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Summary

The United Kingdom (which includes the jurisdiction of England and Wales) has long been seen as the home of a flourishing culture of self-regulation. Statutory intervention to place self-regulatory bodies (SRBs) on a firm footing, as well as the widening application of the Human Rights Act 1998, have to a great extent made up for an initial reluctance by the courts to subject their activities to the same sort of review as would apply to government departments. The overall result is an increasingly mature and well-established network of SRBs which are likely to continue in their respective roles for some time to come.

Contents

I.	THE CONSTITUTIONAL DIMENSION	4
I.1	INTRODUCTION	4
I.2	THE HUMAN RIGHTS ACT 1998	5
	<i>I.2.1 What are the consequences for SRBs of being subject to the Human Rights Act 1998?.....</i>	<i>5</i>
	<i>I.2.2 Will SRBs be able to complain of breaches of their human rights?.....</i>	<i>7</i>
I.3	THE LAW OF THE EUROPEAN UNION	8
I.4	CONCLUSION	9
II.	THE PRIVATE/PUBLIC NATURE OF THE SELF-REGULATORY BODY AND ITS ACTIVITIES	9
II.1	INTRODUCTION	9
II.2	BODY’S NATURE-BASED DISTINCTION	10
	<i>II.2.1 ECJ and the vertical effect of EU directives</i>	<i>10</i>
	<i>II.2.2 The Human Rights Act 1998</i>	<i>11</i>
II.3	BODY’S ACTIVITIES-BASED DISTINCTION: JUDICIAL REVIEW PROCEEDINGS	14
	<i>II.3.1 Source of power</i>	<i>14</i>
	<i>II.3.2 Duty or Function</i>	<i>15</i>
	<i>II.3.3 What are the consequences for SRBs’ activities of being considered ‘public’ for the purposes of judicial review?</i>	<i>16</i>
III.	LIABILITY OF SELF-REGULATORY BODIES	18
III.1	INTRODUCTION	18
III.2	BREACH OF STATUTORY DUTY	18
III.3	BREACH OF THE HUMAN RIGHTS ACT 1998 (“THE HRA”)	19
III.4	EURO-TORT	20
III.5	NEGLIGENCE	20
III.6	MISFEASANCE IN PUBLIC OFFICE	22
III.7	JUDICIAL REVIEW	23
III.8	CONCLUSION	23
IV.	SECTORAL ANALYSIS	24
IV.1	ENVIRONMENTAL PROTECTION	24
IV.2	ADVERTISING	25
	<i>IV.2.1 The Constitutional dimension</i>	<i>26</i>
	<i>IV.2.2 The nature of the regulatory body and their activities.....</i>	<i>26</i>
	<i>IV.2.3 Liability of the ASA</i>	<i>27</i>
IV.3	SPORTS	27
	<i>IV.3.1 The nature of the regulatory bodies and their activities</i>	<i>29</i>
IV.4	LEGAL SERVICES	29
	<i>IV.4.1 The constitutional dimension</i>	<i>29</i>
	<i>IV.4.2 The nature of the regulatory body and its activity</i>	<i>30</i>
	<i>IV.4.3 Liability of self-regulatory bodies.....</i>	<i>34</i>
IV.5	THE MEDICAL PROFESSIONS	34
	<i>IV.5.1 The constitutional dimension</i>	<i>34</i>
	<i>IV.5.2 The nature of the regulatory body and its activity</i>	<i>35</i>
	<i>IV.5.3 Liability of self-regulatory bodies.....</i>	<i>38</i>
IV.6	FINANCIAL SERVICES	39
	<i>IV.6.1 The constitutional dimension</i>	<i>39</i>
	<i>IV.6.2 The nature of the regulatory body and its activity</i>	<i>39</i>
	<i>IV.6.3 Liability of the FSA</i>	<i>40</i>
IV.7	MEDIA	41
	<i>IV.7.1 The constitutional dimension</i>	<i>41</i>
	<i>IV.7.2 The nature of the regulatory body and its activity</i>	<i>41</i>
	<i>IV.7.3 Liability of self-regulatory bodies.....</i>	<i>43</i>
V.	BIBLIOGRAPHY	45

I. The Constitutional Dimension

I.1 Introduction

It is trite to point out that the United Kingdom of Great Britain and Northern Ireland¹ is unique among European democracies in the fact that it does not have, and never has had, a documentary constitution. Whilst there have been occasions in history where written rules formally and definitely establishing and regulating the state were thought desirable, the doctrine of parliamentary sovereignty has remained the central feature of British political life.

However, it is equally a truism that the ability to bring into being any law whatsoever by simple majority of both chambers of Parliament does not mean that one cannot properly talk of there being a 'British Constitution'. The question becomes rather one of determining how the unwritten or uncodified character of the United Kingdom Constitution affects the subject of our discussion – the existence and practice of Self-Regulatory Bodies (SRBs). Daintith and Sah² have explored how the largely unwritten status of the constitution has affected the degree of freedom which successive governments have enjoyed in implementing their chosen economic policies, in particular that of privatisation. They put forward the view that a consequence of this peculiarity of our arrangements is that our constitution can be said to display a high degree of formal neutrality as to the question of what economic policies may be implemented. Whilst it is concluded that such freedom could be written into documentary constitutions (and examples are found where this is the case), it appears that in many instances documentary constitutions set in the path of the executive and legislature a variety of obstacles to altering the balance between the public and private sectors.

In the same way, it may be asserted that the absence of a formalised division in the British constitution between the public and private when it comes to regulatory space leads to a prima facie finding of neutrality on the degree to which the function of regulation may be distributed between these two sectors. More specifically, it may be argued that this neutrality has created the circumstances in which SRBs, which are to a greater or lesser degree the product of a privatisation of the business of regulation, can flourish.

However, as we shall discover, the doctrine of parliamentary supremacy has not prevented the establishment or incorporation of certain norms, which, in practice, are as effective as even the most entrenched and fundamental provisions of documentary-style constitutions.

Our aim therefore is to determine whether and how constraints of a 'constitutional' type have modified this state of neutrality and either encouraged the role of SRBs or, alternatively, imposed burdens such as to discourage the 'outsourcing' of the business of regulation to such bodies. The two constitutional innovations which we propose to focus on both directly concern the United Kingdom's emergence from the state of 'splendid isolation' which it could once be said to occupy. The Human Rights Act 1998 and the European Communities Act 1972 are both statutes which have been passed in furtherance of the United Kingdom's international obligations but which have displayed the potential to foster the evolution of our domestic constitution, not least in how they set the boundaries of permissible state action.

¹ It is part of the unique constitutional arrangements of the United Kingdom that one Member State of the European Union comprises at least three distinct jurisdictions – England and Wales, Scotland, Northern Ireland – leaving to one side the special status of territories such as the Channel Islands, the Isle of Man etc. For the purposes of this paper we will concentrate on the first of these jurisdictions, England and Wales, although of course a constitutional perspective must taken into account the whole.

² DAINTITH, T., and SAH, M. "Privatisation and the Economic Neutrality of the Constitution." *Public Law* (1993): 465.

I.2 The Human Rights Act 1998

In terms of its effect on the relationship between the individual and the state, the Human Rights Act 1998 is perhaps the most important piece of legislation to have been introduced in the UK in the last century. Aimed at enabling individuals to enforce in domestic courts the rights which had previously required prolonged litigation in Strasbourg, the Act has had repercussions in almost every sphere of state activity. The question for us is: if SRBs are deemed to come within the remit of the Act³, what effect will that have? There are in fact two sides to this question: first – what will be the effect on SRBs of having to abide by Convention rights and, second, will SRBs in turn be able to enjoy such Convention rights as against the state. We will look at these in turn.

I.2.1 What are the consequences for SRBs of being subject to the Human Rights Act 1998?

In all likelihood, the most important duties to which SRBs will be subject under the Human Rights Act are those in relation to Article 6(1) of the Convention, which it is worth setting out here in full:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

The importance of Article 6(1) is almost impossible to overstate. It is the Convention’s most frequently invoked provision and has been said “to enshrine the fundamental principle of the rule of law”⁴. The Strasbourg Court has ruled that the rights set out in Article 6 hold such a prominent place in a democratic society that a restrictive interpretation would not correspond to its aim and purpose⁵. Article 6 arguably holds a special place within the Convention itself, with its values being echoed in other provisions such as Article 5 and Article 13, as well as in principles such as lawfulness and proportionality which have developed when putting the Convention into practice.

For Article 6(1) to apply at all, it must first be established that the proceedings in question, such as a regulatory decision by an SRB, are ‘in determination of civil rights and obligations.’ The ECtHR has⁶, in the context of the medical profession, accepted that, for the purposes of Article 6, the determination of civil rights and obligations may include professional disciplinary proceedings – a common subject of self-regulation across Europe. Once it has been es-

³ The question of whether SRBs will be subject to the provisions of the 1998 Act is dealt with in detail in the next Part.

⁴ *Golder v United Kingdom* (1975) I EHRR 524, para. 35.

⁵ *Delcourt v Belgium* (1970) I EHRR 355, para. 26.

⁶ *Wickramsinghe v United Kingdom* (1998) 3 EHRLR 338

established that Article 6(1) applies in the given case, Henderson⁷ breaks down its requirements as follows:

1. *The right to a 'fair hearing'*. This is compendious to the extent that it has been taken by the Strasbourg Court to include the right to:
 - a. An oral hearing⁸
 - b. A hearing in the presence of the affected person, particularly where the case involves an assessment of personal conduct⁹
 - c. A reasonable opportunity of presenting one's case in a manner which does not place one at a disadvantage compared to one's opponent¹⁰
 - d. Access to information to bring the case effectively¹¹
 - e. Rules of evidence which do not render unfair the proceedings as a whole¹²
 - f. To know the grounds on which the decision of the tribunal is based¹³
2. *The right to a public hearing*. This right can be seen to be not only for the benefit of the person directly affected by the decision in question but also for the public at large and the public interest in being able to scrutinise public decision-making. Article 6(1) itself does however place constraints on the extent of this right, setting out grounds on which it is legitimate to hold a hearing in private. One example of such an exception applying occurred in a case¹⁴ involving the suspension of a doctor by a Medical Appeals Board where the Commission held that a private hearing was justified by the requirements of maintaining patient confidentiality. It is no doubt to be decided on a case by case basis whether this Article 8 type restriction on a party's Article 6 right would apply in cases where the interest in privacy was more one of commercial confidentiality as may be the case in an area such as regulating the impact of industry on the environment.
3. *The right to a public pronouncement of judgment*. This is also seen to contribute to the public's ability to scrutinise decision-making and is not subject to the express limitations set out in Article 6(1).
4. *The right to a hearing within a reasonable time*.
5. *The right to an independent and impartial tribunal established by law*. The two issues of what is a tribunal and what constitutes independence are closely intertwined, as is clear from the following pronouncement of the Strasbourg Court:

“The power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of ‘tribunal’, as is confirmed by the word ‘determination’...

⁷ HENDERSON, R. "Inaugural Ormrod Lecture." *Medicine, Science and the Law* 40, 4 (2000): 277.

⁸ *Van Oshoven v Belgium* (1997) 26 EHRR 55

⁹ (1991) 15 EHRR 204

¹⁰ *Neumeister v Austria* (1968) I EHRR 553

¹¹ *McGinley and Egan v United Kingdom* (1998) Reports of Judgments and Decisions 1998-III

¹² *Mialhe v France* (No. 2) (1996) 23 EHRR 49 L

¹³ *Ruiz Torija v Spain* (1994) 19 EHRR 553

¹⁴ *Imbrechts v Belgium* 69 DR 312 (1991)

This power can also be seen as a component of the ‘independence’ required by Article 6(1)”¹⁵.

Scottish case law¹⁶ has highlighted the importance of an objective approach in determining independence, taking into account factors such as the manner of appointment of members and their term of office and the existence of guarantees against outside pressure. More problematic for SRBs perhaps is the closely allied idea of impartiality, which requires not only a subjective examination of the existence of any prejudice or bias on the part of the decision-maker but also an objective assessment of whether ‘justice is seen to be done’. At first sight it may appear that to the extent that SRBs are composed of representatives of members of a particular profession or of appointees of fellow regulatees, they will be automatically open to attack on the ground of perceived bias. However, the Court has shown some flexibility in determining what is appropriate with regard to such bodies. In one case¹⁷, again concerning a medical disciplinary hearing, the Court rejected a complaint that the manner in which the Appeals Board of the Belgian *Ordre des Medecins* was appointed was biased, thus violating Article 6. It was held that the practitioners on the Board acted not as representatives of the *Ordre* but in a personal capacity, analogously to members of the judiciary appointed by the Head of State. Further, the court was of the view that the impartiality of the members of the Appeals Board was to be presumed, a presumption which could only be rebutted by positive evidence of partiality.

I.2.2 Will SRBs be able to complain of breaches of their human rights?

One fear in relation to the status of SRBs in the light of the Human Rights Act 1998 is that, if deemed public authorities for the purposes of the Act, they will be unable to complain of any breaches of their own rights under the Act. Were this the case, Oliver¹⁸ argues, an over-zealous expansion of the category of public authorities in an effort to extend the scope of the Convention as far as possible could have the reverse effect of ‘rolling forward the frontiers of the state’, denuding particular organs of private governance of the protections which they might objectively merit.

Whether such a fear will be realised rests on the interpretation of Article 34 of the Convention governing who has standing before the Court. Article 34 states that

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.”

The logical implication of this is that governmental organisations are not regarded as potential victims of violations of rights under the Convention. Case law¹⁹ of the Commission has suggested that ‘public authority’ is the domestic rendering of the phrase ‘governmental organisation’, with the result in Oliver’s view that bodies like SRBs deemed to be public authorities would have no standing before the Court.

¹⁵ *Van De Hurk v Netherlands* (1994) 18 EHRR 48 1, para 45.

¹⁶ *Starrs v Ruxton* (2000) United Kingdom Human Rights Reports 78 (H.C. (Sc.))

¹⁷ *Debled v Belgium* (1995) 19 EHRR 506

¹⁸ OLIVER, D. "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act." *Public Law* (2000): 476.

¹⁹ *Rothenturm Commune v Switzerland* (1998) 59 DR 251; *Ayuntamiento de M. v Spain* (1991) 68 DR 209

However, it is possible to question whether such an outcome is necessary. It would seem open to the Court to distinguish between ‘public authority’ and ‘governmental organisation’ on two grounds. Firstly, as Oliver herself points out, the adjective ‘governmental’ was seen as a distinct addition to the requirement of ‘publicness’ when characterising a body for the purposes of judicial review. Therefore it would be contradictory in this context to state that all bodies deemed ‘public’ automatically also meet the ‘governmental’ requirement.

Perhaps more importantly, it should be borne in mind that in both the judicial review case law and in cases such as *Poplar Housing and Regeneration Community Association Ltd v. Donoghue*²⁰ considering whether a body is to be deemed a public authority for the purposes of the 1998 Act, the courts are primarily examining the function in question, not the status of the body as a whole. Hence, Article 34 could be seen as referring to organisations which are governmental in every way, both in form and function, whereas the tag ‘public authority’ under the Act can be earned only in relation to a specific field of activity. In sum, Article 34 is on its face concerned with an organisation’s pedigree, whereas section 6(3)(b) of the Human Rights Act is content to look at the specific function in dispute. It would be wrong therefore for functional public authorities, a category in which SRBs are likely to be included, to lose these constitutional protections without a positive parliamentary mandate to that effect. It seems that SRBs in particular are precisely the sort of non-governmental public bodies which deserve the protections of privacy, correspondence, freedom of association and expression afforded by the Convention.

I.3 The law of the European Union

Putting to one side the question of entrenchment, there is little doubt that the United Kingdom’s commitment to membership of the European Union has had a broad effect on the subject and content of its legislation, in a way that could be seen as analogous to the adoption of new constitutional values. Hence, it is fitting to examine how this involvement forms part of the constitutional background to self-regulation in the United Kingdom.

It would be fair to say that so far the European Union has had a mixed effect on the United Kingdom’s status as a ‘haven for self-regulation’²¹. On the one hand the position of SRBs has been officially recognised by their designation as competent authorities for the implementation of certain EU legislation. On the other hand, European sources have in the past been seen to exert pressure on the UK government to introduce stricter, statute-based regulation²².

A more direct influence on the continued existence and functioning of SRBs may come via the increasing influence of the Charter of Fundamental Rights of the European Union²³, which may or may not eventually form part of the Union’s constitutional framework. Article 47 of the Charter reasserts the need for “a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law” and is probably of no greater effect than Article 6 of the Convention. Article 15 on the other hand enshrines the right “to engage in work and to pursue a freely chosen or accepted occupation” and may be seen to strengthen the position of an individual whose livelihood is affected by the determina-

²⁰ *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2002] QB 48, considered further below.

²¹ BAGGOTT, R. "Regulatory Reform in Britain: The Changing Face of Self-Regulation." *Public Administration* 67, (1989): 435.

²² See JOWELL, J. "The Takeover Panel: Autonomy, Flexibility and Legality." *Public Law* (1991): 149.

²³ Charter of Fundamental Rights of the European Union (2000/C 364/01)

tion of an SRB such as the Bar Council, the General Medical Council, the Institute of Chartered Accountants and the like.

I.4 Conclusion

We have seen that in its purest state of informality the British Constitution could indeed be said to have been a ‘haven for self-regulation’. However, it remains to be seen whether SRBs can rise to the challenges presented by the shifting constitutional order, in particular the requirements of the Convention. It will require a sensitive exploration of the peculiar nature of these bodies by the courts to determine the proper balance between the rights of regulated persons and the rights of the bodies themselves. In particular, pigeon-holing such bodies into ‘public’ or ‘private’ should be strenuously avoided and the appropriateness of transplanting systems of classification from the judicial review sphere or that of standing before the European Court of Human Rights should be carefully considered.

One should however be aware of the broader political pressure on self-regulation, beyond the purely legal demands of the Human Rights Act and compliance with the law of the European Union. The Human Rights Act in particular has the potential to be a vehicle for reform rather than simply for reassessment of the existing forms of regulation in the United Kingdom. More broadly still, the performance of a number of SRBs has been called into question and may arouse public sympathy for a more state-centred system of regulation in a number of traditionally self-regulated areas. The Press Complaints Commission (PCC) has always suffered criticism to a greater or lesser degree but its position seems guaranteed by government reliance on the goodwill of the media. More recently, the BBC, a substantially self-regulated organisation based on Royal Charter, has come under great pressure for reform after the criticism it received in Lord Hutton’s report on the circumstances surrounding the death of government scientist Dr David Kelly. As we will see below, SRBs in the medical and legal spheres are also under pressure to reform in the wake of scandals in those professions. It remains to be seen whether the government is prepared to assume the burden of day-to-day regulation of these hugely important areas of national life.

II. The private/public nature of the self-regulatory body and its activities

II.1 Introduction

Traditionally, the precise delineation of the respective spheres of public law and private law in England has been related to specific purposes. The classic pragmatism of the English legal system has in the past discouraged courts and commentators from dealing with this topic in ‘mere academic’ terms. Thus, the problems of definition and classification concerning precisely what constitutes a ‘public’ or ‘private’ element have particularly arisen in the context of significant legal changes which demand accurate judicial assessments. In deciding the nature of a particular self-regulator and its activities we may well draw upon this jurisprudence. However, as Craig points out, considerable care must be taken when using such a material for general conclusions, since the purposes for which the definitions are being made are strictly confined to the matter in question²⁴.

As far as self-regulatory *bodies* are concerned, there are two specific factors which have brought the distinction into the open. The first one is the enforcement of EU directives against the British state. The case law of the European Court of Justice has made clear that directives

²⁴ CRAIG, P. *Administrative Law*. 5th ed: Sweet & Maxwell, 2003.at page 594.

cannot be pleaded against particular bodies. This reluctance to admit that they can have horizontal direct effect has therefore led the Luxembourg's Court to draw lines as to what constitutes the ambit of the state for these purposes. Thus, the inquiry undertaken by the ECJ is particularly aimed at deciding whether a body's nature is public or private. The second factor is to be found in Section 6(1) of the Human Rights Act 1998, which provides that it is "unlawful for a public authority to act in a way which is incompatible with a Convention right". In deciding whether a particular self-regulator comes within s.6 English courts have necessarily been concerned with whether such bodies are public or private. In this sense, the HRA also draws a distinction exclusively based on the body's nature.

The courts have also had to determine whether a particular self-regulatory *activity* can be regarded as public or private, regardless the nature of the performing body. This jurisprudence is basically related to the enlargement, over the last twenty years, of the scope of judicial review of administrative action. In particular, the focus shifted from controlling the institutions of government to controlling the exercise of public activities whether performed by government or non-government bodies²⁵. According to this functional approach, the only question to be asked in relation to the limits of judicial review is whether the act alleged to be unlawful is public or private. This jurisprudence may well be of use in understanding the nature of self-regulatory activities.

II.2 Body's nature-based distinction

II.2.1 ECJ and the vertical effect of EU directives

The European Court of Justice has accorded EU directives vertical direct effect against the state²⁶. Thus, its case law is particularly concerned with whether bodies exercising powers are sufficiently public to be regarded as part of the state with the consequence that a directive can be enforced against them. The leading case is *Foster v British Gas*²⁷, where the Court held that

"a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is included in any event among the bodies against which the provision of a directive capable of having direct effect may be relied upon."

Whether self-regulatory organisations are caught by the *Foster* criteria is also something which can only be determined on a case by case basis. Four essential criteria must be met. Firstly, that the body was "made responsible, pursuant to a measure adopted by the State, for providing a public service". This implies a need for the existence of an enabling measure either legislative or administrative in nature. This would obviously exclude those SRBs which have not received such explicit sanction but rather emerged through contractual arrangements or "without any visible means of legal support." Secondly, emphasises the functional question of whether what an individual SRB does can be properly described as a 'public service', a term which has gained particular significance in European case law. Thirdly, such a service must be provided under 'the control of the state', a term which surely cannot stretch so far as

²⁵ CANE, P. *Administrative Law*. 4th ed: Oxford University Press, 2004.at page 5.

²⁶ CRAIG, P. *Administrative Law*. 5th ed: Sweet & Maxwell, 2003.at page 318.

²⁷ *Foster v British Gas* [1990] CMLR 833

to encompass the sort of tacit control which can be said to be exercised by Parliament over all aspects of life. Fourthly, the body must have ‘special powers’; this may exclude those SRBs established purely under contract which confer on them only such powers as are well within those resulting from ‘the normal rules applicable in relations between individuals’.

The consequences for SRBs of being considered ‘public authorities’ for the purposes of vertical direct effect are that individuals will be allowed to bring actions against self-regulators in their own names within national courts in order to enforce rights conferred to them by directives.

II.2.2 The Human Rights Act 1998

The stated aim of the Human Rights Act was to ‘bring rights home’; firstly by putting an end to the requirement of pursuing the long and expensive route to Strasbourg to enforce the rights enshrined in the European Convention on Human Rights (“ECHR”) and secondly by performing more fully the United Kingdom’s obligation to secure to everyone within its jurisdiction the rights and freedoms set out in the Convention.²⁸ Whilst not technically incorporating the text of the ECHR into domestic law, the 1998 Act gives those rights legal effect in the domestic sphere in two ways. Firstly, according to section 3 of the Act, primary and secondary legislation must be read and given effect in a way which is compatible with ECHR rights, so far as it is possible to do so. Secondly, section 6 of the Act imposes a duty on ‘public authorities’ to act compatibly with Convention rights. In this sense, the 1998 Act aims principally at creating a system whereby rights can be asserted in ‘vertical’²⁹ situations as between a private individual (who may be a natural or legal person) and a ‘public authority’. Setting out the relevant parts of the Act in full:

- “6. (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
 (3) In this section "public authority" includes-
 (a) a court or tribunal, and
 (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
 (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.”

Our concern for the moment is to determine whether the relationship between regulatees and SRBs is ‘vertical’ in this sense, which turns on the meaning given to the phrase ‘public authority’ under the above section. An analysis of section 6 reveals two distinct categories of ‘public authorities’:

1. ‘Obvious’ public authorities, which are subjected to the application of s6(1) whether the act in question is ‘public’ or ‘private’
2. ‘Functional’ public authorities, some of whose functions (but not all) are of a public nature, which are subject to s6(1) when engaging in a ‘public’ but not ‘private’ acts.

²⁸ Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 Rome, 4.XI.1950 (“ECHR”), Article 1.

²⁹ The Act has also had a tangential but highly important effect on ‘horizontal’ situations between private individuals through its requirement that the courts, as public authorities, develop the common law in such a way as to enforce those rights.

At first sight, SRBs have the potential to fall into either of these categories, depending on where they position themselves on the public/private spectrum.

Are SRBs ‘obvious’ public authorities?

This category of public authority is nowhere listed in the Act, to be contrasted with the Freedom of Information Act 2000, which sets out at length this category of bodies in its first Schedule. In the absence of such a list, it is the task of the courts to develop the necessary criteria for determining whether a body is a section 6(1) type ‘public authority’, to be subjected to the requirement to act compatibly with the ECHR in all circumstances.

Oliver proposes a stringent series of hurdles to overcome before designating a body an ‘obvious’ public authority:

1. *Does the body exercise genuine ‘authority’ in the sense of possessing “coercive powers over the civil and political rights of individuals, powers to affect their legal status, or immunities or exemptions from the ordinary law”?* SRBs are not always furnished with any special coercive powers, though the contractual arrangements with the regulatees may give such bodies a great degree of *de facto* power, particularly in cases where submission to such regulation is a practical prerequisite of engaging in the regulated activity.
2. *Is the body publicly funded?* Whilst Oliver does not regard public funding as being determinative of the issue, largely on the basis that many bodies receive public funding which it would be anomalous to consider ‘public authorities’, it is nevertheless legitimate to take this factor into account. On this basis, a large proportion of SRBs which are funded out of contributions from the regulated group would be excluded.
3. *Does the body have a statutory basis?* The relationship between SRBs and statute is frequently complex, varying from explicit parliamentary sanctioning of a particular body, such as through the Lloyds Act 1982 to a more subtle, contingent relationship whereby a statutory framework of regulation is implicitly founded on the assumption of the continued existence of an established industry regulator.
4. *Is the body under a duty to act in the public interest with the sanction of democratic accountability?* This may seem a slightly circular test but it is worthwhile considering at least what the body itself considers to be its duty towards acting in the public interest, perhaps expressed in its constituting memoranda, if a registered company, or in any Code of Practice that it operates. The requirement of democratic accountability poses definitional problems in the sense that in a system where Parliament is supreme, no body is immune from the possibility of censure by the electorate through the medium of Parliament. However, a narrower conception of democratic accountability would point out that courts and tribunals are beyond such direct censure. The fact that courts are specifically treated as a special, additional type of public authority by section 6 of the 1998 Act may indicate an implicit recognition of this narrower conception and thus require all other public authorities to have the characteristic of direct democratic accountability. To the extent that Parliament is capable of legislating to sanction or remove any SRBs it chooses, such bodies are democratically accountable but at the same time they are largely removed from the form of parliamentary accountability to which government ministers and their departments are exposed.
5. *Is the body under a duty to act without self-interest?* Oliver sees it as a distinguishing feature of traditional public authorities that they are not regarded as having self-serving interests. In particular, they are not empowered to carry out transactions for private profit, nor

may their actions be motivated by such factors as the avoidance of political embarrassment³⁰. More sensitively in this context, certain case law³¹ has suggested that they lack an interest in their reputation such that they are unable to sue for defamation in their capacity as authorities. This suggests the question of to what extent such bodies are permitted to complain of breaches of their human rights, as discussed above. Whether SRBs are motivated primarily by the public interest rather than their own interests is to a large extent a question to be decided on the facts of each case. Certain bodies such as the General Medical Council, which determines the fitness of doctors to practise in the community, would no doubt see themselves as guardians of the public interest. They may however be said to be acting in their own interest in the sense of wanting to preserve the reputation of the profession of which they are members. It is questionable whether the balance of activity of certain forms of SRB such as trade unions falls rather on the side of acting in the interests of their members (the regulatees) rather than in the interests of the public as a whole. Were this to be the case, they would not meet this particular criterion of ‘publicness’.

Overall, it seems that if one is to require a positive answer to the six questions above before designating a body an ‘obvious’ public authority within the meaning of section 6(1) of the Human Rights Act 1998 then it is unlikely that any of the bodies which we normally regard as SRBs would be caught in this category.

Are SRBs ‘functional’ public authorities under the Human Rights Act 1998?

Even if it is likely that SRBs will not be considered ‘obvious’ public authorities, they may still be in a position where they must act compatibly with Convention rights in relation to non-private acts if they are considered to be bodies “certain of whose functions are functions of a public nature”.

The Home Secretary when tabling the Human Rights Bill before Parliament gave a number of examples of bodies which he considered would fall within this category, including amongst these some of the most visible and important SRBs: the Takeover Panel, the BBC and the Press Complaints Commission³². The exact scope of this category beyond these central cases was nevertheless left open but the Home Secretary indicated that “[w]e wanted to ensure that, when courts were already saying that a body’s activities in a particular respect were a public function for the purposes of judicial review, other things being equal, that would be a basis for action under the Bill”³³.

The case of *Poplar Housing and Regeneration Community Association Ltd v. Donoghue*³⁴ examined this question in the context of an eviction decision made by a limited liability housing association company created by the London Borough of Tower Hamlets. In contesting the claim for a court order of possession of the property, the defendant argued that Poplar HRCA was a public authority, or performing a public function, for the purposes of section 6 of the Human Rights Act 1998. In giving the judgment of the Court of Appeal, Lord Woolf was heavily influenced by the wording of section 6(3)(b) which he regarded as being “clearly in-

³⁰ *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997

³¹ *Derbyshire County Council v Times Newspapers* [1993] AC 534

³² H.C. Deb., Vol. 314, cols 406-414, June 17, 1998.

³³ H.C. Deb., Vol. 314, col. 408, June 17, 1998.

³⁴ *Poplar Housing and Regeneration Community Association Ltd v. Donoghue* [2002] QB 48

spired by the approach developed by the courts in identifying the bodies and activities subject to judicial review”³⁵. Further,

“What can make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body may be deemed public but the activities of the body which is regulated may be categorised private”³⁶.

Lord Woolf was content to determine that on these facts Poplar HRCA was performing a public function but strenuously avoided the laying down of a universal test. Indeed, he remarks that “[a]s is the position on applications for judicial review, there is no clear demarcation line which can be drawn between public and private bodies and functions. In a borderline case, such as this, the decision is very much one of fact and degree.”³⁷ However, his judgment does seem to favour the approach taken in the *Datafin* line of cases (of which more below) and it is safe to say that, in the vast majority of situations, if a body is considered susceptible to judicial review in relation to a given challenged decision, it will also be subject to the human rights duties set out in the Convention.

II.3 Body’s activities-based distinction: Judicial Review proceedings

Judicial review is a fundamental mechanism for preventing the excess and abuse of power in the *public* sphere. The test for determining the limits of the court’s jurisdiction is therefore based on the private/public nature of the activities performed by bodies exercising power. Thus, if the contested decision has been adopted by a body performing a public activity, its lawfulness can be controlled by the remedies of public law. In practice, the amenability to judicial review has been explored in a series of judgements which provide specific criteria as to the nature of the bodies’ activities. As regards self-regulatory organisations, the courts have refined the test of ‘publicness’ in accordance to the source of power to act and the character of the function or duty performed by the relevant authority.

II.3.1 Source of power

According to this approach, the nature of the self-regulatory activity is determined by the source of power to act, regardless the nature of the body. Thus, if the decision is made under statute or under the prerogative then the activity would be held to be ‘public’ and ‘subject to judicial review’, even though it is performed by a private regulator. The Law Society provides a good example. In Lord Hoffman’s words, this body is essentially a private club incorporated by royal charter which exercises public powers, conferred by statute in the public interest³⁸.

³⁵ Ibid. , at page 69.

³⁶ Ibid., at page 69.

³⁷ Ibid., at page 70.

³⁸ *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909.

Conversely, if it is not possible to ascertain that the activity was performed under statute or under the prerogative, it would be of a private nature. That is the case, for example, of activities performed under a contractual source of power. In particular, the courts have made clear that they should not be subject to judicial review since the ordinary law of contracts only gives rise to private rights³⁹.

II.3.2 Duty or Function

However, there are some self-regulatory activities which may be held to be ‘public’, and therefore subject to judicial review proceedings, even though they are not made under any grant of statutory or prerogative power at all. That is the case of activities developed by private entities which perform a public duty or function. Here the need for judicial review arises from the role that some of these bodies play in the political process. In particular, it is observed that self-regulatory organisations can exercise significant power, sometimes on behalf of the state. It is necessary therefore to protect individuals from abuses of that power, and if that power is exercised on behalf of the state it should be compatible with the objectives of public policy. Thus, in order to prevent neo-corporate bodies from becoming merely a haven for self-interested groups, the state has extended the scope of judicial review to make them responsive to general interests⁴⁰. At the present stage, the limits of this extension are by no means certain and should be analysed on a case by case basis. Nevertheless, it is possible to group arguments underlying the categorisation of an activity as ‘public’ into two main forms.

One type of argument focuses on the SRB’s actual association with the state. There are some activities whose ‘publicness’ stems from the very fact that they are exercised on behalf of the state, to the extent that if the private regulator did not exist, would no doubt be exercised by the government. In *R. v. Panel on Takeovers and Mergers ex p. Datafin plc*⁴¹, for example, the High Court held that the prescription and operation of the City Code on Takeovers and Mergers (including rulings and complaints) represent a significant expression of a public duty performed by a body “whose birth and constitution owed nothing to any exercise of governmental power”. In particular, the Court drew attention to key elements which indicate that the Panel had been “woven into the fabric of public regulation in the field of take-overs and mergers” such as the leading and continuing role played by the Bank of England in the affairs of the panel, the statutory source of the powers and duties of the Council of the Stock Exchange, the wide-ranging nature and importance of the matters covered by the code, and the public law consequences of non-compliance. Thus, the courts are determined not to allow any self-regulatory function related to the machinery of government to be classified as private and not amenable to judicial review.

Consequently, where there is no such link with the state the courts have declined to regard functions performed by self-regulators as coming within a public sphere, even though they attract the interest of society. This latter approach is well captured by the dicta of Rose J in *R v Football Association Ltd(FA), ex p Football League Ltd*⁴². He said that despite its virtually

³⁹ *R v Insurance Ombudsman Bureau ex parte Aegon Life Assurance Limited*, The Times, 7 January 1994; *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan*; *R v Lloyd's of London ex parte Briggs and others* [1993] Lloyd’s LR 176.

⁴⁰ BLACK, J.M. "Constitutionalising Self-Regulation." *Modern Law Review* 59, (1996): 24.

⁴¹ *Ibid.* See also *R v Advertising Standards Authority Ltd, ex p Insurance Service plc* [1989] 9 Tr LR 169; *R v Code of Practice Committee of the British Pharmaceutical Society, ex p. Professional Counselling Aids Ltd* [1990] 3 Admin LR 697.

⁴² [1993] 2 All ER 833.

monopolistic powers and the importance of its decisions to many members of the public, the Football Association's activities exist in private law only. In his view, there was no sign of underpinning directly or indirectly by any organ or agency of the state or any potential government interest, nor was there any evidence to suggest that if the FA did not exist the state would intervene to create a public body to perform its functions.

A similar line of reasoning was applied in the *Wachmann* case⁴³. Here the applicant, an Orthodox Rabbi appointed to a synagogue by a congregation which belonged to the United Hebrew Congregations of Great Britain and the Commonwealth, sought judicial review of a decision of the spiritual head, the Chief Rabbi, removing him as a Rabbi. However, the Court refused the application, holding that the Chief Rabbi's activities were essentially private, since no governmental interest was involved in his decision-making power. In particular, it was stressed that the regulatory system in question was not supported by any statutory power or penalty indicative of government concern. By the same token, there was no suggestion that the government would seek to discharge the applicant's spiritual functions were he to abdicate his regulatory responsibility.

A second type of argument is based on the monopoly power which self-regulatory organisations can wield. In this case, it is the amount of power rather than the association with the government which leads to the conclusion that the body's activities are public. In *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan*⁴⁴, for example, the Court accepted the applicant's contention that the Jockey Club effectively regulates a significant national activity, exercising powers which affect the public and are exercised in the interest of the public. However, when establishing the basis for such conclusion the Court said that in this case the body in question had "not been woven into any system of governmental control of horse racing". Thus, "while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental".

II.3.3 What are the consequences for SRBs' activities of being considered 'public' for the purposes of judicial review?

The consequences for SRBs in relation to the classification of their activities as public for the purposes of judicial review can be divided into two groups: those relating to the possible application of particular substantive rules and those relating to the alteration of applicable procedural rules.

Substantive Rules

The characterisation of self-regulatory activities as 'public' and therefore 'subject to judicial review' does not necessarily entail the application of substantive rules different from those applied in private areas such as company law, trusts, and private licensing decisions, expulsions, 'the right to work' and so on⁴⁵. In the latter context, these rules are usually grouped together as 'principles of good administration'. They include "the requirement of fairness in its various guises, and they prohibit the fettering or delegation of discretion, abuse of power, arbitrariness, capriciousness, unreasonableness, bad faith, breach of accepted moral standards,

⁴³ *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249.

⁴⁴ (As above).

⁴⁵ OLIVER, D. "Is the *ultra vires* rule the basis of Judicial Review?" *Public Law* (1987): 543.

and so on”⁴⁶. They require, in other words, what in public law is called legality, rationality, procedural propriety and possibly proportionality.

In particular, as regards SRBs, the application of these common principles either to public or private authorities has been advocated with particular clarity by Black. She suggests that instead of being obsessed, or at least diverted, by the question of what is ‘public’ and what is ‘private’, we should rather be looking at the type of function being exercised asking “what duties and responsibilities should accompany the exercise of such functions and to whom should they be owed, what degree of autonomy should those exercising them have and what degree of judicial supervision should be exercised over them, and use that, not a narrow public/private dichotomy, as the basis for determining the legal principles which should apply”⁴⁷.

Procedural Rules

According to the principle of procedural exclusivity introduced by *O’Reilly v. Mackman*⁴⁸ and developed by cases such as *R. v. Panel on Takeovers and Mergers ex p. Datafin plc*⁴⁹, depending upon whether the self-regulatory activity is of a public or private character, litigants are forced to choose whether they wish to proceed by way of an application for judicial review, or whether they wish to challenge the decision by way of an ordinary action commenced by writ or originating summons. There are two types of exceptions to this criterion. First, a public decision could be reviewed by way of an ordinary action where the claim arises as a collateral issue in an action for infringement of a right of the applicant arising under private law⁵⁰. Secondly, a person could proceed outside the judicial review procedure where none of the parties objected, notwithstanding that the case might involve a challenge to a public law act or decision.

In practice, there are several differences between an action for judicial review and one involving private rights⁵¹. On the one hand, the time limit for applications in judicial review cases is much shorter than in private law proceedings. Further, the courts are reluctant to allow discovery and cross-examination to investigate factual issues relating to the case, normally because of the delays and extra costs which this concession generates. On the other hand, it is believed that public law remedies are more effective in returning parties to the status quo ante. Secondly, it is said that the scope of obligations imposed upon the respondent body in public law procedures exceeds those that would be imposed under ordinary trial procedure.

Nevertheless, in the light of the considerations outlined in the section on substantive rules, this procedural and remedial divides introduced by the House of Lords in *O’Reilly v. Mackman* seem particularly inappropriate. As Oliver points out, it is difficult to find a rational justification for a situation in which standards of legality, fairness and rationality are imposed broadly across the spectrum of public and private law, and yet procedural and remedial pro-

⁴⁶ Ibid.

⁴⁷ BLACK, J. "Reviewing Regulatory Rules: Responding to Hybridisation." In *Commercial Regulation and Judicial Review*, edited by Black, Muchlinsky and Walter: Hart Publishing, 1998.at page 157.

⁴⁸ [1983] 2 A.C. 237.

⁴⁹ (As above). It is argued that the impact of *ex parte Datafin* on the scope of judicial review has changed the functional concept of ‘public law’ held by the House of Lords in *O’Reilly v. Mackman* to a functional concept of ‘public duty’. FORSYTH, C.F. "The Scope of Judicial Review: "Public Duty" not "Source of Power"." *Public Law* (1987): 356.

⁵⁰ For example, a case where the applicant seeks to establish private law rights which cannot be determined without an examination of the validity of a public law decision.

⁵¹ CRAIG, P. *Administrative Law*. 5th ed: Sweet & Maxwell, 2003. at pages 793-845.

tections apply in certain types of case because public functions are being exercised and certain remedies are being claimed⁵².

III. Liability of Self-Regulatory Bodies

III.1 Introduction

We are considering here the question of when SRBs will be liable in respect of alleged failures in either making or enforcing rules designed to regulate an activity. One question which will always be of relevance, no matter in what terms any action for damages is framed, is for whose benefit the rules in question exist. As may be imagined, the answer to this varies from case to case and is rarely simple – some rules (and bodies) may exist for the benefit of members of the public affected in one way or another by the activity, others may be to ensure that the actions of one regulatee do not overly impinge on another, and yet others may concern the fair treatment of an individual regulatee by the body itself.

Given the existence of these numerous variables, our intention here is merely to give some idea of the range of actions which may be available in the English courts, hopefully with some indications as to how apt they may be in a given situation.

III.2 Breach of Statutory Duty

Given the strict nature of the duty to abide by statute, removing much of the burden on an injured party to show ‘fault’, breach of statutory duty will often be the first port of call when considering an action against an SRB.

First, in order to establish an action in breach of statutory duty, it must be asked whether the body in question is operating under some form of statutory authority (which, as we have seen, is by no means universally the case for SRBs).

Second, if an empowering statute does exist, does it impose a duty or merely provide a power? This distinction is crucial to understanding the nature of the action – statutory powers by definition authorise but do not oblige a body to act whereas statutory duties must be complied with.

The essentials of the action in ‘breach of statutory duty *simpliciter*’ (as distinct from an action on the basis of alleged negligence in the performance of some statutory power) are relatively straightforward. The claimant must show that the damage he suffered falls within the ambit of the statute, namely that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It must be proved that the statutory duty was breached; whilst the duty is always in a technical sense strict, a body may be ‘strictly’ required under statute to act with reasonable care. As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage would have occurred in any event. Finally, there is the question of whether there are any defences available to the action (such as limitation, contributory negligence etc.).

Crucially, an action in breach of statutory duty requires the claimant to show that the “statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty”⁵³.

⁵² Oliver, Dawn, “Review of (Non-Statutory) discretions”, in *Judicial Review and The Constitution*, (as above), 323-324.

The question of what may be considered a ‘limited class of the public’ is much debated but often sterile. It seems that where the court wishes to provide an action, it will be possible to define the group of persons of which the claimant is a part in such a way as to be sufficiently specific, for example ‘road users’⁵⁴.

‘Indicators’ of when a private right is intended by Parliament include the type of statutory provision itself; statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large have not been held to give rise to a private law right of action for damages for breach of statutory duty: “Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general”⁵⁵.

The existence of alternative remedies such as an internal complaints procedure established by the statute or the presence of public law remedies will weigh against interpreting the statute as providing a private law right of action. Further, the courts are notoriously cautious about inferring the existence of such an action where the harm suffered is pure economic loss.⁵⁶

In all, an action in breach of statutory duty is very closely circumscribed and perhaps lacks the flexibility to cope with the novel permutations of rule-making power which SRBs represent.

III.3 Breach of the Human Rights Act 1998 (“the HRA”)

Closely linked to the tort of breach of statutory duty are the new set of “constitutional torts” stemming from the statutory duty of public authorities (under section 6 of the HRA) to act in compliance with rights set out in the Convention.

When an SRB may be considered a “public authority” for these purposes is a complex question which we have considered at length above⁵⁷. For these purposes it is worth reminding ourselves that the distinction between pure and quasi-public authorities determines the situations in which the body will be under a duty to act in compliance with the Convention. Pure public authorities are dutibound to act in a manner which is compatible with Convention rights when exercising functions governed by public law or private law. By contrast, quasi-public authorities are obliged to comply with section 6(1) of the HRA in relation to their public functions but not their private law relationships.

When considering its attractiveness to potential claimants, it should also be noted that breach of the HRA appears to give rise to lower damages awards than might be the case under common law, given that in this instance the English courts are required only to mirror the (relatively low) levels of award made by the Strasbourg court⁵⁸.

⁵³ *X (minors) v Bedfordshire County Council* [1995] 2 AC 633, per Lord Browne-Wilkinson at 731.

⁵⁴ See *Roe v Sheffield City Council* [2003] 2 WLR 848 at [49].

⁵⁵ *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731-732.

⁵⁶ See *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 160-161 per Lord Bridge. Contrast the availability of actions for economic loss occasioned by violation of European Community legislation.

⁵⁷ See Part II – The nature of the body.

⁵⁸ See *Anufrijeva v Southwark LBC* [2003] 2 WLR 603.

III.4 Euro-tort

Another species of breach of statutory duty arises in the form of an action for breach of European legislation where treaty provisions or regulations are held to be directly applicable in the Member States or if an unimplemented Directive is such that it gives rise to a right of action – what Clerk and Lindsell modishly refer to as the ‘Euro-tort’⁵⁹.

The House of Lords in the *Three Rivers* case considered such an action⁶⁰. In that case, over 6000 claimants sued the Bank of England in respect of losses they had sustained on the collapse of the Bank of Credit and Commerce International SA (“BCCI”). The Bank of England had been responsible for the supervision of BCCI’s activities in England. As well as pleading their case in misfeasance in public office (considered below), the claimants also argued that the defendant’s inadequate supervision of BCCI gave rise to liability for breach of Community law. The Community Banking Co-ordination Directive (77/780) required Member States to ensure that deposit-taking and credit institutions such as BCCI were properly authorised to conduct their business and that they were supervised and monitored to ensure compliance. The Directive was implemented by the UK in the form of the Banking Act 1979. The 1979 Act was ultimately repealed and replaced by the Banking Act 1987. Crucially, section 1(4) of the 1987 Act gave the Bank of England an immunity from liability in relation to its supervisory functions, unless it had acted in bad faith. The basis of the claimant’s claim under Community law was that the onerous requirement of establishing bad faith meant that the Directive had not been effectively implemented. The incentive for framing their claim in that way against the Bank, as an appropriate emanation of the state, was that such an action would circumvent the public policy restrictions employed by the English courts to bar claims in negligence against public authorities operating in a regulatory capacity. The action failed. The Court of Appeal accepted that one of the objectives of the Directive was to protect individual depositors and that it was sufficiently clear and precise to confer rights on credit institutions. Strangely, the court held that the Directive was not clear and precise enough to confer rights on individual depositors. As such, it did not have direct effect so as to enable an individual depositor to sue before a domestic court. The House of Lords affirmed the Court of Appeal’s findings.

Even if one leaves to one side questions of the existence of horizontal direct effect, it is a matter of speculation perhaps how the reasoning in *Three Rivers* may be applied to the question of the liability of SRBs, or indeed whether it says anything more than that the courts will be reluctant to impose liability for unimplemented Directives. However, it is not difficult to imagine that similar considerations will arise in terms of restricting the liability of SRBs at common law and how this may conflict with obligations arising at the European level. Also, in what circumstances SRBs may be considered emanations of the state (a question touched on in Part II above) is one which may be addressed in a very different way if in practice private bodies are used as the means of fulfilling such obligations.

III.5 Negligence

As in many ways the most flexible cause of action available at common law, the tort of negligence perhaps offers the most potential for allowing recovery against SRBs who have by their action or omission caused harm to individuals.

⁵⁹ CLERK & LINDSELL. *Torts*. 18th ed, *The Common Law Library*. London: Sweet and Maxwell.

⁶⁰ *Three Rivers District Council v Governor and Company of the Bank of England (No.3)* [2003] 2 AC 1.

When therefore will an SRB owe a duty of care to an individual to take reasonable steps not to cause him harm? As a preliminary point, it should be noted that even if a statute does not itself give rise to a cause of action for breach of statutory duty (considered above), it may in any event indicate the presence of a common law duty of care in negligence. However, in relation to the liability of a public body for failing to exercise its statutory power a particular way, it has been said that there must be “exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.”⁶¹

Whether a statute is the source for the defendant’s regulatory powers or not, the tripartite test for the existence of a duty of care set out in *Caparo*⁶² will apply. That test requires first that a claimant show that it was reasonably foreseeable that he would suffer harm if the defendant acted without reasonable care; second, that there was a sufficient relationship of proximity between the parties and third that it is fair, just and reasonable to impose a duty on the facts of the case.

One problem which is likely to arise when seeking to impose of duty of care on SRBs is that often the ‘proximate cause’ of any loss is likely to be the actions of a third party (usually a regulatee) rather any action on the part of the body itself. Indeed, the case for imposing liability for an omission (to make a particular rule or to enforce it) may at first sight at least be less compelling than that for imposing liability on the person whose positive actions have caused harm. The issue of liability for damage which could not have occurred but for the actions of a third party also impacts on the related questions of causation and remoteness. In essence, the question is always whether it is proper to hold the defendant liable for the loss in question and where there are multiple factual causes of that loss, the result can seem largely instinctive.⁶³

The principles at play are perhaps best illustrated by the case of *Watson v British Boxing Board of Control Ltd*⁶⁴. The claimant, Michael Watson, was a professional boxer who collapsed after a boxing match in September 1991. The match was regulated by the defendant Board, of which the claimant was a licensed boxing member. The claimant’s case was that the Board owed him a duty of care to take reasonable steps to ensure that he was reasonably safe when boxing and that the rules which the Board had made regarding the minimum medical facilities to be present at a boxing match were insufficient to discharge this duty. In particular, he contended that the Board should have required those organising the fight to provide facilities to enable ringside resuscitation and to make sure that a nearby hospital with neurosurgical facilities was placed on standby.

The Court of Appeal, in considering whether to uphold the judgment at first instance in favour of the claimant, explicitly acknowledged that it was being asked to break new ground. Lord Phillips MR states at paragraph 59 that “We have been referred to no case where a duty of care has been established in relation to the drafting of rules which have governed the conduct of third parties towards a claimant.” However, the court was content to consider the question in terms of whether it provided a logical extension of the rule that where a person gives advice to another which foreseeably resulted in injury to the person or property of a third person, then he may be held liable to that third person in negligence.

⁶¹ *Stovin v Wise* [1996] AC 923, per Lord Hoffmann.

⁶² *Caparo Industries Plc v. Dickman* [1990] 2 AC 605

⁶³ See *South Australia Management Corp. v York Montague Ltd* [1997] A.C. 191 and *Home Office v Dorset Yacht Co. Ltd* [1970] 2 WLR 1140

⁶⁴ *Watson v British Boxing Board of Control Ltd and another* [2001] 2 WLR 1256

What emerges from the judgment of the Court of Appeal is that the Caparo requirement of ‘proximity’ forms the main criterion for determining whether the Board was liable to compensate the claimant. Further, the Court approved the broad (and rather convoluted) view of proximity taken by Hobhouse LJ in *Perrett v Collins*⁶⁵ where it was stated that

“Where the plaintiff belongs to a class which either is or ought to be within the contemplation of the defendant and the defendant by reason of his involvement in an activity which gives him a measure of control over and responsibility for a situation which, if dangerous, will be liable to injure the plaintiff, the defendant is liable if as a result of his unreasonable lack of care he causes a situation to exist which does in fact cause the plaintiff injury. Once this proximity exists, it ceases to be material what form the unreasonable conduct takes.”

It will be seen that this formulation is sufficiently wide to cover a broad range of persons who have “a measure of control over and responsibility for” an activity, including SRBs. Importantly, in terms of to whom such a duty of care is owed, the claimant in *Perrett* does not appear to have himself been a member of the defendant body and so whilst such membership may go a long way towards showing proximity (as in *Watson* itself) it is not a necessary part of the existence of a duty of care.

Also, it may be noted that no analytical distinction is drawn in *Watson* between failures in rule-making (as in *Watson*) and failures of enforcement (as was the case in *Perrett* where proper rules on aircraft safety were not enforced). The lack of concern with any such distinction is perhaps evident in the last sentence of the passage in *Perrett* cited above.

What is also of note is that the nature of the boxing Board (a non-profit company limited by guarantee) is also seen as irrelevant to the question of liability and is in fact roundly dismissed as follows:

“[Counsel for the Board] urged that a duty of care should not be imposed upon the board because it was a non-profit-making organisation and did not carry insurance [...] Considerations of insurance are not relevant. Nor do I see why the fact that the board is a non-profit-making organisation should provide it with an immunity from liability in negligence.”

Indeed, though it formed no part of the court’s judgment, it will have been aware that its finding for the claimant was likely to send the Board into liquidation, which eventually did occur. One may infer that the courts will have no compunction in imposing duties on SRBs in the same way as on any other type of defendant.

III.6 Misfeasance in Public Office

The common law has also developed a specific tort in relation to the performance of a public office. A public officer will be liable in misfeasance in public office if it can be shown that he has committed an unlawful act (i.e. outside of his powers or otherwise wrongful), that he did so in bad faith and that his actions caused the claimant loss of type which is not too remote to be compensable.

The first question in to be raised in the context of SRBs is whether they are ever properly regarded as ‘public officers’. In Part II above we examined whether similar labels would attach

⁶⁵ *Perrett v Collins* [1998] 2 Lloyd’s Rep 255

to SRBs in the context of the HRA and in judicial review. There is no doubt that the answers reached in those contexts will heavily influence the courts' approach to misfeasance but in so far as different considerations apply (private law being largely a question of risk allocation and redistribution of money) those labels will not be binding in all situations. It may be the case that an increase in private actors exercising powers which were once the preserve of public bodies will persuade the courts to expand the scope of this tort.

Even if the hurdle of 'public officer' is overcome, a claimant must still show that the defendant (for our purposes, the relevant SRB) has acted in bad faith. The question of what constitutes bad faith in this context was addressed at length in the *Three Rivers* case⁶⁶. The following broad propositions emerge; first, bad faith may be classified as 'targeted' or 'untargeted' malice. The former requires proof of specific intent to injure the claimant or a person in the class of which the claimant is a member, the latter can be satisfied by, at its lowest, showing only that the defendant acted intentionally, being aware that it risked directly causing loss to the claimant or an identifiable group of which the claimant formed part, and wilfully disregarded that risk.⁶⁷ This latter form of bad faith is obviously more likely to be applicable in the context of SRBs.

III.7 Judicial Review

Aspects of the availability of judicial review of administrative acts in terms of the characterisation of bodies subject to the court's review have been considered above. For the present purposes of determining liability (in the narrow sense of a body being required to compensate an individual) three things are of importance.

First, judicial review is a procedure rather than a remedy – in other words, it is not an end of itself, the desired outcome being either a declaration, a quashing, prohibitory or mandatory order of the court. This leads on to the second, and perhaps most important point: a court will not order damages in judicial review proceedings unless the claimant can show a private law right to them. Third, permission to proceed to judicial review being at the discretion of the court, a party must exhaust all his private law remedies before seeking it.

The cumulative effect of these requirements is that a party seeking compensation for a failure or particular form of treatment by an SRB will be unlikely to obtain such compensation by way of judicial review alone, notwithstanding the very real benefits of obtaining declaratory or other relief from the court.

III.8 Conclusion

The question of liability of SRBs to compensate an individual for damage suffered as a result of its acts or omissions is complex and the answer cannot be said to be predetermined. It depends rather on the specific circumstances of the case. Nevertheless, the tort of negligence in particular has proved itself robust and adaptable enough to cope with new and unique types of relationship, even though determinations of whether these give rise to liability can appear to be arbitrary.

⁶⁶ *Three Rivers District Council v Governor and Company of the Bank of England (No.3)* [2003] 2 AC 1.

⁶⁷ For an interesting analysis of this case, see: ROSSI, F. "Tort Liability of Financial Regulators - A Comparative Study of Italian and English Law in a European Context." *European Business Law Review* (2003): 643.

IV. Sectoral Analysis

IV.1 Environmental Protection

Self-regulation for environmental purposes is particularly expressed through the use of contracts by the government. The key feature of this system is that people voluntarily agree to achieve environmental goals in a manner which is considered more effective than regulation by command and control.

For example, much rural activity such as agriculture and afforestation is subject to a form of regulation which is entered into voluntarily. Historically, agreements to secure a change of behaviour in this field are characterised by freedom of contract and the cost of regulation will be borne by the state, generally through a payment, which is justified on the ground that the landowner is suffering a loss in the existing use value of the land.

Management agreements are also used to regulate activities in national nature reserves, in sites of special interest (SSSIs), in environmentally sensitive areas and in access areas. The government has, for example, relied on the voluntary approach to manage peatland in Caithness and Shuterland and geese in Dumfries and Galloway. As regards SSSI, s. 15 of the Countryside Act 1968 enables English Nature or the Country-side Council for Wales to negotiate agreements with landowners who are carrying out activities which may damage the nature conservation. What is relatively new in this sector is a significant broadening of the range of duties incorporated into the agreements. For some time now agreements have involved not only a mere restriction of activities but also positive management of sites. Sometimes such contracts operate on a 'whole farm' basis which combines good farming practice with the protection of habitats, landscape and archaeological features.

Similarly, s. 18 of the Agriculture Act 1986 empowers the Secretary of State to enter into an agreement with a landowner for the purpose of preserving an environmentally sensitive area. In most cases positive obligations are imposed on farmers to adopt traditional methods of farming rather than intensive practices such as the application of herbicides, pesticides and certain fertilisers. These obligations might also provide for maximum stocking levels to prevent overgrazing.

It is worth noting that sometimes the government has relied on tax credits to encourage landowners to enter into management agreements for environmental protection. In particular, the Inheritance Tax Act 1984 provides that owners of land may be exempted from inheritance tax or capital gains if they agree to manage 'national heritage'⁶⁸ property in the public interest.

Furthermore, the UK government has employed covenants to achieve environmental protection in a more informal, cheaper and quicker way. For example, the Department of the Environment has controlled the use of greenhouse gases in the manufacture and operation of aerosol, foam and fire extinguishing equipment by entering into an agreement with trade associations representing that sector of industry.

Consensual forms of self-regulation can also be found in relation to work on construction sites which may create noise and vibration. Part 1 of the Environmental Protection Act 1990, for example, provides that any contractor who wishes to carry out works on a site may make an application to the appropriate local authority for prior consent. These agreements have been especially designed to afford a defence against any notices which may be served by the local

⁶⁸ This concept includes land of outstanding scenic, scientific or historic importance and certain buildings of special interest.

authority under section 80 of the Act. Thus, an understanding may be reached between the contractor and the enforcement agency in order to avoid the agency's own stipulations in the case of nuisance which are likely to be far harsher. In addition, this dialogue between the parties contributes to form a good working relationship which may provide solution to futures difficulties based on mutual reliance⁶⁹.

Another advantage is that this form of self-regulation may reduce or eliminate the costs that would otherwise be incurred by the local authority in monitoring on site. By providing that contractors must monitor themselves according to the "polluter pays" principle, the enforcer is saving the costs of placing monitoring equipment and rectifying any problems on site. In other words, the local authority only spends resources to control that the contractors are self-regulating to an appropriate standard. This can be done, for example, by checking readings taken from the equipment.

Waste management also involves a self-regulating duty of care which ensures the integrity of the waste stream on its journey from producer to disposer. In particular, Section 34 of the Environmental Protection Act 1990 imposes on every agent of the management chain a duty to ensure the safe handling and disposal of waste as well as a proper containment over time. A Code of Practice provides guidance as to how to discharge the duty of care, for example, by refusing further consignments until a problem is remedied. Thus, self-regulation is based on "the rationale that companies do not want to inherit other companies' environmental problems and this will lead to improved management along the waste chain"⁷⁰.

IV.2 Advertising

The Advertising Standards Authority (ASA) is a self-regulatory body set up in 1962 by the advertising industry through the Committee of Advertising Practice (CAP)⁷¹ to police the rules laid down in the British Codes of Advertising and Sales Promotion. In particular, the Code requires all marketing communications to be 'legal, decent, honest and truthful', and to respect the principles of fair competition and responsibility to consumers and society.

The strength of this self-regulatory system lies in three main factors. First, the fact that the Code of Practice produced by the CAP is administered a wholly independent body, the ASA. In this manner, there is no conflict between the regulatory function and the responsibility to represent members' interests. Secondly, the unqualified backing of the industry to the independence of the ASA and the unequivocal support of government has encouraged a full acceptance of its adjudications in spite of its lack of statutory powers. Thirdly, self-regulation has proved to be a faster and more 'user friendly' way of dealing with apparent breaches of

⁶⁹ CHAKRAVORTY, S. "Section 61 of the Control of Pollution Act 1974." *Construction Law Journal* (1993). , 170-172.

⁷⁰ ROWAN-ROBINSON, J., and ROSS, A. "Enforcement of environmental regulation in Britain: strengthening the link." *Journal of Planning & Environment Law* (1994). , 207.

⁷¹ This is a committee composed of representatives from a wide range of bodies involved in advertising, including bodies representing media owners, interactive advertisers, advertising agencies, sales promoters, direct marketers.

the rules than going to law⁷². Accordingly, advertising self-regulation has been explicitly singled out for praise by several reports in the UK which consider it as an effective model⁷³.

Nevertheless, it is worth noting that although the advertising sector is generally controlled by self-regulatory organisations, there are several statutory and administrative interventions by government which seek to regulate the content of specific advertisements in order to protect consumers. Thus, governmental concern has been expressed through the regulation of unsolicited telephone calls for marketing purposes⁷⁴, mail order advertisement⁷⁵, lottery tickets⁷⁶, price advertising⁷⁷, goods descriptions⁷⁸, advertisement for medicinal products⁷⁹, and credit offers⁸⁰.

IV.2.1 The Constitutional dimension

From a constitutional perspective, the system of self-regulation in the advertising sector is significantly concerned with the incorporation into the law of England and Wales of the European Convention on Human Rights by way of the Human Rights Act 1998. In particular, attention must be paid to Article 10, dealing with freedom of expression, and Article 8 dealing with the right to privacy. Decisions of the Advertising Standards Authority will be subject to review on the basis that they did not conform with these Articles.

In a broader sense, the regulation of advertising raises issues of constitutional significance, in particular in relation to the implementation of European law. There exist 'general' Directives concerned, *inter alia*, to e-commerce⁸¹, data protection⁸², comparative advertising⁸³, distance selling⁸⁴, distance contracts⁸⁵, and tobacco advertising⁸⁶.

IV.2.2 The nature of the regulatory body and their activities

The ASA is a private body which does not exercise statutory powers, its source of power being purely contractual. Nevertheless, its activities have been considered of a 'public' nature for judicial review purposes. Thus, in *R v. Advertising Standards Authority ex p. Insurance Services*⁸⁷, Glidewell LJ held that:

⁷² WEBSTER, D. "Joint Response of the Advertising Standards Authority and Committee of Advertising Practice to the Ofcom Consultation on promoting effective self-regulation: Criteria for transferring functions to co-regulatory bodies." 2004.

⁷³ See HMG. "White Paper on Consumer Strategy." 1999. Also, NATIONAL CONSUMER COUNCIL. "Models of Self-Regulation." 1999., which looks at many systems including advertising.

⁷⁴ Telecommunications Act 1984 and the Telecommunications (Data protection and privacy) Regulations 1999.

⁷⁵ Mail Order Transaction (Information) Order 1976.

⁷⁶ National Lottery Act 1976.

⁷⁷ Consumer Protection Act 1987

⁷⁸ Trade Descriptions Act 1968; Food Labelling Regulations of 1984 and the Food Safety Act 1990.

⁷⁹ The Medicines Act 1968 and The Medicine (Labelling and Advertising to the Public) Regulations 1994.

⁸⁰ The Consumer Credit Act 1974 and the Consumer Credit (Advertisements) Regulations 1989.

⁸¹ E-Commerce Directive 2000/31.

⁸² Data Protection Directive 97/66 and the Data Protection Act 1998.

⁸³ Directives 84/450 and 97/55.

⁸⁴ Distance selling Directive 97/7 and The Consumer Protection (Distance Selling) Regulations 2000.

⁸⁵ Distance Contracts Directive 97/7.

⁸⁶ Directive on tobacco advertising 98/43.

⁸⁷ (1989) SJ 1545.

“The characteristics of the Advertising Standards Authority are in many ways similar to those of the take-over panel. The authority has no powers granted to it by statute or at common law, nor does it have any contractual relationship with the advertisers whom it controls. Nevertheless, it is clearly exercising a public law function which, if the authority did not exist, would no doubt be exercised by the Director General of Fair Trading... I, therefore, have no hesitation in concluding that the decisions of the authority are susceptible to control by the court by way of judicial review”.

IV.2.3 Liability of the ASA

The ASA is a company limited by guarantee, which means that it has legal personality and a basic constitutional structure in the shape of the memorandum and articles registered at Companies House as public documents⁸⁸. Thus, the liability of its members is limited to such amounts as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up.

Nevertheless, as Graham points out, often what is important is not the formal arrangements but the working relations established. In this sense, an indirect form of accountability can operate through the appointment of the Chair of its Council by the Advertising Standards Board of Finance Limited after consulting the existing members of the Council and obtaining their agreement, as well as informal consultation with the Secretary of State⁸⁹.

IV.3 Sports

Traditionally bodies controlling sports in the United Kingdom are self-regulatory organisations which have a relatively clear role: they set and enforce the rules; they licence and register participants; they set, enforce and monitor standards. As far as their relationship with the government is concerned, it is observed that most of these bodies such as the Test and County Cricket Board, the International Amateur Athletic Federation, or the International Federation of Football Associations, are in the form of unincorporated associations. These entities therefore are not created by statute and derive their powers from contracts which are contained in the association’s rules and codes of practice. Exceptionally, however, there are some incorporated bodies such as the Football Association or the British Amateur Athletics Board, though their rules are equally promulgated on a consensual basis. Thus, it is possible to say that regulatory organisations in the British sport context are classic example of ‘voluntary’ self-regulation, the clubs never having been drawn into a regulatory partnership with government⁹⁰.

The advantages of this form of regulation over statutory or direct government intervention in the sport field are particularly associated to flexibility and cost-effectiveness. Thus, it is said that self-regulation can be easily adapted to reflect changing circumstances or sport developments. For example, it is observed that Football is a fast-changing business to which a state regulator would find it difficult to adapt quickly. Besides, statutory regulation would be more expensive to the general public than a system such as self-regulation which usually makes no direct demands on the tax-payer.

⁸⁸ GRAHAM, C. "Self-Regulation." In *Administrative law and government action: the courts and alternative mechanisms of review*, edited by Richardson, Geneva and Genn, Hazel G. Oxford: Clarendon Press, 1994. at page 196.

⁸⁹ Ibid. at page 197.

⁹⁰ HARLOW, and RAWLINGS, eds. *Law and Administration*. 2nd ed, *Law in Context*, 1997.

Nevertheless, the fact that many areas of professional sport such as Football are now ‘big and high profile business’⁹¹, largely due to lucrative revenue streams from television, sponsorship, merchandising and escalating admission prices, has inevitably brought in its wake a kind of juridification in the form of governmental and judicial colonisation of sports administration. This phenomenon has been recently acknowledged by the judiciary in several judgements. In Jones⁹², for example, the Court said:

“There are likely to be many people who take the view that the processes of the law have no place in sport and the bodies which run sport should be able to conduct their own affairs as they see fit ... However, sport today is big business. Many people earn their living from it one way or another. It would, I fear, be naive to pretend that the modern world of sport can be conducted as it used to be not very many years ago”.

In general terms, governmental concern about sport regulation in the UK has been expressed through a wide call to bring transparency and accountability into this field in order to increase public confidence in the way the games are run. In particular, the government has identified the following issues that need to be addressed and warrant some form of regulation:

- detecting or exposing crime or serious misdemeanour;
- preventing the public from being misled;
- protecting the public from fraud and/or misleading information;
- preserving consumer rights and the right to information;
- protecting civil liberties;
- protecting public health and safety

The government has suggested that some models of regulation from outside the world of sports should be explored in order to provide a more effective solution to these issues than that offered by self-regulation. In particular, there are a number of options within a range from creation of independent commissions at one end to full statutory regulation at the other. The case of Football regulation is particularly illustrative of these alternatives, since it provides examples of both ends of the spectrum⁹³.

As regards independent scrutiny over self-regulators, a Football Task Force (FTF) was convened by the government in 1997 to investigate and suggest reforms to several issues that were of widespread public concern. The FTF produced four reports between 1998 and 1999, in the last of which it recommended that there should be an Independent Scrutiny Panel (ISP) to monitor the performance of the governing bodies, and ‘provide the open accountability that should be expected of the national game’⁹⁴. Thus in March 2000 the Independent Football Commission (IFC) was agreed by the football self-regulatory organizations in a submission to the Department of Culture Media and Sports. In establishing this Panel, the game’s governing bodies took a step to introduce a degree of independence to the regulation of ‘public interest’ issues. In particular, the governing bodies looked to the IFC to comment on the effectiveness

⁹¹ BOON. "Deloitte and Touche Annual Review of Football Finance." Deloitte and Touche, Manchester, 1997.at page 3.

⁹² *Jones v. Welsh Rugby Football Union*, The Times, March 6, 1997. See also ROSE, and ALBERTINI. "Jones v. The Welsh Rugby Union: New Law for The New Era." *Sport and the Law Journal* 5, 1 (1997). at page 20.

⁹³ INTERNATIONAL FOOTBALL COMMISSION. "Report." May 2004.

⁹⁴ FOOTBALL TASK FORCE. "Report on Commercial Issues." December 1999.

of Customer Charters, examine the work of the Financial Advisory Unit (FAU), and act as the final point of appeal in the complaints hierarchy. The game's authorities also asked the IFC to review the rules relating to financial and business matters and the Code of Best Practice. In practice, however, the reports of the IFC, published annually since 2003, have focused not only on these issues, but also on wider issues such as merchandising, racism, club financial difficulties, matters of governance and compliance, and the overall effectiveness of the governing bodies.

The statutory intervention of the Government in safety matters in Football also serves as an example of state reaction in the light of self-regulation failure. Namely, the Hillsborough tragedy prompted government to confer to a new body, the Football Licensing Authority, statutory powers to operate a licensing scheme for football grounds.

IV.3.1 The nature of the regulatory bodies and their activities

It is worth noting that self-regulatory bodies and activities in the sport field do not involve a public law element, even though they may affect the public interest and the livelihood of many individuals⁹⁵. In particular, sport bodies are not statutory, nor do they exercise *de facto* powers of a governmental nature. Their source of power is purely contractual and therefore based on private law.

For this reason, as seen above, the supervisory jurisdiction of the courts, which is exercised in the case of 'public law' decisions, cannot be extended to this context. In *Aga Khan*⁹⁶, for example, Sir Thomas Bingham said:

“the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the rules of racing, derive from the agreement of the parties and give rise to private rights... It would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case”.

In these cases, therefore, if control is needed it must be found in “the law of contract, the doctrine of restraint of trade, the Restrictive Trades Practice Act 1976, articles 85 and 86 of the EEC Treaty and all the other instruments available in law for curbing the excesses of private power”⁹⁷.

IV.4 Legal Services

IV.4.1 The constitutional dimension

Clementi⁹⁸ identifies a number of considerations surrounding the regulation of legal services which may be said to have constitutional significance:

⁹⁵ See the dicta of Hoffmann LJ in *Aga Khan*, (as above).

⁹⁶ (As above).

⁹⁷ Ibid. See also BELOFF, M.J. "Pitch, Pool, Rink...Court? Judicial Review in the Sporting World." *Public Law* (1989): 95. at page 98.

⁹⁸ CLEMENTI, D. "Review of the Regulatory Framework for Legal Services in England and Wales - A Consultation Paper." 2004.. As the title suggests, this independent review is a wide-ranging and authoritative study of the regulation of the legal profession and forms the basis of most of the observations in this section. 'Clementi' (as the report is commonly called in reference to its author, Sir David Clementi) was commissioned by the Secretary of State for Constitutional Affairs in the light of the July 2003 Department for Constitutional Affairs (DCA) report entitled "Competition and Regulation in the Legal Services Market". The

Maintaining the rule of law – a predictable and proportionate legal system with fair, transparent and effective judicial institutions is arguably essential to the protection of citizens against any arbitrary use of state authority and unlawful acts of both organisations and individuals.

Access to justice – those responsible for the regulation of legal services ought to have in mind the goal of improving access to justice for all.

Consumer considerations – perhaps reflecting the centrality of the consumer in the ‘economic constitution’ conception of the European Union, Clementi argues that a central task of the regulator is to ensure a genuine and informed choice on the part of the consumer. As well as providing information, consumer-driven regulation may also take the form of prohibiting oppressive marketing practices, raising or setting standards, resolving disputes and protecting vulnerable groups.

Competition considerations – again perhaps reflecting the ‘economic constitution’, Clementi regards it as important that a system of regulation in this sector should prevent unjustified restrictions on competition in legal services, subject to the proper safeguards of consumer interests.

Promoting public understanding of the citizen’s rights – Clementi cautiously poses the question of whether a regulator in this sector has a duty to ensure the provision to the public of consumer knowledge of the most commonly-used parts of the law such as the law surrounding the purchase of real estate. One might be more bold and argue that knowledge of the full range of one’s legal rights and obligations itself has an important, even crucial, part to play in the constitutional framework of any democracy and that it should be part of a regulator’s role to encourage the conditions for such knowledge to exist.

International considerations – Clementi raises the government’s obligations in the international sphere as one of the matters to be borne in mind when devising any new regulatory framework. Particular attention is given to sectoral directives to promote the cross-border practice of law within the European Union and to recent European Commission initiatives designed to promote further competition in professional services. Also of importance are international trade obligations, including those stipulating basic principles governing domestic regulation, in particular WTO agreements such as the provisions of the General Agreement on Trade in Services relating to domestic regulation which stipulate that domestic regulation should be based on objective and transparent criteria, not be more burdensome than necessary and, in relation to licensing procedures, not in themselves a restriction on the supply of the service. Clementi is also keen that statements of international organisations should be taken into account, including those of the United Nations and the Council of Europe on certain key concepts (such as access to justice) relating to the role and exercise of the legal profession.

IV.4.2 The nature of the regulatory body and its activity

Many, including those in the legal professions, take the view that the legal professions are largely self-regulated.⁹⁹ However, while there is broad theme of self-regulation amongst legal

Scoping Study annexed to the 2003 report had concluded that the current regulatory framework was “outdated, inflexible, over-complex and insufficiently accountable or transparent”.

⁹⁹ As an example, an article entitled ‘Balancing Act’ in the Law Society Gazette, 21 November 2003, states “Self-regulation starts with entering the profession and continues through education and training. The control of standards of entry is where the process begins, the setting of ethical standards, enforcing the standards through conduct, then handling consumer complaints”.

professional bodies¹⁰⁰, this operates within increasingly significant parameters laid down by law. As an example of this, under the Courts and Legal Services Act 1990 and now the Access to Justice Act 1999, the approval of the Secretary of State for Constitutional Affairs (following consultation with designated judges, the Legal Services Consultative Panel and the Office of Fair Trading) is required before certain rules of the legal professional bodies, which (broadly speaking) relate to the grant or exercise of rights of audience or rights to conduct litigation, can have effect.¹⁰¹ The Secretary of State also has the power to revoke rules relating to the grant or exercise of rights to conduct litigation and rights of audience if he considers that they are unduly restrictive.

Further, under the Solicitors Act 1974 the Law Society is required to obtain the approval of the Master of the Rolls for those of its rules not already subject to separate approval by the Secretary of State. The Access to Justice Act 1999, through its creation of the Legal Services Commission (LSC), the body responsible for the distribution of publicly-funded legal representative work, has introduced a further purchaser-enforced quality assurance system. In addition to the more direct forms of regulation, legal service providers are also subject to regulation in the form of rules of legal procedure made by the various rule committees and practice directions issued by the Heads of Division¹⁰² which control the manner in which any person, including legal professionals, will operate when conducting litigation or exercising advocacy rights in court.

Bearing this in mind, it may be argued that over recent years the form of regulation of legal services has moved further towards co-regulation (exercised by government and the legal professional bodies) and away from pure self-regulation, although the system overall remains on based on a combination of self-, co-, and state regulation.

However, it may be useful to focus on two of the key regulatory functions in this area: complaints handling and discipline. These connected functions (which for many are the cornerstones of the idea of professional regulation) are perhaps the area in which the legal profession has most effectively preserved its original ethos of self-regulation. It is worth looking in some detail at how these functions are performed in relation to the two main sub-divisions of the legal profession – solicitors and barristers. Generally, for either solicitors or barristers, an individual’s complaint must be made in the first instance to the service provider of whom the complaint is made. If not satisfied at this stage, the complaint may be referred to the relevant professional body.

¹⁰⁰ The Scoping Study, annexed to the report entitled “Competition and Regulation in the Legal Services Market” of July 2003 identifies 18 bodies with various regulatory powers impacting on this sector. They are (i) Lord Chancellor (now the Secretary of State for Constitutional Affairs), (ii) Master of the Rolls, (iii) Financial Services Authority, (iv) Office of Fair Trading, (v) Attorney General, (vi) Judiciary, (vii) Rule Committees, (viii) Registrar of the Patents Office, (ix) Legal Services Ombudsman, (x) Law Society of England and Wales, (xi) Solicitors Disciplinary Tribunal, (xii) General Council of the Bar of England and Wales (‘the Bar Council’; including the Inns of Court), (xiii) Institute of Legal Executives, (xiv) Institute of Trade Mark Attorneys, (xv) Chartered Institute of Patent Agents (xvi) Council for Licensed Conveyancers, (xvii) Immigration Services Commissioner, (xviii) Court of Faculties.

¹⁰¹ As set out at sections 27, 28 and Schedule 4 of the Courts and Legal Services Act 1990, as amended by the Access to Justice Act 1999.

¹⁰² The Heads of Division are: the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Vice-Chancellor.

Solicitors

For solicitors, the relevant body is the Law Society. It deals with complaints through its Office for the Supervision of Solicitors (OSS). Although the OSS is funded and managed as part of the Law Society, the Council has guaranteed that the OSS will be wholly independent of the rest of the Society so far as the handling of individual complaints is concerned. Rule 15 of the Solicitors Practice Rules requires solicitors to have in place in-house complaints handling procedures, which must normally be followed before a client complaint is made to OSS. Under a voluntary ‘consumer redress scheme’, overseen by an Independent Commissioner since 1 November 2002, OSS first attempts to conciliate between client and solicitor. If this fails, OSS conducts a formal investigation. OSS categorises complaints into two broad headings:

1. Inadequate professional service - e.g. not carrying out clients’ instructions, creating unreasonable delays etc. If OSS upholds a complaint, it can reduce a solicitor’s bill, order a solicitor to pay compensation to a client of up to £5,000, or tell a solicitor to correct a mistake and pay the costs involved.
2. Professional misconduct - e.g. not keeping a client’s business confidential, failing to pay money over to a client when due etc. If OSS upholds a complaint that does not contain an element of inadequate professional service it cannot award compensation to the client, but it can discipline a solicitor by issuing a reprimand. The Law Society can also place conditions on a solicitor’s practising certificate, but this can be appealed to the Master of the Rolls. Serious cases may be referred to the Solicitors Disciplinary Tribunal. OSS does not deal with most negligence cases, which must be pursued through court proceedings.

The body responsible for the discipline of Solicitors, the Solicitors Disciplinary Tribunal (SDT), is constituted under Section 46 of The Solicitors' Act 1974. It is independent of, but funded (with the exception of lay members) by, the Law Society. The Master of the Rolls appoints the SDT members. Its principal function is to hear allegations against solicitors of unbecoming conduct or breaches of their conduct rules. It is open to anyone to make an application to the SDT, although most applications are made by OSS, following investigation there. The Law Society may refer cases itself, for example, following an inspection by its Forensic Investigations Unit. The SDT sanctions are against the solicitor and include striking a solicitor off the Roll. It does not award compensation. Appeal from a decision of the SDT lies to the Queen’s Bench Division of the High Court.

Barristers

To become a barrister, a person must be admitted as a student to one of the four Inns of Court. Students must then complete certain examinations, “keep terms” (i.e. attend a specified number of events of an educational or collegiate nature arranged by, or on behalf of, an Inn), pay a fee, and sign the “Call Declaration” in which, importantly, they undertake to abide by the code of conduct maintained by the General Council of the Bar.

The Bar Council requires that all barristers in independent practice “(i) must deal with complaints made to him promptly, courteously and in a manner which addresses the issues raised, and (ii) must have and comply with an appropriate written complaints procedure and make copies of the procedure available to a client on request. Any complaints made to the Bar Council are received by the Bar’s Complaints Commissioner, who is not a lawyer. The Commissioner may dismiss complaints he considers unfounded, with which he considers the Bar is not able to deal, or where he is able to broker a conciliation. Complaints are categorised into two broad types:

1. Inadequate Professional Service - e.g. delay in dealing with papers, poor or inadequate work on a case etc. The Bar can require a barrister to: apologise to a client, repay fees, or pay compensation up to £5000, but only if the complainant is the barrister's client.
2. Professional Misconduct - e.g. misleading the court, not keeping client affairs confidential, acting against a client's instructions or best interests etc. These complaints are dealt with under the Bar's disciplinary procedure.

As regards the discipline of barristers, if the Complaints Commissioner considers a complaint may be justified, he will refer it to the Professional Conduct and Complaints Committee (PCC) of the Bar Council. The Bar Council also raises a number of complaints against barristers itself for breach of practising rules (e.g. failure to comply with continuing education or insurance requirements). Such complaints are referred direct to the PCC and are not considered by the Commissioner. When sitting, the PCC comprises some 18 barristers and two members of the Bar Council's panel of lay representatives. The PCC cannot dismiss a complaint unless the lay members agree.

If the complaint involves only inadequate professional service, the PCC will refer the case to an Adjudication Panel (chaired by the Commissioner, with two barristers and one lay member). The Panel determines whether the complaint is founded and decides what the penalty should be, including any compensation to the complainant.

If the complaint involves professional misconduct, the PCC can refer the complaint to:

- an informal hearing;
- a summary procedure panel; or
- a disciplinary tribunal of the four Inns of Court - the Tribunal, administered by the Inns of Court, deals with the most serious cases, and can disbar a barrister, or suspend him for an unlimited period.

Each of the above has a mixture of barrister and lay representation. Professional misconduct matters cannot be subject to an award of compensation, but where any inadequate professional service arises out of a case of misconduct each of the bodies above can sanction or award compensation to the same degree as the Adjudication Panel.

Barristers can appeal from a summary procedure panel or disciplinary tribunal to the Visitors of the Inns, selected from the ranks of the High Court Judges. There is no provision for a complainant to appeal to the Bar Council against its decisions, although he can refer a complaint to the Legal Services Ombudsman (LSO). The LSO was established under the Courts and Legal Services Act 1990 and investigates the handling of a complaint by lawyers' professional bodies. If the LSO considers a complaint has not been investigated properly, he can recommend the body review the matter again. The Ombudsman also has the power to investigate the original complaint but to date this has been used infrequently.

The Access to Justice Act 1999 provides for the Secretary of State to appoint a Legal Services Complaints Commissioner (LSCC) in the event of a legal professional body failing to handle complaints effectively and efficiently. The LSCC could be given powers to make recommendations about complaints systems, to set targets for the handling of complaints, to require the body to submit a plan for complaints handling, and to levy fines. In September 2003, it was announced that the current LSO would be appointed on an interim basis to act as LSCC for the Law Society pending consideration of findings of the Clementi review.

Regulatory Models

Part of the remit of the Clementi review was to set out various options for the restructuring of the regulatory scheme in relation to legal services. One of the main concerns expressed in the review is that of the hybrid nature of many of the bodies under review (including in particular the Law Society and the Bar Council) in the sense of combining both regulatory and representative functions. This hybridity, perhaps the defining feature of professional self-regulation, is considered to go to the heart of the debate on models of regulation for the legal sector.

Clementi in response considers two main models of regulation. The first, referred to as Model A, involves stripping out all regulatory functions from the professional bodies. All these functions would be vested in, and carried out by, a ‘Legal Services Authority’ (‘LSA’), which would interface directly with the providers of legal services. Both in name and in nature this body can be seen to be closely analogous to the Financial Services Authority.

The second, Model B, gives responsibility for the regulatory functions to the practitioner bodies, but creates a further tier, a ‘Legal Services Board’, which provides oversight over all the bodies. This model is in turn closely analogous to the newly created Council for the Regulation of Healthcare Professionals (CRHP).

IV.4.3 Liability of self-regulatory bodies

The issue of liability of the regulatory bodies involved in the regulation of the legal professions is something which has been touched on in the preceding paragraphs, specifically in relation to the role of the Legal Services Ombudsman and the Legal Services Complaints Commissioner (currently one and the same person). It can be seen that these bodies introduce an element of ex post accountability of the regulatory bodies for their activity, in addition to the ex ante controls exerted on those bodies by statute and other means.

However, the issue of ‘liability’, in its purest sense of being subject to a duty to compensate one who has suffered a loss, is not something which has formed part of the regulatory scheme in the legal services field. One reason for this is perhaps that the regulator can only ever be secondarily liable for failing to prevent some other actionable fault on the part of its regulatees. As such it is a defendant of last resort. In the legal services field little or no use is made of this last resort for the simple reason that the regulatees are obliged to be insured against liability in negligence. Hence, liability for failures of legal regulators in standard setting or monitoring is not something which has been litigated before the courts. There does however seem to be no prima facie bar to liability in negligence, providing the elements of duty of care, breach, causation and loss are established, or indeed for breach of statutory duty, if the requisite elements are made out.

IV.5 The Medical Professions

IV.5.1 The constitutional dimension

In spite of its obvious importance to the individual and the high political profile it enjoys, it is perhaps difficult to argue that the regulation of the medical professions engages particular constitutional norms aside from those applicable to other areas of regulation. It is however noticeable that much of the case law concerning Article 6 of the European Convention on Human Rights has been concerned with the application of the right to a fair trial to disciplinary proceedings brought against medical practitioners.

In a broader sense, the regulation of the medical professions raises issues of constitutional significance, in particular in relation to the implementation of European law in the sphere of

free movement of workers. There exist ‘general’ Directives and Implementing Orders concerned to encourage the mobility of labour within the EEA (Directives 89/48/EEC and 92/51/EEC as amended) as well as ‘sectoral’ Directives issued to cover particular groups in specific professional contexts.¹⁰³ An example is the Council Directive 93/16/EEC of 5 April 1993, OJ 1993 L165/1 as amended with respect to doctors, which obliges Member States to recognise diplomas, certificates, and other evidence of formal primary medical qualifications awarded to nationals of Member States and which was implemented into UK domestic law by the Medical Act and, among other things, the European Primary Medical Qualifications Regulations 1996 SI 1996 No.1591, and in relation to specialised medicine by the European Specialist Medical Qualifications Order 1995 SI 1995 No.3208, as amended. These provisions apply to nationals of the European Economic Area (EEA) and their families who enjoy parasitic rights to nationals of the member states under EU law. Council Directive 2001/19/EC imposes on the competent authorities of the host Member State a mandatory obligation to take into consideration the recognition by another Member State of non-EU qualifications held by EEA nationals.

A proposed new EU Directive on mutual recognition of professional qualifications has suggested the replacement of the 15 existing Sectoral Directives with a General Systems Directive in this sphere and their substitution by new rights which would, amongst other things, permit professionals from other EU countries to work in that field in the UK for up to 16 weeks without the requirement to register. A number of the bodies responsible for the regulation of the medical professions in England and Wales have expressed concern about the implications of this Directive through the Alliance of UK Health Regulators on Europe.

IV.5.2 The nature of the regulatory body and its activity

Much like the legal profession, the ‘medical profession’ covers a multitude of disciplines, almost every one of which possesses its own regulatory body. However, unlike the legal profession, an overarching body, the Council for the Regulation of Healthcare Professionals (CRHP)¹⁰⁴, now has supervisory power over the vast majority of those bodies¹⁰⁵. ‘Pure’ self-regulation of an entirely voluntary and unsupervised nature does continue to exist in the context of a handful of medically-related professions including psychotherapy, acupuncture and herbal medicine. However, all of these professions are subject to legislative proposals to put their regulation on a more formalised footing similar to that of the more mainstream medical activities.

The role of the CRHP, described below, includes monitoring both the outcome of disciplinary hearings and the effectiveness of the body’s regulatory systems. This innovation places the medical professions in a unique position. If a success, this system of supervised self-regulation could be regarded as a template for regulation of other professions, in particular the legal profession, striking as it does a balance between the preservation of avenues of self-regulation and a heightened awareness of public accountability.

¹⁰³ In the health field, sectoral directives initially covered six health professions: dentists, doctors, midwives, nurses, pharmacists and veterinary surgeons.

¹⁰⁴ CRHP has recently re-branded itself the Council for Healthcare Regulatory Excellence (CHRE). However, its identity under statute remains CRHP and so will be referred to by this name throughout.

¹⁰⁵ CRHP oversees the regulatory work of nine organisations: (i) The General Chiropractic Council; (ii) The General Dental Council; (iii) The General Medical Council; (iv) The General Optical Council; (v) The General Osteopathic Council; (vi) The Health Professions Council; (vii) The Nursing and Midwifery Council; (viii) The Pharmaceutical Society of Northern Ireland; (ix) The Royal Pharmaceutical Society of Great Britain.

It is however worth giving a broad overview of the activity of the self-regulatory bodies involved in the medical professions in order to place this innovation in context.¹⁰⁶ Despite the similarity of their core tasks, there are major differences between the bodies supervised by the CRHP in terms of their statutory basis, the scope of their regulatory powers and jurisdiction, their governance arrangements and their resources. Differences may be explained by a number of factors such as the type of health work undertaken, the period in which the regulatory schemes were first established and the numbers and origins of registrants.

Some degree of consistency in the governance arrangements of the various bodies was however introduced by section 60 of the Health Act 1999, which made it possible to alter the primary legislation creating, continuing and varying the statutory regulation of those bodies by executive order rather than by primary legislation. The effect of this is to enable the executive to alter any aspect of the constitution and functioning of those bodies, except that no existing regulatory body within the remit of the CRHP may be abolished or have one of its functions removed. As with the bodies involved in the regulation of legal services, the majority of rules made by the various bodies in this area do not come into force until approved by order of the Privy Council.

Each of the bodies can also be said to share the four basic functions of registration (protecting the right to describe oneself as a particular kind of practitioner and, in certain cases, protecting the right to undertake a certain kind of activity), education, maintaining standards and controlling fitness to practise. The last two of these functions have come under special scrutiny recently, in particular in relation to the activity of the General Medical Council (GMC – the body responsible for the regulation of doctors in the UK).

With regard to maintaining standards, the very recent recommendations of Dame Janet Smith in the fifth part of her report on the Shipman Inquiry (related to a large number of murders of patients committed by a doctor practising in Manchester) have prompted a review of proposals to introduce a system of licensing and periodical revalidation of doctors aimed at closer monitoring of their performance.

In relation to the handling of complaints and controlling fitness to practise, the reforms, currently in the process of being implemented, include streamlining the complaints procedure against doctors with the aim of dealing with complaints as promptly as is consistent with fairness. This is to be done by a greater separation of functions, with cases being heard by specially recruited panellists, rather than by Council members. At the same time, a single procedure will replace the three separate channels currently used for dealing with doctors' conduct, health and performance. Adjudication panels will consider a doctor's fitness to practise in the round and, with a few minor exceptions, will be able to apply the same outcomes and sanctions to all cases.

CRHP and supervised self-regulation in the medical professions

It remains to be seen whether the very substantial reforms implemented by the GMC will be mirrored by the other Councils. One possibility is that it will fall to the newly-created CRHP to take the lead in managing such a process; to that end it is useful to note the origins and powers of this body.

¹⁰⁶ Those seeking an extremely detailed and comprehensive analysis of the constitution and activity of the various bodies supervised by the CRHP should consult ALLSOP, J., JONES, K., MEERABEAU, L., MULCAHY, L., and PRICE, D. "Regulation of the Health Professions: a Scoping Exercise Carried out on behalf of CHRP." 2004.

‘Learning from Bristol’, the report of the Bristol Royal Infirmary Inquiry chaired by Sir Ian Kennedy in 2001 (concerned with alleged irregularities in the retention of organs of deceased infants), recommended that “a single body should be charged with the overall co-ordination of the various professional bodies and with integrating the various systems of regulation.” This recommendation was put into effect by the National Health Service Reform and Health Care Professions Act 2002 (“the 2002 Act”), which also introduced recommendations from the NHS Plan for England and the consultation document ‘Modernising Regulation in the Health Professions.’ The resulting overarching body, CRHP, started work in April 2003.

CRHP’s remit extends to all parts of the United Kingdom. It is independent of Government (though funded by the Department of Health) but is stated to be accountable to the UK Parliament¹⁰⁷. It comprises a Council of 19 members, including one nominated from each of the nine regulatory bodies and ten lay members.

CRHP has broadly two species of powers under the 2002 Act – those related to the performance and rules of the supervised regulatory bodies in general terms and those related to decisions of the regulatory bodies in individual cases.

Powers related to performance and rules: Sections 26 & 27 of the 2002 Act

Section 26(1) gives CRHP a power to do anything which appears necessary to perform its functions as described at section 25(2). Those functions, broadly, are to:

- Promote the interests of patients and other members of the public by monitoring the performance of regulatory bodies;
- Promote best practice by regulatory bodies;
- Formulate principles for healthcare professionals to regulate themselves and to encourage regulatory bodies to follow those principles; and
- Promote co-operation between regulatory bodies, and between regulatory bodies and other organisations performing related functions.

Specific powers and duties under section 26 include investigating and reporting on the performance of individual regulators, investigating how this performance compares with other regulators and recommending changes to the way regulators perform any of their functions.

Section 27 of the 2002 Act gives CRHP a power to instruct a regulatory body to make or change rules for a specific purpose if it considers that “it would be desirable to do so for the protection of the public”. This power, which it is envisaged will rarely (if ever) be used,¹⁰⁸ is limited in several ways. First, by way of subject matter, it applies only to the making or changing of rules which, according to the constituting documents of the individual regulators, need to be approved by the Privy Council.¹⁰⁹ Second, the power is only to be used after a process of consultation with the relevant body and other interested parties has been followed, with the aim of resolving the matter by agreement. Further, instructions from CRHP are not

¹⁰⁷ COUNCIL FOR THE REGULATION OF HEALTHCARE PROFESSIONALS. "Protecting the Public: Decisions to Refer Regulatory Cases to Court." 2003.

¹⁰⁸ COUNCIL FOR HEALTHCARE REGULATORY EXCELLENCE. "Consultation on the procedure for giving regulatory bodies instructions to make or change rules under section 27 of the National Health Service Reform and Health Care Professions Act 2002." 2004.

¹⁰⁹ In this context the ‘Privy Council’ refers to a quasi-governmental executive body, not to be confused with the Judicial Board of the Privy Council, which acts as the court of last resort for a number of Commonwealth jurisdictions.

per se binding; as has been pointed to above, the rule in question must ultimately be approved by the Privy Council. Prior to that however, it must be approved by vote of both Houses of Parliament in succession, or the Northern Ireland Assembly as the case may be. This procedure applies whether the rule change is in respect of one or several regulators.

Powers related to individual decisions: Section 29 of the 2002 Act

Section 29 of the 2002 Act was enacted against the background of an existing right of appeal by practitioners against the majority of decisions which they consider too harsh. Section 29 gives CRHP the corollary power: to appeal against a decision which it considers too lenient. The note on the relevant clause of the Bill read:

‘Section 29 gives [CRHP] the power to refer a fitness to practise decision by the regulatory body to the High Court where this seems to be desirable for the protection of the public. It is envisaged that the Council would do this in extreme cases where the public interest in having a clearly perverse decision outweighs the public interest in the independent operation of self-regulation...’

Contrary to the CRHP’s original interpretation of its powers¹¹⁰, it is open to the CRHP to appeal not only against the leniency of a sanction imposed but also against a finding that allegations of professional misconduct were not proved¹¹¹.

Significantly, the CRHP considers the decision whether or not to make such an appeal an administrative rather than a judicial one, not requiring the degree of consultation and representation that a disciplinary hearing would require. This characterisation is essential to the CRHP’s ability to keep within the strict four-week time limit for bringing such appeals imposed by section 29(6).

IV.5.3 Liability of self-regulatory bodies

The Scoping Report¹¹² notes that very few of the bodies involved in the regulation of medical professions have a clear procedure for informing those dissatisfied with their performance about how to make a complaint. At the time that report was written, only the General Dental Council and the Nursing and Midwifery Council had a clear process described on their website and even then the action to be taken was determined by the President, against which there is no appeal.

However, it is again possible to conceive of a situation where such a body could find itself liable in negligence for failure to act reasonably in exercising its duty of care towards particular individuals. Such a body could also be held liable for breach of statutory duty, provided that the significant hurdle of showing that the duty was owed to the particular claimant (rather than the public at large) is overcome.

¹¹⁰ COUNCIL FOR THE REGULATION OF HEALTHCARE PROFESSIONALS. "Protecting the Public: Decisions to Refer Regulatory Cases to Court." 2003. at paragraph 1.7.

¹¹¹ *Ruscillo v CRHP & GMC; CRHP v NMC & Truscott* [2004] EWCA Civ 1356

¹¹² Op. cit.

IV.6 Financial Services

IV.6.1 The constitutional dimension

It is doubtful if any specific constitutional norms can be said to be of particular application to the regulation of financial services other than ideas such as the protection of property taken in their broadest sense. What can be said without doubt is that such regulation bears the burden of preserving not only the continued economic life of the UK, given the pre-eminence of the financial services sector in the UK economy, but also in so far as it is concerned with activities such as pensions and savings, with the preservation of conditions in which the modern welfare state can operate.

IV.6.2 The nature of the regulatory body and its activity

It should be explained at the outset that as far as financial services in England and Wales are concerned, self-regulation is largely a thing of the past. Much has changed since the era when gentlemen's agreements and reputational sanctions were thought sufficient to control the activity of this increasingly vast portion of the UK economy. [OVER A CERTAIN PERIOD] regulation in this sector became a matter for statutory bodies, each with their own relatively narrow remit, based on the particular form of financial service or activity they were established to monitor. By 1997 nine¹¹³ such bodies existed, leading to what was perceived by the incoming Labour government¹¹⁴ as a costly, inefficient and confusing situation, given the increased overlap between types of financial institution and the activities they performed.

The solution to this situation was introduced by the Financial Services and Markets Act 2000 (FSMA) in the form of a single, unified financial services regulator, the Financial Services Authority (FSA). In addition to the responsibilities of the nine pre-existing regulatory bodies, the FSA has also been given responsibility to be the UK Listing Authority; to regulate professional firms (solicitors, accountants and actuaries) that undertake a significant amount of regulated financial services activities; to regulate credit unions and to regulate mortgage advice and general insurance broking.

The FSA continues to co-operate closely, and to exchange information, with the Bank of England and the Treasury, under the 1997 Memorandum of Understanding. This Memorandum establishes the framework for co-operation among the three institutions in the area of financial stability. It sets out the roles of each institution and explains how they work together towards the common objective of financial stability. The close co-operation between the FSA and the Bank of England is ensured by a monthly Standing Committee and by the cross-membership of the Chairman of the FSA as a member of the Court of the Bank of England, and by the Deputy Governor (Financial Stability) of the Bank of England being a member of the FSA Board.

In essence, the FSA performs a wide range of regulatory functions in this area, including the setting and enforcement of the rules and codes governing service provision; giving guidance and advice on general policy; and exercising investigative, enforcement and disciplinary powers. Despite its broadly autonomous nature, some limited residuary powers are retained by the

¹¹³ The Securities and Investments Board, the Personal Investment Authority, the Investment Management Regulatory Organisation, the Securities and Futures Authority, the Supervision and Surveillance Division of the Bank of England, the Building Societies Commission, the Insurance Directorate of the Department of Trade and Industry, the Friendly Societies Commission, and the Registrar of Friendly Societies.

¹¹⁴ HM TREASURY. "Financial Services and Markets Bill: A Consultation Document. Part One. Overview of Financial Regulatory Reform." 1998.

government to instruct the FSA in certain matters, namely where a reference has been made to and a report issued by the Competition Commission; where a direction is needed to ensure compliance with international obligations; and regarding the contents of the FSA's annual report.

The four statutory objectives of the FSA are to:

1. Maintain confidence in the financial system;
2. Promote public understanding of the financial system;
3. Secure the appropriate degree of protection for consumers; and
4. Reduce the extent to which it is possible for a financial services firm to be used for a purpose connected with financial crime.

It has been suggested¹¹⁵ that the FSA should be given a fifth statutory objective, 'to minimise the anti-competitive effects of requirements placed on authorised persons by the FSA'. A competition objective was also proposed during parliamentary debate on the new legislation, but the outcome was to leave the four statutory objectives unchanged, whilst strengthening the emphasis on competition in the considerations set out in the FSMA to which the FSA must have regard in discharging its general functions. The impact of the FSA's activities on competition in the financial sector is also a matter subject to the scrutiny of the Director General of Fair Trading, the Competition Commission and the Treasury.

The FSMA itself sets out only broad threshold conditions which a firm must meet in order to be granted permission by the FSA to carry out one of the regulated activities; the detailed rules and regulations for firms are made by the FSA itself, in its Handbook of Rules and Guidance. As far as the regulatory function of complaints handling is concerned, consumer complaints and redress (but not compensation on insolvency) are dealt with separately by the Financial Ombudsman Service (FOS), with disciplinary matters resting with the FSA. A pattern of behaviour identified by the FOS may result in the FOS making a reference to the FSA for possible regulatory action. Rules set down by the FSA require providers to have in-house complaints handling procedures, which must be followed before a complaint can be made to the FOS. A practitioner or firm can seek judicial review of a FOS decision and a complainant retains the right to pursue his originating complaint through the courts.

IV.6.3 Liability of the FSA

The Financial Services and Markets Act 2000 (FSMA) requires the FSA to have arrangements for investigating complaints made against it. The schemes which have been in place since 2001 cover complaints about the way the FSA has carried out, or failed to carry out, its responsibilities, including mistakes and lack of care, unreasonable delay, unprofessional behaviour, bias and lack of integrity. The schemes do not cover complaints about the performance of the FSA's legislative functions under the FSMA. Nor will the FSA investigate a complaint under the schemes where it reasonably considers either a) that the complaint could be more appropriately dealt with in another way, or b) that the complaint amounts to no more than dissatisfaction with its general policies or its exercise of discretion, where no misconduct is alleged.

¹¹⁵ CRUICKSHANK, D. "Competition and Regulation: an Interim Report. Review of UK Banking Services." London, 1999.

The investigation of complaints is in two stages. Stage 1 is an investigation by a member of FSA staff not previously involved in the matter complained of. The main scheme also allows the FSA to offer an ex gratia payment. Stage 2 involves the investigation of complaints by an independent Complaints Commissioner, who considers whether to investigate complaints referred direct to her by complainants who are not satisfied with the results or progress of the Stage 1 investigation. She also considers whether to investigate complaints which the FSA has decided not to investigate, or which the FSA believes are excluded from investigation under the schemes' rules. Complainants may refer complaints direct to the Commissioner, but in these cases she will consider whether the FSA should first conduct a Stage 1 investigation.

The potential liability of one of the oldest and grandest providers of what may broadly be termed financial services, the Bank of England, is discussed in detail above.

IV.7 Media

IV.7.1 The constitutional dimension

The impact of the regulation of broadcast and print media on constitutional rights and freedoms needs little rehearsal here – the often conflicting relationship between respect for individuals' right to private and family life on the one hand and freedom of expression on the other is one familiar to both the judiciary and the public alike. Where this conflict arises in relation to the media as opposed to expressions of fact or opinion by individuals, there is often added to the scales the extra constitutional weight of the requirement for free and unfettered reporting and criticism of government action. Indeed, for this reason it is in the context of professional media that the concept of self-regulation is most fiercely defended – any close control by Parliament (which is itself closely controlled by the governing party) is likely to be perceived as stifling of press and broadcast freedom. One might also comment that it is in this area that self-regulation is most firmly entrenched given the huge power of the press in particular to inflict punishment on any government which should seek to remove this area of liberty.

The undoubted power of the 'fourth estate' in all its guises raises a range of constitutional questions related to the checks and balances to be applied to what is itself an institution of constitutional importance. Self-regulation in the media, where it applies, focuses rather on the functional aspects of how the media behave rather than what might be termed 'structural' questions of ownership and competition.

IV.7.2 The nature of the regulatory body and its activity

Print media

Perhaps the *locus classicus* of SRBs in England and Wales is the Press Complaints Commission (PCC), which has its origins in the Press Council established in 1953. A series of high-profile breaches of acceptable standards by the press during the 1980s¹¹⁶ reinforced a belief among many members of Parliament that the Press Council was not a sufficiently effective body. Some parliamentarians were of the view that the public interest required the enactment

¹¹⁶ Not least of which the 'interview' of an actor recently involved in a serious road accident in his hospital bed and under heavy sedation; see *Kaye v Robertson* [1991] FSR 62.

of a law of privacy¹¹⁷ and a right of reply as well as a statutory press council wielding enforceable legal sanctions. In the face of this criticism, a government-appointed Departmental Committee under David Calcutt QC¹¹⁸ was charged with considering what measures (whether legislative or otherwise) were needed to give further protection to individual privacy from the activities of the press and improve recourse against the press for the individual citizen, taking account of existing remedies, including the law on defamation and breach of confidence.

The Report of the Calcutt Committee was published in June 1990. It recommended the setting up of a new Press Complaints Commission in place of the Press Council, with an eighteen month probationary period. Failure to prove its effectiveness would lead to statutory intervention.

The response of the press, under threat of statutory regulation, was concerted. The PCC, a private company limited by guarantee, was established in tandem with a Press Standards Board of Finance (Pressbof), modelled on the self-regulatory system established by the advertising industry in 1974. Pressbof raises a levy upon the newspaper and periodical industries to finance the Commission, with the aim of securing financial support for the PCC at the same time as maintaining complete independence.

The work of the PCC is centred on devising and enforcing the voluntary Code of Practice, binding on those newspaper and magazine editors who subscribe to the organisation, which is the overwhelming majority. The Commission receives and adjudicates upon complaints by members of the public. However, if a newspaper is found to be in breach of the code, the sole ‘remedy’ available to the complainant is that the newspaper is required under the code to publish the adjudication of the PCC. The PCC has no legal powers to prevent publication of material, to enforce its rulings or to grant any legal remedies (in terms of money compensation or otherwise) to a complainant.

Broadcast media

The Office of Communications (or “Ofcom” as it is universally known) is a statutory body set up under the Communications Acts of 2002 and 2003 in an effort to consolidate and rationalise the regulation of communications in general in the UK. In relation to broadcast media, it replaced¹¹⁹ two statutory bodies – the Broadcasting Standards Commission (“BSC”) and the Independent Television Commission (“ITC”) – which had overlapping areas of competence within the commercial and non-commercial broadcasting sectors.

Under section 3(1) of the 2003 Act:

“It shall be the principal duty of Ofcom, in carrying out their functions;
(a) to further the interests of citizens in relation to communications matters;
and
(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”

In relation to broadcast media in particular, this general aim is broken down into various specific goals, including ensuring a wide range of TV and radio services of high quality and wide

¹¹⁷ A view recently shared by the European Court of Human Rights in Judgment of 28 January 2003, *Case of Peck v. The United Kingdom*. See also MUMFORD, R.S.J. "Are the media now above the law?" *The Telegraph online* - www.telegraph.co.uk, 10 April 2003.

¹¹⁸ Sometime chairman of the Takeover Panel – see Financial Services sector above.

¹¹⁹ Though certain ‘legacy codes’ of those bodies still apply.

appeal, maintaining plurality in the provision of broadcasting, applying adequate protection for audiences against offensive or harmful material and against unfairness or the infringement of privacy.

Ofcom seeks to achieve these goals by means of a series of published codes and guidelines in relation to specific communications-based activities, with which those undertaking such activities must comply or risk paying a fine or, ultimately, lose their licence. Interestingly, in exercising its regulatory powers, Ofcom operates a self-proclaimed “hands-off” approach, aiming to ‘intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve’, ‘with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required’, ensuring its interventions will be ‘evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome’ and aiming to ‘always seek the least intrusive regulatory mechanisms to achieve its policy objectives’¹²⁰.

The breadth of Ofcom’s remit in relation to ‘communications matters’ is wide enough to require it to ‘outsource’ its regulatory activities in relation to broadcast advertising to the ASA, with which it operates on a co-regulatory or supervisory basis.

BBC

The BBC exists as something of an anomaly in terms of its regulation; having once operated a system of self-regulation in its purest sense whereby its own Board of Governors was solely responsible for regulation of its activities, it now struggles to maintain this privileged status in the face of calls for it to be brought within the same regime as other broadcasters. Its anomalous status is most obvious in terms of its unique funding position whereby it receives money from what is essentially a hypothecated tax – an annual licence fee payable by television¹²¹ owners.

The BBC was incorporated by Royal Charter of 1926, since periodically renewed and (significantly) due for renewal in 2006. A 1996 Agreement between the Corporation and the government recognised the BBC’s editorial independence and set out its public obligations in detail. A 2003 Amendment to the Agreement deals with the relationship between the BBC and Ofcom. The effect of that amendment is to make the BBC subject to Ofcom regulation in the areas of fairness and privacy, offensive or harmful material and range of programming, as well as to require the BBC to consult with Ofcom in relation to various quotas, including news content. Breach of these obligations could result in a fine of up to £250,000 payable by the BBC to Ofcom. However, the BBC retains exclusive competence as regards the regulation of programme standards (impartiality, accuracy in news and the presence of commercial products within programmes) and party political, election and referendum broadcasts.

IV.7.3 Liability of self-regulatory bodies

The Administrative Court exercises a limited supervisory jurisdiction over determinations of complaints by the PCC¹²² and certain functions of the BBC are also subject to judicial review¹²³.

¹²⁰ See www.ofcom.org.uk.

¹²¹ An equivalent radio licence was abolished in 1971.

¹²² See *R v Press Complaints Commission, ex parte Ford* [2001] EWHC Admin 683

¹²³ See, for example, *R (Prolife Alliance) v BBC* [2003] UKHL 23 in relation to a refusal by the BBC to schedule a party political broadcast on behalf of an anti-abortion group.

It is difficult to conceive of a situation in which an action in private law is likely to be of any use to an individual in terms of obtaining a remedy against the PCC for failure to regulate. The PCC's powers are exclusively *ex post* with the result that it is unlikely that it would be considered negligent for failing to prevent the publication of something to which an individual might object. Further, it does not operate under statute so there is no question of an action in breach of statutory duty.

It perhaps strains language slightly to describe an action in defamation against the BBC as a means of redress for failure to self-regulate but in practical terms it is perhaps the most effective (and certainly the most used) private law action against the BBC. However, it is of course the case that it is not the BBC's role as an SRB that makes it subject to actions in defamation but rather its role as a broadcaster.

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