of the service, with the consequence that it is difficult, if not impossible, to find a contract-like arrangement to which duties of natural justice, or not to act arbitrarily and capriciously, could attach. Alternatively, insofar as the jurisprudence is based on the right to work or restraint of trade, it will have limited application. Finally, however, if, as was suggested in Mullins, this jurisprudence is triggered because the challenged decision has ‘importance’ to the applicant, it will be extremely relevant in the private delegation context. At the moment, all that can really be said is that if this jurisprudence progresses in accordance with Mullins, it may prove to be extremely helpful in responding to private delegation by extending administrative law-like obligations to private delegates. It could also signal the demise of the procedure criterion as an important factor in this context.

7.4.2.2 United States state law: Procedure and scope distinct

In many states, such as New York, the common law remedies of certiorari, mandamus, and prohibition were derived from English law and became, at an early time, part of the common law of the state.¹⁶⁸ Historically, the function of the writs was ‘to enforce performance of some act or duty commanded by statute or relating to some public matter or right’,¹⁶⁹ and they were intended to serve only ‘for the purposes of reviewing or compelling official action’.¹⁷⁰ Nonetheless, in practice, the writs were often used to monitor private institutions, for instance, to compel the performance by an incorporated private association of its corporate duties,¹⁷¹ or even to instate or reinstate rejected members to membership of incorporated private associations.¹⁷²

In many states the common law writs have been abolished, and the remedies of mandamus, certiorari, and prohibition have been codified. Usually the impact of such codification, as with the English 1977 Order 53 innovation, has been to introduce a new procedure for applying for the remedies. Unlike in England, though, codification did not hinder the extension of public law values into the private realm and, indeed, in recent times, courts in states such as New York and California

¹⁶⁷ Mullins (n 165) [39].
¹⁶⁹ Weidenfeld v Keppler 82 NYS 634, 635 (NY App Div 1903) (emphasis added).
¹⁷⁰ Mangano v Altmeyer 225 NYS2d 379, 381 (NY Sup Ct 1962) (emphasis in original).
¹⁷¹ State, ex rel Rhodes Mortician and Undertaking Co v New Orleans Funeral Directors’ Association 108 So 132 (La 1926).
have often taken a rigorous approach to reviewing the actions of private actors and, admittedly with some exceptions,¹⁷³ have generally insisted on interpreting the relevant statutory provisions broadly.

One factor that may partly explain this difference between the English reaction to procedural codification and the US state reaction to procedural codification, is that codification in the US does not seem to have resulted in the anomaly of different remedies, by which similar administrative principles are applied, being available through different procedures, thereby requiring something akin to the English rule of procedural exclusivity. Another possibly influential factor is the explicitly broad scope of the US state statutory provision, which, as will be seen, can extend simply to an ‘aggregation of persons’¹⁷⁴: this is a less convincing explanation of the difference, however, given the broad scope of Part 54 itself.

In New York, Article 78 of the Civil Practice Law and Rules¹⁷⁵ provides that the relief previously obtained by writs of certiorari to review, mandamus, or prohibition must be obtained through the special proceeding provided by Article 78.¹⁷⁶ The aim is to provide a uniform and expeditious procedure for applying for all of the prerogative remedies,¹⁷⁷ and, for instance, there is a short time limit—of four months.¹⁷⁸ Although the substantive grounds of review—failure to perform a duty imposed by law,¹⁷⁹ excess of jurisdiction,¹⁸⁰ violation of lawful procedure,¹⁸¹ arbitrary or capricious decision-making,¹⁸² abuse of discretion,¹⁸³ whether a determination is supported by substantial evidence¹⁸⁴—are listed in Article 78, the courts have been keen to stress that Article 78 supersedes the common law writs in procedure only. The right to relief still depends on the substantive law of the former writs.¹⁸⁵

In their scope, the codified Article 78 proceedings are broad and can be brought against a ‘body or officer’ including ‘every court, tribunal, board, corporation, officer or other person, or aggregation of persons’.¹⁸⁶ Article 78 is not applied without limitation, of course, and it has not been applied wholesale to the private sector.¹⁸⁷ The proceeding has been held inapplicable to a private insurance agency¹⁸⁸ and to a voluntary unincorporated association.¹⁸⁹ Moreover, as will be discussed below,¹⁹⁰ Article 78 proceedings are not considered appropriate to enforce private contractual rights.¹⁹¹ However, Article 78 proceedings have

been found suitable to review the actions of many non-governmental bodies,\footnote{See Goldman v White Plains Center for Nursing Care LLC 801 NYS2d 508, 510–11 (NY Sup Ct 2005).} including an expulsion decision at a private denominational elementary school,\footnote{Hutcheson v Grace Lutheran School 517 NYS2d 760, 761 (NY App Div 1987). Although the Court found no violation of Art 78 requirements, it did not question the applicability of Art 78 to a private school.} the actions of a residential cooperative board,\footnote{Levandusky v One Fifth Avenue Apartment Corporation 553 NE2d 1317 (NY 1990).} a private hospital’s termination decision,\footnote{In re Libby 558 NYS2d 116, 116–17 (NY App Div 1990). The decision in this case was that the petitioner could not use an Art 78 proceeding because he had not exhausted his administrative remedies. There was no indication that the Court did not consider the Art 78 proceeding to be entirely appropriate.} the expulsion of members from an athletic club,\footnote{Murphy v NY Athletic Club in the City of NY Inc 671 NYS2d 475, 476 (NY App Div 1998) (allowing the Art 78 proceeding but finding that ample notice of the charges had been given and finding a rational basis for the expulsion).} the temporary suspension of the employee of a private not-for-profit corporation,\footnote{Mitchell v Dowdell 569 NYS2d 291, 292 (NY App Div 1991). See also Matter of Carr v St John's University 235 NYS2d 834, 834 (NY App Div 1980).} and the for-cause element of expulsion of a member of a political party.\footnote{Battipaglia v Democratic County Committee of the County of Queens 191 NYS2d 288, 292–3 (NY Sup Ct 1959).} As is explicit from its wording, Article 78 can be used against a corporation,\footnote{Vanderbilt Museum v American Association of Museums 449 NYS2d 399, 400–01 (NY Sup Ct 1982); Sines v Opportunities for Broom Inc 550 NYS2d 99, 100–01 (NY App Div 1989). But see Fiammetta v St Francis Hospital 562 NYS2d 777, 778 (NY App Div 1990).} especially where it is alleged that the corporation did not follow its own internal procedural rules and regulations.\footnote{Gray v Canisius College of Buffalo 430 NYS2d 163, 166 (NY App Div 1980).} It has also been held that an Article 78 proceeding is appropriate to compel private corporations to fulfil obligations imposed upon them by statute as well as by their internal rules,\footnote{Auer v Dressel 118 NÉ2d 590, 592 (NY 1954); Weidenfeld (n 169) 635–6.} including adherence to their own hearing or review procedures.\footnote{Below 7.4.4.2.}

Similarly, in California, there are two codified remedies of ‘traditional mandate’ and ‘administrative mandate’. The ‘administrative mandate’ will be discussed below,\footnote{Code of Civil Procedure § 1085.} but, for now, it should be noted that the ‘traditional mandate’ is generally intended to compel any tribunal, corporation or person to comply with a legal duty or to stop preventing another from enjoying a right or office to which he or she is entitled.\footnote{Hobbs v Tom Reed Gold Mining Co 129 P 781, 781 (Cal 1913).} It has been used to compel non-governmental officers to perform their legal duties, such as officers of business corporations\footnote{Thorman v International Alliance etc Employees 320 P2d 494, 497 (Cal 1958) (overruled on other grounds Consolidated Theatres Inc v Theatrical Stage Employee Union 447 P2d 325, 331 fn 8 (Cal 1968)).} and labour unions.\footnote{The writ has also been employed in the context of restoring...}
membership to corporations\textsuperscript{207} and unincorporated associations,\textsuperscript{208} and is the ‘established avenue’ for review of the actions of private hospitals.\textsuperscript{209}

Thus, in both these states, administrative law principles can be applied against private actors, with the result that the question of determining whether such actors can be deemed ‘governmental’ is bypassed. Moreover, it should be stressed that the courts will often vary the standard of review depending on the identity of the respondent to the suit. For example, the standard of review of the actions of a residential cooperative board was a ‘business judgment’ standard.\textsuperscript{210}

7.4.2.3 European Union: Procedure and scope distinct

As was discussed above in Chapter Six,\textsuperscript{211} it seems that the only way an action against a private delegate could be brought to the attention of the ECJ would be through a national court reference, under the Article 234 EC procedure. The Article 230 EC procedure is strictly restricted to Community institutions. However, as in the US and as was seen in Chapter Six, the procedure would not have any bearing on the application of relevant substantive administrative law obligations, which are governed by different concerns and principles.

7.4.3 The ‘source of power’ criterion

7.4.3.1 England: The importance of the source of power

Having established that a separate procedure has had a substantive influence on the scope of judicial review, the English courts have also had to determine when a body might be ‘public’ for the purpose of the procedure. One important element of this inquiry has been determining the source of power of the body under scrutiny, which requires examining the authority under which the body in question performs its functions. As a basic rule, it seems that, as Lord Justice Lloyd put it in the well-known Datafin case:

If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review.\textsuperscript{212}

However, between those two extremes lie many cases where the source of power test no longer provides an answer to the question of amenability and other factors, such as function, acquire importance.\textsuperscript{213} From a general

\textsuperscript{207} Taboada v Sociedad Española De Beneficencia Mutua 215 P 673, 674 (Cal 1923).
\textsuperscript{208} Bernstein v Alameda etc Medical Association 293 P2d 862, 869 (Cal Ct App 1956).
\textsuperscript{209} Westlake Community Hospital v Superior Court 551 P2d 410, 421 (Cal 1976).
\textsuperscript{210} Levandusky (n 194) 1318.
\textsuperscript{211} Above 6.3.3.1.
\textsuperscript{212} R v Panel on Take-overs and Mergers, ex p Datafin [1987] QB 815 (CA) 847.
constitutional perspective, the importance of a statutory basis and the drawing of ‘a conceptual line between functions of public governance and functions of mutual governance’²¹⁴ reflects the fact that in the Diceyan model, as was discussed in Chapter Two, the basis for the courts’ judicial review jurisdiction is the sovereignty of Parliament and the associated doctrine of ultra vires, while Dicey’s particular conception of the rule of law ensures the priority of private law remedies over their public law counterparts.²¹⁵ From the more specific perspective of delegated governmental power, the obvious major difficulty with this test, explicit in Lord Justice Lloyd’s dictum, has been a dominant trend in judicial reasoning to assume that contractual or consensual relationships belong to private and not public law.²¹⁶ As discussed in the procedure section of this chapter, this trend is waning.²¹⁷ However, while statutory underpinning will generally indicate amenability to judicial review,²¹⁸ by contrast, where the defendant derives its authority from contract, courts will be very hesitant to intervene.

This jurisprudence has repercussions for private delegation. Given the widespread use of contract as a mechanism for delegation of governmental power to private parties, an emphasis on statutory underpinning for amenability to judicial review means that private delegates who have received their governmental power from contract, will often be immune from administrative law obligations. In other words, English administrative law has generally only been capable of reaching private delegates created by one of the three mechanisms of delegation identified in this book—legislative delegation—and not delegation by contract or grant. Wade has noted that:

If contract is made into a rigid barrier against judicial review, victims of abuse of power may be left without a remedy where they are not themselves parties to a contract under which some public service is administered. ‘Government by contract’ is now so extensive that the case for controlling it may become irresistible.²¹⁹

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²¹⁴ Aston Cantlow (n 2) and [2001] EWCA Civ 713 [38].
²¹⁵ M Hunt, ‘Constitutionalism and the Contractualization of Government in the United Kingdom’ in Taggart (n 149) 21, 27; see also Servite Houses (n 213) 66. See also above 2.3.2.1.
²¹⁷ Mullins (n 69) [29] (Sir Stanley Burnton J noting that ‘the existence of a contractual relationship is not inconsistent with judicial review’).
²¹⁸ Leech v Deputy Governor of Parkhurst Prison [1988] AC 533 (HL) 561; R v General Medical Council, ex p Colman [1990] 1 All ER 489 (CA) 499.
²¹⁹ Wade and Forsyth (n 69) 638.
This difficulty has been exacerbated by what appears in the case law to be a judicial tendency to adopt a narrow understanding of ‘statutory’ source of power and a generous understanding of ‘contractual’ source of power.

(a) Narrow understanding of statute
A noteworthy example of the narrowness of the courts’ understanding of ‘statutory’ source of power—and simultaneously of the broad understanding of contract—is actually found in the contracting-out context. In Servite Houses the applicants were elderly residents at a home run by Servite Houses, a charitable housing association. Wandsworth Council had, pursuant to its statutory duties, assessed them as being in need of residential accommodation, and in accordance with section 26(1) of the National Assistance Act 1948 contracted out its duty to provide residential accommodation to Servite Houses. When Servite decided to close the home in which the applicants lived, they objected, claiming that they had been promised a home for life. Moses J was therefore required to determine whether the private service provider was amenable to judicial review, which was all the more important, given that the case was argued on the basis that there was no private law form of redress.

Jumping back in time for a moment, writing in 1997, Murray Hunt envisaged some hope for an extension of judicial review to private actors, in part, in light of the case of R v Governors of Haberdashers’ Aske’s Hatcham College Trust, ex p Tyrell. This is an interesting case, which could have provided some guidance for the court in Servite Houses. In Haberdashers’, at issue was section 105(1) of the Education Reform Act 1988, which permitted the Secretary of State to enter into an agreement with any person whereby that person agreed to maintain an independent school or City Technology College (‘CTC’). Haberdashers’ Aske’s College entered into such an agreement, and a disappointed applicant for admission to the College sought judicial review of the decision refusing him a place on the ground that the criteria actually adopted in the admissions process departed substantially from those set out in the College’s prospectus.

Holding the CTC subject to judicial review, Dyson J’s reasoning exhibited three interesting aspects. First, he was satisfied that the existence of the CTC ‘derive[d] from s105 of the 1988 Act and the exercise by the Secretary of State of his powers under that section’. Accordingly, although not explicitly stated by

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220 Above n 213.
221 National Health Service and Community Care Act 1990 s 47.
222 Above (n 213) 56–9. It should be noted that Moses J found no delegation of the s 21 obligation to provide accommodation (ibid, 69). For the purposes of this book, it is argued that there was nonetheless a ‘transfer of authority’ (above 1.1.1) since Servite was performing a function which, as is evidenced by the facts of the case, involved the exercise of discretionary power and which would otherwise have been performed by the government itself.
223 Above (n 213) 61.
224 [1995] COD 399 (QB); Hunt (n 215) 35.
225 Ibid 400.
Dyson J, the implication seems to be that CTCs could be said to have a statutory source of power. Second, the learned judge was additionally persuaded by the fact that the Secretary of State had the power under section 105(3)(a) to control the admissions procedure of the CTC.²²⁶ Most interestingly, however, the third aspect of Dyson J’s judgment indicates that he was unconvinced by the argument that an agreement existed between pupils and parents of CTCs and the CTCs, as there had never been any intention to enter into a contract.²²⁷ Consequently, he was particularly persuaded by the fact that if the CTCs were not found to be susceptible to judicial review, pupils and parents would be left without a remedy.²²⁸

Unfortunately though, and contrary to Hunt’s hopes, this case has not been the source of a new and more expansive judicial review jurisprudence. Although relied on in the Servite Houses judgment for its dicta on private schools, the central holding of Haberdashers’ was not even mentioned by Moses J.²²⁹ Had he followed Haberdashers’, Moses J might have been influenced by the fact that the plaintiffs in Servite Houses had no alternative remedy to judicial review. Moses J might also have reasoned that section 26, enabling a local authority to make arrangements with a voluntary organization or any person who is not a local authority, was analogous to section 105; or, as counsel for Servite Houses put it, that ‘Servite and Wandsworth [were] locked together in a statutory embrace’.²³⁰ Just as in Haberdashers’, the source of power of the college was found to derive from the statutory provision allowing the Secretary of State to enter into agreements with the colleges so, too, in Servite, Moses J could have found a statutory source of power in the statutory provision permitting local authorities to enter into agreements with housing associations. Although section 26 did not include as much regulation of the housing association as contained in section 105, in terms of the CTCs, it did nonetheless contain some provisions requiring housing associations to be either registered or exempt in respect of the homes.²³¹ Yet this option was expressly rejected by Moses J, as he noted that ‘[i]t does not seem to me that reliance can be placed upon the very legislation which enables privatization to take place’,²³² as its only effect was to enable arrangements to be made.²³³

In a telling sign of the Diceyan importance to English judges of justifying judicial review by reference to parliamentary intention, Moses J explained this position by resorting to statutory intention, adding that:

It is likely that when the powers of local authorities to make private arrangements pursuant to section 26 were introduced in 1993, no-one gave thought to the question of whether the private service provider was to be subject to public law standards.²³⁴

²²⁶ Ibid 401. ²²⁷ Ibid. ²²⁸ On other occasions, judges have stated expressly, however, that public law should not be used to ‘patch up the remedies available against domestic bodies by pretending that they are organs of government’: Aga Khan (n 216) 933.
²²⁹ Above (n 213) 74. ²³⁰ Ibid 70. ²³¹ Section 26(1A).
²³² Above (n 213) 77. ²³³ Ibid.
²³⁴ Ibid.
Thus, the standard set by Moses J was such that in order for a statutory source to be found, what is required is a statutory enmeshing—a statute creating a mixed economy of services is insufficient. This position has been justifiably criticized by Craig, who has noted that:

In the case of contracting-out there is legislation that explicitly and directly, not implicitly and directly, tells us that a private party can perform the public function cast on the local authority.²³⁵

The reasoning in Servite Houses has been followed in R (A) v Partnerships in Care Ltd.²³⁶ At issue in the case was the challenge of the claimant, who had a severe personality disorder and had been detained in a private hospital pursuant to section 3(1) of the Mental Health Act 1983, to the decision of the managers of the hospital to change the focus of the ward from provision of care and treatment for patients suffering from personality disorders to the provision of care and treatment for patients suffering from mental illness. A similar power to that contained in section 26 of the National Assistance Act 1948 had been vested in the Secretary of State and delegated to health authorities to arrange for private hospitals to provide health services under the National Health Service Act 1977, and these statutory provisions alone were not sufficient to render a private hospital amenable to judicial review.²³⁷ Unlike in Servite Houses, however, there were other factors which resulted in the conclusion that the hospital was amenable to judicial review. The hospital was a registered mental nursing home under Part II of the Registered Homes Act 1984, and pursuant to Regulation 12(1) of the Nursing Homes and Mental Nursing Homes Regulations 1984, which were made under the 1984 Act, the hospital was required to provide adequate professional staff and adequate treatment facilities.²³⁸ Keith J was also persuaded by the fact that there was a public interest in the hospital’s patients receiving care and treatment which might result in their living in the community again, and that patients admitted to the hospital under section 3 of the 1983 Act were detained compulsorily.²³⁹ Thus, clearly, while the judge found functional factors persuasive, the ‘statutory framework’ was his ‘starting point’.²⁴⁰

In short, rather than perceiving of the relationship between citizen, private contractor, and governmental authority as a triangular relationship with the state fulfilling its statutory obligation through the private contractor,²⁴¹ in Servite Houses Moses J conceived of the relationship in linear terms and could not be satisfied that there was a sufficiently immediate link between the private contractor and

²³⁵ Craig (n 6) 810.
²³⁶ [2002] EWHC 529 (Admin) [21]. See also Ch Six n 146.
²³⁷ See National Health Service Act 1977 s 23; National Health Service (Functions of Health Authorities and Administrative Arrangements) (England) Regulations 2001 (SI 2001/747).
²³⁸ Above n 236 [24].
²³⁹ Ibid [25].
²⁴⁰ Ibid [14].
²⁴¹ See Ch One (1.1.1).
the statute. This is evident from the learned judge’s comment: ‘It follows that not only is the relationship between Servite and Wandsworth governed solely by the terms of the contract between them, but the relationship between Servite and the Applicants is solely a matter of private law’. Consequently, the statutory link, through the statutory obligation to arrange provision of accommodation, had been broken by the contract. By contrast, in Partnerships in Care the court could find a direct link between the private contractor and the statute.

(b) Expansive understanding of contract

The English courts’ expansive understanding of contract has mostly been evidenced in cases involving private associations and self-regulatory organizations, and not in the private delegation context. Clearly, though, the jurisprudence surrounding private associations is illustrative for private delegation purposes. In Law v National Greyhound Racing Club judicial review was considered inappropriate for the greyhound club, because the club promulgated rules of racing which applied to all holders of its licences, and thereby was deemed to have derived its powers contractually from the relationship between it and the licence-holders. Similarly, in the Aga Khan case, the Jockey Club’s functions were not found to be public, in part because they derived purely from the contractual relationship between the club and those who agreed to be bound by the rules of racing. The problems with the expansive notion of contract adopted in these cases have been well-documented. Indeed, in the Aga Khan case, this practical reality was even acknowledged by the judges, one of whom noted that a person had ‘no choice’ but to submit to the Jockey Club’s rules if he wished to race horses in this country. He quickly dismissed his own concern, though, by declaring in a ‘peremptory’ manner that ‘nobody is obliged to race his horses in this country’. Similarly, in Law, it was noted that all greyhound racecourses in the south of England held greyhound club licences, but still, any consideration of the genuineness of consent was precluded by the narrow concentration on the source of power.

In the private delegation context, where the private delegate takes over the role of the governmental actor, the citizen is often, by virtue of even requiring governmental services, in a position of some vulnerability. Consequently, it is often quite simply fictional and unrealistic to assume that there has been consensual and voluntary acceptance of the private delegate’s power. As Aronson has put it, behind the private law form lies a pure exercise of government power, because it is in the nature of outsourcing that the consumer has no more say in the formation or

242 Servite Houses (n 213) 76.
244 Aga Khan (n 216) 924, 928, 933.
245 Ibid 928 (Farquharson LJ).
247 Aga Khan (n 216) 928.
248 Law (n 243) 1311.
249 Hunt (n 215) 33.
terms of the contract than in the pre-outsourcing days when government provided the service direct. ²⁵¹

Thus, even where there is a contract between the citizen and the private contractor, to consider that relationship as a consensual relationship is problematic. Indeed, this was an issue that troubled Moses J in Servite Houses, and he noted that the claimants ‘had no choice as to whether to enter an establishment provided by Wandsworth or by a private body’. ²⁵²

(c) Judicial attitudes

Even though the English judiciary has not always wholeheartedly embraced the emphasis on the source of power test, it is so well-established that doubting judges usually feel bound by authority to apply it, rather than seek an alternative and more useful approach for private delegation. Indeed, in Servite Houses, Moses J noted that an argument in favour of extension of administrative law to private contractors presented ‘enormous attraction’, ²⁵³ but felt ‘compelled to decline to follow so enticing a path... [and] inhibited by the approach of previous courts’. ²⁵⁴ As noted above, if the Mullins and Bradley case law described above progresses, the English courts’ reluctance to extend administrative law review to bodies exercising powers derived from contract will become less relevant in the context of private delegation, as an alternative supervisory jurisdiction will be available. At the moment, though, that jurisprudence is too uncertain and not sufficiently well-evolved to provide an adequate substitute to extending judicial review to the private delegates of governmental power.

7.4.3.2 United States state law: The source of power as one factor

With regard to the source of power analysis, there are a number of points to be made about New York law. The first is that Article 78 proceedings are, as already noted, ²⁵⁵ and as in the English context, not considered appropriate to enforce private contractual rights. ²⁵⁶ However, this is not an absolute rule and there are recognized exceptions. So, for instance, mandamus is considered by the New York courts to be a judicial command to perform a ministerial act specifically required of a public or corporate officer or body by law. ²⁵⁷ The term ‘law’ here not only refers to statutory or common law but, significantly, also includes a rule of limited application as laid down in a ‘contract with a public dimension’ fixing the petitioner’s right to such performance. ²⁵⁸ In contrast to the English context,

²⁵¹ M Aronson, ‘A Public Lawyer’s Responses to Privatization and Outsourcing’ in Taggart (n 149) 40, 55–6.
²⁵² Servite Houses (n 213) 78–9.
²⁵³ Servite Houses (n 213) 79.
²⁵⁴ Ibid.
²⁵⁵ Above 7.4.2.2.
²⁵⁶ Oshinsky (n 191) 411; Gray (n 200) 168 fn 3.
²⁵⁷ Geraci v New York State Department of Correctional Services 456 NYS2d 63, 73–4 (NY App Div 1982).
²⁵⁸ Ibid (emphasis added).
where the existence of a contract tends to the conclusion that a ‘public element’ is absent, in New York it is possible for a contract to have a ‘public dimension’, thereby enabling mandamus to be sought. Even more interestingly, it has been stated that:

By definition government contracts have a public dimension because of the public status of the government party, and because of the contracts’ being an exercise of sovereign power albeit narrowly applied in the form of a set of rules governing the relations of the parties to the contracts. In a sense, the government can be said to have bound itself (and its officers) by contract in the same way it binds itself by statute or judicial decision.²⁵⁹

The second point to note about New York law is that there seems to be a much narrower understanding of ‘contract’ in the New York jurisprudence than exists in the English context. New York courts have not excluded from review relationships that the English courts are quick to exclude. For example, Article 78 proceedings have been found suitable to review an expulsion decision at a private denominational elementary school.²⁶⁰ Similarly, Article 78 proceedings have also been brought to challenge the expulsion of members from an athletic club,²⁶¹ a private hospital’s termination decision,²⁶² the temporary suspension of the employee of a private not-for-profit corporation,²⁶³ and the for-cause element of expulsion of a member of a political party²⁶⁴—all situations that would no doubt have been analysed in the English context as ‘contractual’ and therefore unsuitable for judicial review.²⁶⁵ In *Lane v Sierra Club*²⁶⁶ it was held that the action of the voluntary, non-profit Club in suspending its local New York group without notice was invalid.²⁶⁷ Article 78 was an appropriate vehicle where individual rights in a private organization were abrogated in violation of lawful procedure²⁶⁸—which did not simply mean the procedures provided in the by-laws of the corporation, but encompassed more generally ‘established notions of procedural due process and fundamental fairness’.²⁶⁹

A third point to make is that legislative regulation can play a more persuasive role in New York than it does in England. If there is a duty imposed by law, this seems to suffice to bring a body within the scope of Article 78. In the case of *Battipaglia*, the rules adopted by a political party were adopted pursuant to an election law, and this was considered sufficient to bring the political committee within the realm of Article 78, since it was ‘recognized by statute and [with] statutory rights and duties’.²⁷⁰

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²⁵⁹ *Geraci* (n 257) 73 n 8.
²⁶⁰ *Hutcheson* (n 193) 761–2.
²⁶¹ *Murphy* (n 196) 476.
²⁶² *In re Libby* (n 195) 116.
²⁶³ *Battipaglia* (n 198) 294.
²⁶⁴ 706 NYS2d 577 (NY Sup Ct 2000).
²⁶⁵ Ibid 580.
²⁶⁶ 706 NYS2d 577 (NY Sup Ct 2000).
²⁶⁸ Above (n 198) 293.
7.4.3.3 European Union: The source of power as one factor

The relevance of an entity’s source of power sometimes emerges in the ECJ’s jurisprudence in the context of determining the reach of the Member State. So, in determining the enforceability of directives according to the Foster test discussed in Chapter Six, it is relevant that the body in question has been granted responsibility pursuant to a measure adopted by the state, and, as was considered above, it is up to the national courts to determine what this means. However, a formalistic source of power test is not overriding in the ECJ jurisprudence, and the Court has often indicated that it is a ‘functional’ approach that must be adopted.

7.4.4 The ‘function’ criterion

7.4.4.1 English law: The emergence of the function test

The final leading test in determining the reach of administrative judicial review is a function test and, in theory at least, ever since the Datafin case, concerning the Panel on Take-overs and Mergers, English courts do apply a function test. Strictly, this is the only test actually mentioned in Part 54. The Panel was a self-regulating body that had no direct statutory, prerogative or common law powers, but it was supported by certain statutory powers that presupposed its existence, and its decisions could result in the imposition of penalties. In finding the Panel subject to review, the Court reasoned that the absence of a statutory or prerogative base for powers did not exclude judicial review if the nature of the task rendered the body suitable for judicial review. The Panel, although self-regulating, did not operate consensually or voluntarily but rather imposed a collective code on those within its ambit. It was performing a public duty as manifested by the government’s willingness to limit legislation in this area and to use the Panel as part of its regulatory machinery, and to reinforce the Panel by statutory powers exercisable by the government and the Bank of England. Finally, the applicants did not appear to have any cause of action in contract or tort against the Panel. In terms of using judicial review to reach private delegates, a function test is certainly to be welcomed. The problem with this test in the English context has been, however, that the courts have applied it in a very narrow way and it is well-known that ‘Datafin has been distinguished more often than applied’. Three shortcomings in the application of this test by the English courts are worth noting.

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271 Above 6.3.3.2.
273 Above n 212.
274 CPR 54.1(2)(a)(ii).
275 Above (n 212) 825–6, 845–6.
276 Ibid 838–9, 848–9, 850–51.
277 Ibid 838–9, 851–2.
278 Ibid 838–9.
First, even in Datafin, the court never strayed too far from its primary test of statutory underpinning. The Datafin court was strongly influenced by the fact that, although the Panel did not enjoy a statutory or charter basis, its system of regulations was buttressed by a system of statutory powers and penalties, which assumed that the Panel was at the centre of the regulatory scheme. By retaining the source of power factor as part of the analysis in Datafin, the Court then left it open to subsequent courts to shift the focus back to the source of power criterion—as has actually happened.\(^{280}\) Second, in some cases, the courts have distorted the test by introducing a ‘but for’ inquiry. This has involved the courts considering whether or not, if the organization did not exist, ‘Parliament would almost inevitably intervene to control the activity in question’.\(^{281}\) In the case of \(R v\) Advertising Standards Authority, ex p The Insurance Service plc\(^{282}\) the body was found to be exercising a public law function, in part because, if it did not exist, its function would be exercised by the Director of Fair Trading.\(^{283}\) On the other hand, the Football Association was not held amenable to judicial review because there was no statutory underpinning and it could not be said that if the body did not exist the state would necessarily intervene.\(^{284}\)

Setting aside the intrinsic difficulties with such a test, in a situation where a power has been expressly delegated through contract to a private actor, it seems unhelpful to contend, as did Moses J in Servite Houses, that the ‘but for’ test is not applicable. Moses J reasoned that the test could not be applied, because the local authority, while remaining under a duty to provide housing, would not necessarily have to intervene and provide the service itself. It was open to the local authority to simply find another private provider. Therefore, the ‘but for’ test was not satisfied, because ‘but for’ the private provider, the state would not, in fact, be forced to provide the service itself.\(^{285}\)

While there is a certain strict logic to Moses J’s argument, the problem is that, instead of attaching the ‘but for’ test to the function being performed, the learned judge attached the ‘but for’ test to the particular actor, thereby narrowing even further the already extremely narrow ‘but for’ test. After all, ‘but for’ private providers, the local authority would have had to provide the service itself, which surely suffices to indicate that the service being provided is ‘governmental’ in nature. Why should it also have to be shown that ‘but for’ this particular private provider, the government would intervene? Of course, the ‘but for’ element seems to be yet another indicator of the English courts’ attachment to the ultra vires doctrine as the basis for judicial review, and to the persistence of the judicial perception that, to be legitimate, everything the courts do must be justifiable by reference to parliamentary intent.\(^{286}\)

\(^{280}\) Hunt (n 215) 33.
\(^{282}\) (1990) 2 Admin LR 77 (QB).
\(^{283}\) Ibid 86.
\(^{284}\) Football Association (n 216) 848.
\(^{285}\) Servite Houses (n 213) 72–3.
\(^{286}\) Bamforth (n 246) 245; Pannick (n 250) 5–6.
Third, the function test will often be overridden by the presence of a contractual source of power which will act as a ‘fatal impediment’ to the amenability of judicial review and Datafin has ‘failed to dent the common law’s refusal to treat contractual power as public power’. All of this said, of course, as was noted above, lower courts in particular have considered the tests under section 6(3)(b) of the HRA and Part 54 to be coinciding and merging. Thus, any widening of the section 6(3)(b) functional analysis will most likely result in a corresponding evolution in the judicial review context.

7.4.4.2 United States state law: Function in practice

State courts in the US have generally shown a marked willingness to apply a function test generously. In the context of Article 78 proceedings, New York courts have been attuned to the potentially tremendous power wielded by private entities. The case of Vanderbilt Museum v American Association of Museums is interesting in this regard. Although the Court did not find the Association of Museums to be a state actor for constitutional purposes, it noted that the Association exercised ‘a function [accreditation of museums] which has extensive economic impact on museums, affecting their ability to obtain funding from both governmental and private sources’. The fact that accreditation had ‘such evident economic impact’ meant that notice and hearing were required if accreditation was to be suspended.

The New York courts also appear to accept that Article 78 will be appropriate, where the respondent [even if a private institution] performs official functions, which, if not performed by him, would have to be undertaken by the state, or when the respondent has a franchise from the state.

In the case of Akivis v Brecher an Article 78 proceeding was permitted to compel an attorney to deposit funds for a real estate closing in escrow. Since there was a state Finance Law, section 97-t of which established a state-administered Clients’ Security Fund for reimbursing the victims of dishonest New York attorneys, this meant that ‘the disposition of all attorney escrow funds is a matter of public policy and public right in this state’. Although the Akivis language has not been tested in the contracting-out context, if the spirit of the courts’ jurisprudence is followed, it would seem that private contractors should be subject to Article 78.

287 Servite Houses (n 213) 80.
288 Aronson (n 251) 46.
289 Above 7.4, text to nn 65–70.
290 Vanderbilt Museum (n 199).
291 Ibid 407.
292 Ibid.
293 Ibid.
295 Akivis (n 294) 414 (emphasis in original).
More obviously, in California, one of the primary attributes of the Californian jurisprudence is its functional focus. For a start, the Californian ‘administrative mandate’ explicitly uses a function trigger. The Code of Civil Procedure was enacted in 1945 and it was at this stage that the remedy of ‘administrative mandate’ was introduced:

The writ [ie, the writ of mandate] is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer.

As stressed by the California Supreme Court, the legislature did not bring into being ‘a separate and distinctive legal personality…removed from the general law of mandamus’ but, rather, it established ‘a specialized procedure for the review by mandate of certain types of administrative decisions, whose characteristics it specifically delineated in the statute’.

The administrative mandate has been found appropriate to review the decisions of non-governmental bodies including the decision of a private non-profit hospital corporation’s decision refusing to reappoint a physician to its staff, a private dental plan’s decision regarding fees that could be charged by participating dentists, a private manufacturer’s decision to dismiss an employee pursuant to a union’s grievance procedure, a trade union’s decision to remove an officer pursuant to a formal hearing, and a private college’s decision to refuse tenure to a professor. Moreover, all that is needed to fulfill the requirement of the first clause of section 1094.5, that a hearing be given, is a common law rule requiring a hearing.

In the 1977 case of Anton v San Antonio Community Hospital it was held that the administrative mandate should be applicable to the determinations of non-governmental bodies where the requirements of section 1094.5 are otherwise fulfilled. In justifying its decision to extend the scope of the mandamus remedy, the Court stressed ‘that the decision of a private agency which affects a

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296 Anton v San Antonio Community Hospital 567 P2d 1162, 1167 (Cal 1977).
297 Cal Code of Civil Procedure § 1094.5(a).
298 Grant v Board of Medical Examiners 43 CalRptr 270, 274 (Cal Ct App 1965).
299 Anton (n 296) 1167.
300 Saleeby v State Bar 702 P2d 525, 532 (Cal 1985); Kumar v National Medical Enterprises Inc 267 CalRptr 452, 455 (Cal Ct App 1990).
301 Anton (n 296) 1167.
302 Delta Dental Plan v Banasky 33 CalRptr 2d 381, 384 (Cal Ct App 1994).
303 Wallin v Vienna Sausage Manufacturing Co 203 CalRptr 375, 378 (Cal Ct App 1984).
305 Pomona College v Superior Court 53 CalRptr 2d 662, 665–8 (Cal Ct App 1996).
306 Anton (n 296) 1168.
fundamental vested right may be as significant to the holder thereof as any decision by a public agency.\textsuperscript{308}

7.4.4.3 European Union: Function in practice

In determining the reach of the Member State, for the Court a functional approach always takes priority. Two elements of the Foster test relate to function and consider whether the entity is responsible for a public service, and whether it enjoys special powers beyond those which result from the normal rules applicable in relations between individuals.\textsuperscript{309} Moreover, as was discussed in detail in Chapter Six, when the Court is considering the reach of the state in other areas—whether competition, state aid or procurement—a functional approach is always adopted.\textsuperscript{310} For the ECJ, it is the function, rather than the identity of the power-holder, that is the relevant consideration.

7.5 Freedom of Information Legislation

Given that a lack of transparency surrounding the actions of private delegates was considered in Chapter Three above to constitute one of the major challenges of private delegation, before concluding this Chapter, it is worth making a very brief comment about the application of freedom of information legislation to private delegates. Obviously, account has to be taken of the private delegate’s privacy interests, but greater access to information regarding private delegates would open their activities to greater public scrutiny.\textsuperscript{311} In general, it seems that in all three jurisdictions, there is a growing awareness of the importance of transparency in private delegation—although, as yet, in none of the jurisdictions is freedom of information legislation applied directly to private delegates. In England, the Freedom of Information Act 2000\textsuperscript{312} confers a power on the Secretary of State to issue an order subjecting to the Act any person who appears to the Secretary to exercise functions of a public nature or who is providing under a contract with a public authority any service whose provision is a function of that authority.\textsuperscript{313} Arguably, it would have been preferable had the Act applied directly to those entities exercising public functions—in a similar manner to the HRA. There have, however, been a significant number of orders issued pursuant

\textsuperscript{308} Ibid 1172. This case was superseded by an amendment to § 1094.5(d) as to the standard of review to be applied in respect of private hospitals, but not the availability of review: Quini v Paradise Valley Hospital 2003 WL 550164 (Cal Ct App 2003) 4.

\textsuperscript{309} Above 6.3.3.2.

\textsuperscript{310} Above 6.3.3.3(b).

\textsuperscript{311} See Feiser (n 77) 54–62.


\textsuperscript{313} Section 5.
to the Act, extending the Act’s application to a variety of non-statutory private and expert bodies.³¹⁴ Guidelines have been established for the use of the Act in the procurement context³¹⁵ and include, for example, requiring authorities to carefully consider the compatibility of non-disclosure or confidentiality clauses with their obligations under the Act.³¹⁶ Even where the private contractor is not designated access to the information may still, of course, be possible through the public authority.³¹⁷ Various exemptions in the Act will be particularly relevant in the private delegation context, in particular section 43(2), where disclosure is exempted where it would, or would be likely to, prejudice the commercial interest of any person.³¹⁸

In the US, as was discussed above, the definition of ‘agency’ in the FOIA, albeit broader than under the APA, is narrow, requiring either extensive control by the government of the private delegate or that the private delegate has ‘authority in law to make decisions’.³¹⁹ So, generally, private delegates are immune from freedom of information obligations. However, documents created by private delegates may be subject to disclosure if they are transferred to a body recognized by the courts to be an agency and they can be deemed to constitute an ‘agency record’.³²⁰ A document will become an ‘agency record’ where there is ‘some relationship’ between the agency and the document.³²¹ Two conditions must be fulfilled to create the necessary relationship: first, the agency must either create or obtain the document³²²; and second, the document must be in the control of the agency at the time the FOIA request is made.³²³ It is not sufficient for this second requirement that the document be located at the premises of the agency; rather, it must be part of the official business of the agency.³²⁴ Feiser describes this as an ‘official control’ test because it focuses on both the official purpose of the record and the control over the record at the time of the request.³²⁵ Neither test is easily satisfied, such that gaining access to information possessed by the private delegate of governmental power is difficult, and it is arguable that this consequence defeats congressional intent in broadening the definition of ‘agency’ under the Act in 1974.³²⁶


³¹⁷ Section 3(2). ³¹⁸ For discussion, see Arrowsmith (n 314) 101 [2.82].

³¹⁹ Above 7.4.1.1. ³²⁰ For detailed discussion, see Feiser (n 77) 43–54.

³²¹ Forsham (n 93) 178.


³²⁴ Tax Analysts (n 322) 145; Wolfe v Department of Health and Human Services 711 F2d 1077, 1080–81 (DC Cir 1983).

³²⁵ Feiser (n 77) 45. ³²⁶ Ibid 54–62.
Aside from FOIA, there are two other situations where private delegates may be required to disclose information. First, committees of private experts who are consulted by federal agencies are governed by the Federal Advisory Committee Act, and are required to meet in public and make their recommendations public. Second, under what is known as the Shelby Amendment, bodies in receipt of grants under OMB Circular A-110, discussed above in Chapter Five, are also required to make available to the public any data produced from work funded by the grant. The Amendment seems to apply mostly to scientific research conducted through grants, and does not apply to private delegates in contractual relationships with government. Two points should be made here. First, it is regrettable that private contractors are not subject to an obligation similar to the Shelby Amendment freedom of information obligation. Second, once again, the arbitrary distinction between grant and contract, discussed above in Chapter Five, emerges. Interestingly, while it will be recalled that the obligations on delegators using contracts were more onerous than those on delegators using grants, here there is evidence of more onerous obligations being placed on delegates of grants than on delegates of contracts.

Finally, in the EU, the Treaty guarantee of access to documents, and the 2001 Regulation implementing the Treaty provision, is limited in scope to the documents of the Parliament, the Commission, and the Council. The 2001 Regulation does, however, allow for access to documents created by third parties, but in the possession of the Commission, following a consultation procedure with the relevant third party. Thus, any documents transferred from the private delegate to the Commission will be available for the public. However, there is no right of access to documents of private delegates relating to the performance of EU functions, but not in the possession of the Commission. Again, it might be hoped that compliance with the Meroni doctrine would require freedom of information obligations to be extended to private delegates and, at the very least,
encourage the Commission to include freedom of information clauses in its contracts with private delegates.

Indeed, in all three jurisdictions, the government could require, as a contractual condition, access to documents relevant to the performance of the delegated function and disclosure of which would not violate the privacy interests of the private contractor. This would enhance the internal accountability of the private delegate to government. In the absence of third party beneficiary rights, it would not, however, provide a direct mechanism of external accountability of the private delegate to individual citizens—something which could only be achieved through direct application of freedom of information legislation to private delegates.³³⁵

7.6 Administrative Law Controls on the Delegate: An Overview

A number of issues have emerged from this discussion. One observation relates to the reluctance of US courts, whether state or federal, to adopt a generous applicability criterion for APAs. This is particularly obvious at the federal level, where the language of the APA could potentially reach private delegates, but the courts have developed a malleable and sequential multi-factored test, enabling them to choose one criterion or another in such a way as to exclude private actors as they wish. It was suggested that this may be because an APA is perceived to constitute a monolithic form of administrative law: the temptation to narrow its scope can be strong, due to the fact that it seems that once found subject to the legislation, the full panoply of regulation entailed by the legislation must follow, as a matter of course. However, as was also shown, given flexible judicial application of the federal APA, this concern is misplaced.

The separate procedure for applying for administrative law in England has been very instrumental in creating a pronounced public-private dichotomy. However, special procedures do not inevitably or unavoidably result in a stark public-private divide, as shown by state experience in the US, and the English situation may be due more to the anomaly created by the particular procedural codification adopted. As for the last two potential applicability criteria, clearly, a functional test will be more useful for reaching private delegates than a source of power test. Private delegates will only occasionally have a legislative source of power. Their power will more often have been delegated through contract. It is unfortunate, therefore, that the source of power test has dominated the English jurisprudence to such a large degree. It has also led to a generous interpretation of ‘contract’ to encompass the relationships between members of associations and the association, and a narrow interpretation of ‘statutory source of power’

³³⁵ See below 8.3.2.2.
³³⁶ See above 3.4 for a discussion of internal and external accountability.
to exclude situations where there has been express legislative provision for the contracting-out of a particular task. This attachment to a statutory source of power may perhaps be due, on some subconscious level, to the enormous influence of the traditional Diceyan justification of judicial review as a mechanism for implementing parliamentary intention.³³⁷ Unencumbered by such a tradition, the US state courts, and the ECJ, place greater emphasis on the function being exercised and, indeed, the US courts are prepared to accept that even a contract may have a public dimension. Of course, as was noted in Chapter Two, the influence of Dicey has been waning.³³⁸ Likewise, as seen throughout this chapter, the evolution of English law, through greater emphasis on functional considerations and through the assertion of a supervisory jurisdiction independent of judicial review, has been a positive development for the control of private delegates of governmental power.

With regard to freedom of information obligations, it seems that the powerful role of private delegates, and the corresponding need for transparency surrounding the activities of such delegates, is slowly being acknowledged. In this regard, the English formulation is by far the most promising—although its weakness lies in the fact that whether an obligation on the private delegate is triggered is dependent on the will of the Secretary of State.

Overall, though, for both administrative law and freedom of information obligations, it is submitted that, if a Meroni analysis is not available, whereby obligations follow the delegation, a functional test, for the reasons suggested above in Chapter Six in the human rights context,³³⁹ should take precedence. Where a body has functional equivalency with government, it should be subject to the same restrictions as government for the performance of the relevant function.

³³⁷ Hunt (n 215) 26–7.
³³⁸ Above 2.3.2.1.
³³⁹ Above 6.2.1, 6.2.2, and 6.4.