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THE APPLICATION OF ADMINISTRATIVE LAW PRINCIPLES IN PRIVATE LAW: THE CASE FOR CONVERGENCE

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The common law represents an ongoing negotiation between past precedents and present-day principles and policies. If, as will be argued, the basis of the common law and judicial review in particular is the courts' duty to protect the individual from the effects of dominant power, then we must look to where that dominant power will increasingly reside. In the past, that power resided predominantly with the state. The future promises to be one with metanational private organisations disrupting that monopoly of power through their contractual relationships with us. Not if but when that situation materialises, the public-private function distinction that presently delineates the application of judicial review principles will increasingly sound quaint. We should therefore turn our attention to examining how judicial review principles—developed over centuries to control dominant state-based power—can be adapted to regulate the contractual relationships between powerful private organisations and us. This has possible wide-ranging implications, including a growing irrelevance of judicial review procedure, and contract law doctrines exerting at least an anchoring effect on how judicial review principles evolve.

I. THE RISE OF METANATIONAL ORGANISATIONS

"In a lot of ways Facebook is more like a government than a traditional company", Mark Zuckerberg said in 2016.[1] Since then, a lot has happened to only reinforce this notion. As one commentator notes:

> Facebook can't chop off people's heads and it has to obey the laws of the jurisdictions where it operates, but, even so, it faces a version of the problem that plagued the Stuarts. Facebook can unilaterally and arbitrarily change many of the laws of its realm (terms of service and market making algorithms among them). Even if you feel manipulated, there may not be much you can do about it. Network effects—which Facebook has gone to great lengths to reinforce—lock both businesses and users into Facebook, even if they all individually might prefer a

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[1] Franklin Foer, "Facebook's war on free will" *The Guardian* (19 September 2017), online: The Guardian <https://www.theguardian.com/technology/2017/sep/19/facebooks-war-on-free-will>.

> different system of rule. As with citizens of traditional States, users of Facebook can exit if they wish, but it is extremely difficult.
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> Zuckerberg has proposed setting up independent bodies that would hear appeals from users regarding Facebook's decisions. This might be the corporate version of a constitutional compromise.[2]

Lest it be said that I am picking on Facebook:

> In 2013, Balaji Srinivasan, now a partner at the venture-capital company Andreessen Horowitz, gave a much debated talk in which he claimed Silicon Valley is becoming more powerful than Wall Street and the U.S. government. He described 'Silicon Valley's ultimate exit,' or the creation of 'an opt-in society, ultimately outside the U.S., run by technology.' The idea is that because social communities increasingly exist online, businesses and their operations might move entirely into the cloud.[3]

Foreign Policy reported in 2016 that the cash that Apple has on hand exceeds the GDPs of two-thirds of the world's countries.[4]

Presently, metanational private organisations[5] like Facebook and Apple cannot chop off your head. But they can (subject to their contractual terms of service) suspend or even exile you—a fate with its own irreversible consequences, oftentimes without any meaningful recourse. Moreover, their algorithms—not just their decisions—often carry a strong public policy dimension that can impact billions of lives.

Facebook has reported in a study, published in Nature, no less, that its "I Voted" button had driven a small but measurable increase in turnout, primarily among young people, for the 2010 United States ("US") congressional elections.[6] More recently, at the US Senate Intelligence Committee Hearing on 5 September 2018, Facebook's chief operating officer acknowledged that it was "too slow" to act on election interference while Twitter's chief executive stated that his platform "was unprepared and ill-equipped" for it.[7] Google did not show up for the hearing.

The influence of metanationals extends beyond our choice of government to the functions of government itself. The rules and policies applicable to Twitter users

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[2] Henry Farrell, Margaret Levi & Tim O'Reilly, "Mark Zuckerberg runs a nation-state, and he's the king" *Vox* (10 April 2018), online: Vox <https://www.vox.com/the-big-idea/2018/4/9/17214752/zuckerberg-facebook-power-regulation-data-privacy-control-political-theory-data-breach-king>; see also Mark Zuckerbeg, "A blueprint for content governance and enforcement" *Facebook* (16 November 2018), online: Facebook <https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129621634/>.

[3] Parag Khanna, "These 25 companies are more powerful than many countries" *Foreign Policy* (April 2016), online: Foreign Policy <https://foreignpolicy.com/2016/03/15/these-25-companies-are-more-powerful-than-many-countries-multinational-corporate-wealth-power>; see also Balaji Srinivasan, "Silicon valley's ultimate exit" *Genius* (2013), online: Genius <https://genius.com/Balaji-srinivasan-silicon-valleys-ultimate-exit-annotated>.

[4] Khanna, *Ibid*.

[5] *Ibid*.

[6] Robert Bond *et al.*, "A 61-million-person experiment in social influence and political mobilization" [2012] 489 Nature 295.

[7] Chris Fox, "Facebook and Twitter 'too slow' to tackle meddling" *BBC* (5 September 2018), online: BBC <https://www.bbc.com/news/technology-45420175>.

stipulate that users "may not promote violence against, threaten, or harass other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease".[8] This leaves Twitter as the arbiter of what constitutes "hate speech" (to use the term loosely) in much the same way as the Minister of Home Affairs pursuant to section 9(1) of the *Maintenance of Religious Harmony Act*.[9]

Recently, metanationals have even started supervising Heads of States and pro-establishment partisan political interests. Notably, on 23 June 2020, Twitter placed a "public interest notice" on a tweet by US President Donald Trump for "violating our policy against abusive behaviour, specifically, the presence of a threat of harm against an identifiable group".[10] During the recent Singapore General Elections in July 2020, Facebook took down several accounts for "violating its policies" as part of "measures to protect the integrity of the upcoming General Election".[11] The main aim of one of those accounts was, according to its founder, to "play a part in helping the Government explain and reason".[12]

II. Conventionally Conceived Judicial Review Risks Obsolescence

If metanationals are supposed to "obey the laws of the jurisdictions where [they operate]",[13] those laws must have actual bite. So far, States have been playing catch up to hold metanationals accountable through domestic legislation regulating competition, privacy and even fake news. But that, I submit, should not detract from the necessity (acknowledged by Mr Zuckerberg himself) of holding metanationals directly accountable to their users. How should the common law respond to this state of affairs? Should it sit back and wait for Mr Zuckerberg's "constitutional compromise"?

In the past, the common law has not sat back. In the battle between David and Goliath, it has always favoured—and even armed—the former. In response to the age of privatisation during the latter half of the 20th Century, the courts extended judicial review principles (*ie* scrutiny of whether a decision is irrational, illegal or

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[8] Twitter, *The Twitter Rules*, online: Twitter <https://help.twitter.com/en/rules-and-policies/twitter-rules>.

[9] (Cap 167A, 2001 Rev Ed Sing); Section 9(1) reads:

Where the Minister is satisfied that—

(a) any person is inciting, instigating or encouraging any religious group or religious institution or any person mentioned in subsection (1) of section 8 to commit any of the acts specified in that subsection;

(b) any person, other than persons mentioned in subsection (1) of section 8, has committed or is attempting to commit any of the acts specified in paragraph (a) of that subsection, he may make a restraining order against him.

[10] Lauren Feiner, "Twitter flagged another Trump tweet for violating its policies" *CNBC* (23 June 2020), online: CNBC <https://www.cnbc.com/2020/06/23/twitter-labeled-another-trump-tweet-for-violating-its-policies.html>.

[11] Adil Haziq Mahmud, "Facebook removes Fabrications About The PAP admin accounts for violating policies" *Channel NewsAsia* (28 June 2020), online: Channel NewsAsia ("CNA") <https://www.channelnewsasia.com/news/singapore/facebook-removes-fabrications-about-the-pap-accounts-12878360>.

[12] Leonard Lim, "Netizens set up Facebook page to defend PAP" *The Straits Times* (16 September 2011), online: The Straits Times <https://www.smu.edu.sg/sites/default/files/smu/news_room/smu_in_the_news/2011/sources/ST_20110916_3.pdf>.

[13] Farrell, Levi & O'Reilly, *supra* note 2.

procedurally improper) to private bodies exercising public or governmental functions. In the seminal case of *R v Panel of Takeover and Mergers*, *Ex parte Datafin Plc*, the English Court of Appeal extended the reach of judicial review to one such private body owing to its "giant's strength".[14] Thus, the giant would not be "above the law"[15] and "cocooned from the attention of the courts in defence of the citizenry"[16]. In Singapore, Phillip Pillai J observed in *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* that the approach in *Datafin* demonstrated "the vitality of the common law in upholding the rule of law by adjusting to meeting changing public governance landscapes".[17]

However, 30 years on, the vocabulary of *Datafin* with its fixation on the distinction between public and private functions, sounds almost quaint. This distinction—not to say anything about its conceptual fragility[18]—risks becoming obsolete. After all, the decisions of public bodies or private bodies exercising public functions can be susceptible to judicial review "even when they affect hardly anyone".[19] It is hardly intuitive that States are subject to the more exacting standards of accountability afforded by the principles of judicial review but influential metanationals are not.

In light of these dramatic changes, it even appears *passé* to debate whether these metanationals are exercising public functions when their services are already redefining public functions. Unlike the age of privatisation and outsourcing, metanational organisations are not entering into the fray at the behest of States but are nonetheless solving governmental problems and fulfilling public functions faster than any government can—and on a global scale. The common law must find a way to keep pace with these changes.

The evolution of the telecommunications industry provides a useful illustration. Singapore's phone network was initially operated in 1879 by the Eastern Extension Telegraph Company and subsequently the Oriental Telephone and Electric Company, both private enterprises. In 1955, the network was acquired by the British colonial government, which established the Singapore Telephone Board under the Singapore Telephone Board Ordinance. In 1974, this organisation, which was responsible for domestic calls, merged with the Telecommunication Department, responsible for international telecommunication services, to form the Telecommunication Authority of Singapore ("TAS"), a statutory board.[20] Prior to 1 April 1992, TAS was the "all encompassing government authority responsible for telecommunications regulations, network operation and services".[21] Subsequently, a process of

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14 [1987] 2 WLR 699 at 721 (CA) [*Datafin*].

15 *Ibid* at 704.

16 *Ibid* at 715.

17 [2012] 3 SLR 565 at para 16 (HC) [*Yeap Wai Kong*].

18 Stephen Thomson, "Judicial Review and Public Law: Challenging the Preconceptions of a Troubled Dichotomy" [2017] 41 Melbourne UL Rev 891 at 895; Sir John Laws, "Public law and employment law: abuse of power" [1997] Public L 455 at 458.

19 Neil Duxbury, "The Outer Limits of English Judicial Review" [2017] Public L 235 at 240.

20 "One Hundred Years Of Telephone Service In Singapore" *The Straits Times* (1 April 1979 at 25, online: The Straits Times <http://eresources.nlb.gov.sg/newspapers/Digitised/Article/straitstimes 19790401.2.89.3>.

21 Lim Chuan Poh, "The Liberalisation and Privatisation of Telecommunications in Singapore" (Speech delivered on 5 December 1994), online: Infocomm Media Development Authority <https://www.imda.gov.sg/news-and-events/Media-Room/archived/ida/Speeches/1994/20050727180231>.

privatisation[22] culminated in the establishment of Singapore Telecom Pte Ltd ("SingTel") and its listing in 1993.[23] In 1996, the government informed SingTel that it would end the company's monopoly of the telecommunications market with effect from 1 April 2000. This governmental action paved the way for other private sector providers to enter the fray. Fast-forward to today, when the advent of Google Fi, which promises to allow users to seamlessly switch between networks and Wi-Fi hotspots across the globe, could spell the end of the traditional telco.[24]

This brief historical account demonstrates how the public-private functions dichotomy or, more accurately, one's conception of that dichotomy, represents a snapshot in time that may well become obsolete before the common law can catch up. The question of whether a particular decision is subject to judicial review principles becomes a moving target. It does not seem logical that the same decision carrying the same wide-ranging consequences may be an exercise of a public power yesterday (and therefore subject to judicial review) but may not be an exercise of public power today, much less tomorrow (and therefore not subject to judicial review).

III. The True Nature of Judicial Review

Does judicial review (conventionally conceived as the common law's means of regulating *public* functions[25]) have nothing to say about metanationals even though they may wield "a giant's strength"?[26]

In truth, the conventional conception of judicial review is unduly narrow and, in fact, ahistorical. Properly conceived judicial review seeks to regulate abuses of dominant power—be it public or private power. It bears highlighting that *Datafin* was not the first word (and certainly should not be the last word) on the abuse of non-governmental power.

Well before *Datafin*, there was "a long-established antipathy of the common law to abuses of private as well as public power".[27] Professor Craig has explained that in this line of "largely forgotten"[28] jurisprudence from the 17th and 18th Century, the common law established that "the possession of monopoly power, whether *de jure* in the form of a grant of a franchise, or *de facto*, placed constraints on the manner of its exercise",[29] especially the price the monopoly holder could charge.

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[22] Conrad Raj, "S'pore Telecom may privatise in 2 to 3 years" *The Straits Times* (10 November 1989) at 1, online: The Straits Times <http://eresources.nlb.gov.sg/newspapers/Digitised/Article/straitstimes 19891110.2.2>.

[23] "S'pore Telecom debut ushers in new era for stock exchange" *The Straits Times* (2 November 1993) at 39, online: The Straits Times <http://eresources.nlb.gov.sg/newspapers/Digitised/Article/straitstimes 19931102.2.55.39>.

[24] Klint Finley, "How Amazon, Google, and Facebook will bring down telcos" *Wired* (30 December 2016), online: Wired <https://www.wired.com/2016/12/the-end-of-telcos/>; Kevin Kwang, "'Future of telco industry is not telcos': Circles.Life's co-founder shares how AI, data will shape its strategy" *CNA* (5 December 2018), online: CNA <https://www.channelnewsasia.com/news/technology/future-of-telco-industry-is-not-telcos-circles-life-s-co-founder-10995912>.

[25] *Yeap Wai Kong*, *supra* note 17 at para 3.

[26] *Datafin, supra* note 14 at 721.

[27] Sir John Laws, *supra* note 18 at 461.

[28] Paul Craig, "Constitutions, property and regulation" (1991) Public L 538 at 538.

[29] *Ibid* at 551.

Professor Forsyth has argued that these cases establish a broader principle beyond the regulation of price:

> [W]hy should the common law not impose on those who exercise monopoly power, whether that power derives from the ownership of property or otherwise, a more general duty to act reasonably, for instance, to heed the rules of natural justice, not to act irrationally and not to abuse their powers?[30]

Professor Forsyth has gone as far as to state that "the common law imposed a duty to act reasonably on those who exercised monopoly power even where that power simply existed *de facto*".[31]

As economies became more sophisticated, dominant powers were able not just to adjust prices (for those they had contracted with) but to even exclude entrants (prior to the creation of a contractual relationship). Nonetheless, the common law rose to the challenge to regulate such abuses of power.

Here, Lord Denning's decision in *Nagle v Feilden*[32] is of central importance. *Nagle* was a decision from 1966 "in the time-frame of the seminal public law cases of the 1960s, after *Ridge v Baldwin* but before *Padfield* and *Anisminic*".[33] Sir John Laws has argued that "the old common law controls over the exercise of monopoly power" are "explicit" in the modern case of *Nagle*.[34]

In *Nagle*, the plaintiff, Ms Nagle, had trained racehorses for many years. She brought proceedings against the stewards of the Jockey Club, a self-elected body that controlled horseracing in Great Britain, seeking: (a) a declaration that the practice of the stewards in refusing a trainer's licence to any woman was void as against public policy; and (b) an injunction ordering the stewards to grant her a licence. The action was initially struck out at first instance as disclosing no reasonable cause of action since the Statement of Claim did not disclose a contractual relationship between Ms Nagle and the Jockey Club.

However, this was reversed by the English Court of Appeal—the fact that there was no contractual relationship between Ms Nagle and the Jockey Club was not the end of the matter given the "monopolistic" power of the Jockey Club.[35] Lord Denning held the Jockey Club was not a mere "social club". Rather, it was "an association which exercises a virtual monopoly in an important field of human activity":

> By refusing or withdrawing a licence, the stewards can put a man out of business. This is a great power. If it is abused, can the courts give redress? That is the question.
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> The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make

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30 Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55(1) Cambridge LJ 122 at 125.

31 Sir John Laws, *supra* note 18 at 462.

32 [1966] 2 QB 633 (CA) [*Nagle*].

33 Sir John Laws, *supra* note 18 at 462.

34 *Ibid* at 463.

35 *Nagle, supra* note 32 at 649, 650 and 654.

> a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. It is against public policy. The courts will not give effect to it.
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> . . .
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> We live in days when many trading or professional associations operate 'closed shops'. No person can work at his trade or profession except by their permission. **They can deprive him of his livelihood. When a man is wrongly rejected or ousted by one of these associations, has he no remedy? I think he may well have, even though he can show no contract. The courts have power to grant him a declaration that his rejection and ouster was invalid and an injunction requiring the association to rectify their error. He may not be able to get damages unless he can show a contract or a tort. But he may get a declaration and injunction … I have said before, and I repeat it now, that a man's right to work at his trade or profession is just as important to him as, perhaps more important, than his rights to property. Just as the courts will intervene to protect his rights of property, they will also intervene to protect his right to work.**[36]

Sir John Laws has observed that from these cases is "woven" a "seamless web of jurisprudence … in the name of a single principle, which is the duty of the courts to protect the individual from the effects of arbitrary power".[37] Sir John Laws has also observed that:

> **The principle is: the common law will not permit abuse of power. This is the basis of judicial review**, and it reflects also the basis of all those private law doctrines where public policy has been held to restrain one man's hold over another. I think that indirectly it infuses the law of tort as well, and is reflected in the difficult conjunction of Lord Atkin's neighbour principle and the limitations placed upon it by the modern, sometimes problematic, jurisprudence in the field.
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> **But the consequences of this uniformity of principle, standing as it does above our modern distinction between public and private law, have I think not been fully appreciated. It means that this distinction itself casts no or little light on the essential basis upon which the common law proceeds, whether in public or in private law, when it must confront abuse of power.** It proceeds upon a footing which is alike logically anterior to the public power of legislature and the private power of contract. It does not depend on the source of a defendant's or a respondent's authority to affect the lives of others. The cases unfold a moral principle for which only the common law can provide a sure protection.[38]

Despite Hoffmann LJ's (as he then was) later observation that there was an "improvisatory air about this solution"[39] of obtaining a declaration and injunction even in

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[36] *Ibid* at 644–646 [emphasis added].
[37] Sir John Laws, *supra* note 18 at 464.
[38] *Ibid* [emphasis added].
[39] *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909 at 933 [*Aga Khan*].

the absence of a contractual relationship, *Nagle* is now settled jurisprudence in England and "has perhaps assumed an even greater importance since the courts came to adopt the restrictive approach towards the application of judicial review".[40]

Applying *Nagle*, Richard J in *Bradley* (HC) considered the review function of the court in a non-contractual context as an instantiation of its supervisory jurisdiction to prevent abuses of power. Therefore, the same grounds of review as an application for judicial review should apply. Indeed, he considered that it would be:

> [S]urprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision-maker, and so forth.
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> . . .
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> The supervisory role of the court should not involve any higher or more intensive standard of review when dealing with a non-contractual than a contractual claim …[41]

On appeal, Lord Phillips MR commended Richard J's judgment as being of the "highest quality".[42]

Nagle has only been cited by the Singapore Court of Appeal in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* for the narrower proposition that "[j]ust as the courts will intervene to protect [a man's] rights of property, they will also intervene to protect his right to work".[43] *Bradley* (HC) and the decisions following it have yet to be considered by the Singapore courts.[44]

IV. Abuses of Power and the Singapore Caselaw

Sir John Laws' overarching principle (*viz*, that the common law will not permit abuses of power) is also evident in the Singapore caselaw.

First, the Singapore Court of Appeal has repeatedly emphasised that the "*raison d'être* of judicial review is that all powers have legal limits, and that there must be 'recourse to determine whether, how, and in what circumstances those limits [have] been exceeded'."[45] The underlying motivation behind this principle—the need to define and delimit state power in furtherance of the rule of law—equally applies to metanationals that wield the power of States.

Second, the Singapore courts have been known to deploy the creative tools at their disposal to (re)frame the claim as one in contract in order to import, by implication,

40 [2004] EWHC 2164 at para 34 (QB) [*Bradley* (HC)].

41 *Ibid* at paras 37 and 41.

42 *Bradley v The Jockey Club* [2005] EWCA Civ 1056 at para 2.

43 [2008] 1 SLR(R) 663 (CA) at para 46.

44 See, for example: *Fallon v Horseracing Regulatory Authority* [2006] EWHC 2030 (QB); *Mckeown v British Horseracing Authority* [2010] EWHC 508 (QB).

45 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 (CA) at para 55 [*Starkstrom*]; *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 (CA) at para 1.

judicial review principles so as to prevent abuses of dominant power. That appears to have been the case in *Haron bin Mundir v Singapore Amateur Athletic Association*.[46]

There, an athlete brought proceedings in the High Court to challenge the decision of the disciplinary subcommittee of the Singapore Amateur Athletic Association ("SAAA") to suspend him from all forms of track and field activities in and outside Singapore for 18 months. Judicial Commissioner ("JC") GP Selvam held that the athlete's claim should be properly characterised as one for breach of contract.

> The present proceedings therefore are neither an appeal nor an application for judicial review. <u>This is an action for breach of contract</u>. The pleadings may not spell out the cause of action for breach of contract in the traditional way. They do, however, set out sufficient facts to found an action in contract…The device used by the courts to determine cases of expulsion or suspension of members in an unincorporated association is by the application of the doctrine of natural justice. **The rules of natural justice are implied into every contract express or implied which contemplates a hearing affecting the rights and livelihood of persons. The rules are so implied as a matter of law and public policy.**[47]

Selvam JC's characterisation of the claim as one in contract was not controverted on appeal.[48]

Grounding the SAAA's suspension in contract was not a straightforward matter since the athlete was not a member of the SAAA. Organisationally, the SAAA was an association of several sports clubs of which the athlete was a member of one such club, the Flash Athletic Club. Individual athletes cannot be members of the SAAA. Notwithstanding this hurdle to privity and the fact that the pleadings admittedly "did not spell out the cause of action for breach of contract in the traditional way",[49] the High Court found that there was an implied contract between the athlete and the SAAA which:

> [C]ame into being when the [athlete] accepted the [SAAA's] offer to go to Japan for training. The contract was confirmed when the [SAAA] pursuant to their power under r 13 of their constitution exercised the disciplinary powers over the [athlete] and [he] submitted to such jurisdiction. The contract may also be implied on the basis that Flash Athletic Club was the [athlete's] agent.[50]

Pursuant to this (re)formulation of the claim, the court granted leave for the Statement of Claim to be amended at trial so as to include a clear allegation of an implied term that any hearing or inquiry should be conducted fairly and in compliance with the rules of natural justice.[51] Interestingly, the High Court did not make a finding one

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[46] [1991] 2 SLR(R) 494 (HC) [*Haron bin Mundir* (HC)].

[47] *Ibid* at paras 22, 23 [emphasis added].

[48] See *Singapore Amateur Athletics Association v Haron bin Mundir* [1993] 3 SLR(R) 407 (CA) [*Haron bin Mundir* (CA)].

[49] *Haron bin Mundir* (HC), *supra* note 46 at para 22.

[50] *Ibid* at para 21.

[51] *Haron bin Mundir* (CA), *supra* note 48 at para 60.

way or the other as to whether the suspension was amenable to judicial review. The decision was upheld on appeal.[52]

There are, however, limits to such forms of judicial creativity. In *Diane Modahl v The British Athletic Federation Limited (In Administration)*, the English High Court cautioned against the creation of "artificial contract[s], devoid of the normal or usual elements of a contract" and considered *Haron bin Mundir* as one "clearly decided on its special facts".[53]

Today, the somewhat strained implication of a contract may no longer be necessary. There is a compelling argument that had *Haron bin Mundir* (HC) been decided post-*Yeap Wai Kong*, the High Court may well have found that the suspension issued by the SAAA was amenable to judicial review. It is telling in this regard that Selvam JC prefaced his judgment with the observation that the SAAA was a "private body fulfilling public functions".[54] This perhaps explains why the subsequent High Court decision in *Kanesananthan A v Singapore Ceylon Tamils' Association* characterised *Haron bin Mundir* (HC) as "a judgment made in the context of a judicial review of an administrative tribunal".[55]

In any case, *Nagle* demonstrates that judicial review principles may apply to control the abuses of dominant power even in the absence of a contractual relationship. It is important to recognise that *Nagle* did not purport to be the last word on the supervisory jurisdiction of the courts. Lord Denning justified the court's protection of an individual's right to work as an extension of an individual's rights of property.[56] Danckwerts LJ premised his reasoning on the broader proposition that "the law relating to public policy cannot remain immutable. It must change with the passage of time".[57] None of their Lordships stated that the courts' supervisory jurisdiction would only go thus far and no further.

Third, the Singapore courts have been willing to imply judicial review principles (e.g. that the decision-maker is to exercise its discretion in accordance with the rules of natural justice, in "a reasonable manner" and "not capriciously") into contracts, even in cases without a public element, in order to control the abuse of power.

The case of *The Stansfield Group Pte Ltd (trading as Stansfield College) v Consumers' Association of Singapore*[58] is instructive. There, a group of private schools brought claims against their insurer and the Consumer Association of Singapore ("CASE") for breach of contract and tort. CASE administered an accreditation scheme for private schools called "CaseTrust for Education". All private schools that enrolled foreign students required a valid "CaseTrust for Education" membership. One of the conditions of membership was that the private school had to take out an insurance policy for not less than 70% of the tuition fees paid by its foreign students. Following investigations which revealed that the plaintiffs had not obtained insurance cover for a large number of its foreign students, the plaintiffs' insurer froze their insurance facilities and CASE suspended the plaintiffs' memberships. The plaintiffs,

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52 *Ibid*.
53 [2000] All ER (D) 2274.
54 *Haron bin Mundir* (HC), *supra* note 46 at para 1.
55 [2003] 3 SLR(R) 539 (HC) at para 7.
56 *Nagle, supra* note 32 at 646.
57 *Ibid* at 650.
58 [2011] 4 SLR 130 (HC) [*Stansfield College*].

who alleged that they suffered adverse consequences due to the suspension of their membership and the unavailability of the insurance facilities, sued CASE and its insurer.

Judith Prakash J (as she then was) held that the decisions of CASE *vis-à-vis* its members were both governed by contract and subject to the rules of natural justice, one of the grounds for judicial review. This was so because CASE's decisions could have "an impact on the livelihood of [the member] organization whose behaviour it monitors".[59] However, on the particular facts of the case, Her Honour found that CASE was not required to follow the rules of natural justice since "the circumstances require[d] urgent action for the protection of third parties and there [was] the possibility of representations being received subsequently".[60] Accordingly, CASE was entitled to "make its decision first and hear representations later".[61]

Apart from the rules of natural justice, Prakash J held that other "administrative law principles should be imported" by way of an implied term that CASE was to "exercise its rights in a reasonable manner" and "not capriciously". This term was to be implied even if it did not pass the "business efficacy" test or "officious bystander" test—the traditional test for implying terms into a contract. The rationale was that the contractual relationship between CASE and the private schools was not "strictly commercial":

> I think that in a situation such as this, which is <u>not a strictly commercial contract</u> but where, although the form of the relationship is contractual, in fact one party is an arbiter who decides whether the other party is able to do a particular act which affects the livelihood of that second party, any decision taken by the first party which may have an adverse effect on the second's earning capacity must not be an unreasonable decision. <u>Anything else would be an abuse of power</u>. To me, this requirement would definitely satisfy the officious bystander test as both parties would operate on the unspoken assumption that those powers would be exercised in a rational manner and not capriciously and would inform the officious bystander so if he were to pose the question. But even if this term did not pass the officious bystander test, in the light of all the circumstances, it is my view that <u>administrative law principles</u> should be imported into the relationship between CASE and the plaintiffs in relation to CASE's decision-making powers.[62]

Admittedly, CASE had the power to adversely affect the livelihood of member private schools by suspending their memberships and so prevent the enrolment of students to those schools. However, this still falls short of establishing that CASE was exercising a public function. Indeed, the High Court did not undertake any analysis of the sort.

The Court of Appeal decision in *Kay Swee Pin v Singapore Island Country Club*[63] is also instructive in this regard. In that case, the aggrieved member challenged the decision by the general committee of a country club to suspend her on the grounds that the decision breached the rules of natural justice.[64] The court held that the

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59 *Ibid* at para 118.
60 *Ibid*.
61 *Ibid* at para 121.
62 *Ibid* at para 132 [emphasis added].
63 [2008] 2 SLR(R) 802 (CA) [*Kay Swee Pin*].
64 *Ibid* at para 5.

committee's decision, being in the nature of a decision by a disciplinary body, was subject to a "duty to act fairly." Like in *Stansfield College*, the Court of Appeal justified the implication of such a duty by reference to the character of the decision as opposed to the traditional tests for implying terms.[65] The Court of Appeal ultimately declared the suspension order to be invalid.[66] Thus, judicial review principles were implied in an essentially private contractual dispute but this time in an application for judicial review.[67] The question of the amenability to judicial review of the country club's decision appears to not have been raised.

More recently in *Khong Kin Hoong Lawrence v Singapore Polo Club*,[68] the High Court applied *Kay Swee Pin*, a judicial review case, in a claim for breach of contract. Tan Siong Thye JC reasoned that the rules of natural justice, as "universal rules that govern the conduct of human behaviour",[69] were implied in the terms of the contract between the club and the aggrieved member. Once again, judicial review principles were implied by reference to the character of the decision as opposed to the traditional tests for implying terms.

V. Recent Trends in the Convergence of Judicial Review Principles in Contract Law

The convergence of judicial review principles in contract law, in particular, the exercise of contractual discretion, is now firmly established following the United Kingdom Supreme Court decision in *Braganza v BP Shipping Limited*.[70] Baroness Hale (delivering the leading judgment) observed that the common law is moving towards convergence:

> There are signs, therefore, that the contractual implied term [to exercise a contractual discretion reasonably] is drawing closer and closer to the principles applicable in judicial review.[71]

In that case, a widow of a deceased seaman challenged the finding of his employer that he had committed suicide while at sea. Under the terms of the employment contract, death in service compensation was not payable if "**in the opinion of the Company or its insurers**, the death, accidental injury or illness resulted from amongst other things, the Officer's wilful act, default or misconduct".[72]

Their Lordships unanimously agreed[73] that the employer in determining the cause of death was subject to an implied term to reach its decision: (a) in a manner that took into account the right matters in reaching the decision; and (b) without violating the *Wednesbury* principle (*ie* that "even though the right things have been taken into account, the result is so outrageous that no reasonable decision-maker could

65 *Ibid* at para 6.
66 *Ibid* at paras 82, 83.
67 *Ibid* at paras 2 and 44.
68 [2014] 3 SLR 241 (HC).
69 *Ibid* at para 23.
70 [2015] 1 WLR 1661 [*Braganza*].
71 *Ibid* at para 28.
72 *Ibid* at para 1 [emphasis added].
73 *Ibid* at paras 30 (*per* Baroness Hale), 53 (*per* Lord Hodge), 103 (*per* Lord Neuberger).

have reached it").[74] This tracks the *GCHQ* grounds of illegality and irrationality respectively.[75]

The employer's investigative team had failed to direct themselves to the need for cogent evidence commensurate with the seriousness of a finding of suicide and had failed to take into account a relevant factor, namely, the real possibility of accidental death. Notably, the investigative team had in fact identified accidental death as a possibility, and their Lordships' criticism that they failed to take into account a relevant factor must therefore be "read as criticism that they failed to take it **sufficiently** into account, *ie*, a criticism of the way in which evidence had been weighed".[76]

It is important to note that their Lordships did not confine the implication of judicial review principles to cases involving the right to work (as was arguably the case in *Nagle*). Baroness Hale emphasised in *Braganza*, "whatever term may be implied will depend upon the terms and the context of the particular contract involved".[77]

Similarly, Lord Hodge considered that, unlike pure commercial contracts, it would be appropriate to imply administrative law grounds of review in "relational contract[s]"[78] like employment contracts where there is an implied duty of trust and confidence between employer and employee.[79] This echoes Prakash J's holding in *Stansfield College* that, in line with administrative law principles, CASE was obliged not to exercise its contractual discretion "capriciously" as its relationship with the member private schools was not governed by a "strictly commercial" contract.[80]

Writing before *Braganza*, Professor Timothy Endicott suggests the evolution may have already begun. He suggests that the case of *Mullins v McFarlane*[81] "moved the law beyond the common law right to work, at least tentatively".[82] There, a horse trainer had initially brought an application for judicial review against the decision of the Jockey Club to disqualify his horse for failing a drugs test. Leave to commence judicial review was denied since the Jockey Club was not exercising a public function. The case was, however, transferred from the Administrative Court to the Queen's Bench Division to proceed as a claim for a declaration that the disqualification was unlawful.

While Stanley Burton J did not grant the declaration as the allegations of capriciousness and arbitrariness had not been made out, he reached this decision on the assumption that counsel for the claimant's submissions correctly represented the law. Counsel for the claimant had submitted that the court will interfere with a decision of a sporting body if that decision is arbitrary or capricious or is based on a misinterpretation of the applicable rules of the body in question.[83] Counsel for the defendant had submitted that the jurisdiction of the court is more restricted as it is

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74 *Ibid* at para 24.

75 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 [*GCHQ*].

76 See David Foxton, "A good faith goodbye? Good faith obligations and contractual termination rights" [2017] LMCLQ 360 at 369 [emphasis added].

77 *Braganza, supra* note 70 at paras 30, 31.

78 *Ibid* at para 61.

79 *Ibid* at paras 54 and 61.

80 *Stansfield College, supra* note 58 at para 132.

81 [2006] EWHC 986 (QB) [*Mullins*].

82 Timothy Endicott, *Administrative Law*, 3d ed (Oxford University Press, 2015) at 614.

83 *Mullins, supra* note 81 at para 37.

limited to cases involving the claimant's right to work.[84] His Lordship's "provisional view" was that the court's power to grant declaratory relief is "unrestricted":

> [T]here is no jurisdictional (in the narrow sense of the word) boundary to the power of the Court to grant declaratory relief in this context: the jurisdiction of the Court under CPR Part 40.20[85] to grant declaratory relief is unrestricted. The restrictions on the power are discretionary. The discretion will be exercised having regard to the respect and caution appropriate when considering the decision of an impartial qualified tribunal whose knowledge and experience of the subject matter in question is likely to exceed those of the Court.[86]

VI. The Implications of Convergence

The implications of the above analysis are significant.

A. *Abuse of Dominant Power as the Primary Inquiry*

The question of whether judicial review principles should apply to a particular decision should not depend on whether the decision-maker is exercising a public or private function. Rather, judicial review principles should apply where there is an abuse of dominant power—this is faithful to *Nagle*, *Stansfield College* and, more recently, *Braganza.*

Indeed, Lord Hope's category of "relational contracts" carries wide-ranging implications in at least two areas. Given the mutual trust and confidence between certain associations/clubs and their members, the terms of membership should similarly be subject to the "*Braganza* duties".[87] This extension ought to apply *a fortiori* where the contractual decision-maker wields power "more like a government than a traditional company".[88] It is increasingly likely that not only will metanationals wield the power of States, but we will also develop relationships of dependence with them akin to those between citizens and States. We may not be able to live without them. As one commentator notes:

> Put it all together and you can see a day when you're watching content that Google produced disseminated via infrastructure that Google owns on a phone that Google made using a wireless service Google brokered.[89]

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84 *Ibid* at para 38.

85 The equivalent to the *Rules of Court* (Cap 322, Section 80, 2014 Rev Ed), O 15 r 16 [*Rules of Court*].

86 *Ibid* at para 39.

87 *Cf Monk v Largo* [2016] EWHC 1837 at para 54, in which David Foxton QC sitting as a Deputy Judge of the English High Court held that:

> Where, for example, a commercial contract gives one party a right to terminate in certain circumstances, it will not ordinarily be appropriate to subject the exercise of that right to obligations of procedural or substantive fairness akin to the public law duties which apply to the decisions of the executive. . .

See also Foxton, *supra* note 76.

88 Foer, *supra* note 1.

89 Finley, *supra* note 24.

Many traditional governmental services may one day be accessible only through that Google phone or operating system.

Put simply, if it talks like a state and wields power like that of a state, "the same high standards of decision-making ought . . . to be expected [as that] of [a] modern state"—to borrow the language of Baroness Hale in *Braganza*.[90]

This should be a welcome development. Not only is it more faithful to the common law, it could help to stem the "constant unprofitable litigation over the divide between public and private law proceedings".[91] Indeed, "a very substantial volume of the resources of the parties and the courts are still being consumed to little or no purpose".[92] That is the view of none other than Lord Woolf. Debating the private-public distinction is the equivalent of insisting that David be bogged down with heavy armour, while metanational Goliaths are protected by similar armour.

B. *Value of Extending Judicial Review Principles*

At a more fundamental level, it is worth taking a step back to consider whether the extension of judicial review principles will add anything to the protection of individuals against dominant powers. Could it even carry a contracting effect in terms of the protection of individuals? However, the cases discussed above serve to demonstrate that the extension of judicial review principles would make a meaningful, <u>substantive</u> difference to the outcome of cases. If those principles did not apply:

(a) Ms Nagle would have been refused a training license by the Jockey Club.
(b) Mr Haron would have been suspended from competing by the Singapore Amateur Athletic Association.
(c) Mrs Braganza would have been denied compensation by BP Shipping for the death of her husband. She would also have had to live with the stigma that he had been found to have taken his own life.

In all those cases, judicial review principles served to hold the respective decision-maker accountable for their decision-making process—something which traditional contract law principles are loathe to interfere with. One should not underestimate how process can invariably affect outcome.

C. *Irrelevance of Judicial Review Procedure*

The increasing relevance of judicial review *principles* in contract law (and perhaps even other areas of private law) could result in the increasing irrelevance of judicial review *procedure.*

From a plaintiff's perspective, one would be hard-pressed to see any procedural advantage to framing a claim against a private body as an application for judicial review pursuant to Order 53 of the *Rules of Court*,[93] as opposed to a civil claim in contract. Only the former procedure requires an applicant to:

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[90] *Braganza, supra* note 70 at para 31.
[91] *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 WLR 840 at 848.
[92] *Ibid* at 842.
[93] *Rules of Court, supra* note 85.

(a) Obtain leave of court before commencing judicial review proceedings.[94] An application for leave is not necessary before commencing a private law claim.
(b) Commence proceedings within three months of the impugned decision where a quashing order is sought.[95] In contrast, a claim for breach of contract may ordinarily be brought within six years of the breach.[96]
(c) Exhaust all alternative private law remedies (*eg* commencing an action for breach of contract) before commencing an application for judicial review.[97]
(d) Demonstrate that the private body was exercising a public function—an inquiry with an uncertain outcome.

Further, discovery and cross-examination do not ordinarily take place in an application for judicial review pursuant to Order 53.

As for remedies, a declaration and an injunction may well serve the same function as the remedies available under Order 53 (*ie* a Mandatory Order, Prohibiting Order and Quashing Order). As mentioned above, Lord Denning alluded to this in *Nagle*[98] albeit Hoffmann LJ subsequently observed in *Aga Khan* that this solution carried an "improvisatory air".[99]

D. *Commercial Contracts by the Government*

The process of convergence may also exert an influence on the ability to subject commercial or even employment contracts entered into by the government to judicial review principles. In 1994, the Privy Council was of the view that:

> It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be subject to judicial review in the absence of fraud, corruption or bad faith.[100]

Professor Janet McLean notes that in light of *Braganza*, this view is "in danger of becoming something of a public law caricature of contract law. They may not go as far as contract law itself would allow in terms of controlling contractual discretion. Convergence is a two-way process."[101] Indeed, it would be "surprising and unsatisfactory" if different grounds of review were to apply to a contractual or non-contractual claim.[102]

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[94] *Ibid*, O 53 r 1(1)(b).
[95] *Ibid*, O 53 r 1(6).
[96] *Limitation Act* (Cap 163, 1996 Rev Ed), s 6.
[97] See *Tey Tsun Hang v National University of Singapore* [2015] 2 SLR 178 (HC).
[98] *Nagle, supra* note 32 at 644, 645.
[99] *Aga Khan, supra* note 39 at 933.
[100] *Mercury Energy v Electricity Corporation of New Zealand* [1994] 1 WLR 521 at 529.
[101] Janet McLean, "Convergence in Public and Private Law Doctrines—The Case of Public Contracts" (2015) Social Science Research Network at 16, online: Social Science Research Network <https://ssrn.com/abstract=2690935; see also http://dx.doi.org/10.2139/ssrn.2690935>.
[102] *Bradley* (HC), supra note 40 at para 37.

E. *Recalibrating Intensity of Judicial Review*

To respond to the convergence of judicial review principles in private claims the courts may have to calibrate the intensity of review depending on the facts of a particular case. As a matter of conventional judicial review principles, it is well established that the intensity of review is fact-sensitive and "depend[s] upon the context in which the issue arises and upon common sense".[103] A deeper analysis as to how the courts may vary the intensity of review in a principled manner is discussed in a recent article by Ernest Lim and Cora Chan.[104] For present purposes it suffices to identify the following three variables.

First, the nature of the relationship between the decision-maker and the aggrieved party may be relevant to both the application of the judicial review principles[105] and the intensity of review on those very principles.

Second, the intensity of review may also be calibrated to the type of decision in question, namely, whether it involves a paradigm case (*eg*, the suspension or expulsion of an existing contractual relationship) or a penumbral case (*eg*, the refusal to contract). In *McInnes v Onslow-Fane*,[106] Megarry VC, after discussing *Nagle*, distinguished between:

(a) "application cases" where the decision merely refuses to grant the applicant the right or position that he seeks;
(b) "forfeiture cases" where a decision which takes away some existing right or position, as where a member of an organisation is expelled or a licence is revoked. In such cases (unlike application cases), there is a threat to take something away for some reason; and
(c) "expectation cases" which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted.[107]

Megarry VC held that:

> [This] distinction is well-recognised, for in general it is clear that the courts will require natural justice to be observed for expulsion from a social club, but not on an application for admission to it. The intermediate category, that of the expectation cases, may at least in some respects be regarded as being more akin to the forfeiture cases than the application cases; for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence or confirmation of the membership is one which raises the question of what it is that has happened to make the applicant unsuitable for the membership or licence for which he was previously thought suitable.[108]

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[103] See *Lee Hsien Loong v Review Publishing Co* Ltd [2007] 2 SLR(R) 453 (HC) at para 98, citing *R (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 3 at para 39.

[104] Ernest Lim & Cora Chan, "Problems with Wedsnesbury Unreasonableness in Contract Law: Lessons from Public Law" [2019] 135 LQ Rev 88.

[105] See Part V of this article at paras 3, 4.

[106] [1978] WLR 1520 (Ch D).

[107] *Ibid* at 1529.

[108] *Ibid*.

On the facts, it was found that the British Boxing Board of Council's refusal to grant a boxers' manager's license to the applicant was an "application case". Accordingly, the rules of natural justice only required the board to "reach an honest conclusion without bias and not in pursuance of any capricious policy"[109]—it was not required to, *inter alia*, hold a hearing.[110]

Third, the intensity of review may be varied according to the character of the decision-maker, taking into account the extent of its dominant power and the extent to which it is public power. The Court of Appeal's decision in *Sim Yong Teng v Singapore Swimming Club*[111] demonstrates it does not necessarily follow that a lower standard of scrutiny ought to apply for private bodies as opposed to public bodies. There, the court had to determine whether the principle of necessity (a component of the rules of natural justice) applied to private bodies (in contrast to public bodies). The principle enables a decision maker, whether an individual or a tribunal, who is subject to disqualification on account of bias, to decide a complaint or dispute where: (i) no other person or tribunal competent to decide the matter is available; or (ii) a quorum cannot be formed without his/its participation.[112] The court held that the principle of necessity does not apply to private entities as its rationale:

> [I]s to enable statutory tribunals and judicial bodies to hear matters in which they may have a personal or institutional interest, as not do so would frustrate the operation of the statutory provision with consequent public or private detriment and undermine public confidence in the administration of justice.[113]

That rationale did not apply for private bodies since the principle of necessity should not be invoked "for the advancement or protection of …private interests".[114] Rather, "in a conflict between such interest and the interest of justice, the latter should prevail over the former …**In short, the rules of natural justice must prevail over contractual rights when exercised unjustly or seen to be exercised unjustly**".[115]

The court also observed that unlike statutory tribunals, private bodies can change their rules to ensure that the disciplinary hearings are conducted in a way that complies with rules of natural justice or find alternative means to cure the apparent bias.[116]

F. *Convergence of Contract Law Doctrines*

As convergence implies a two-way process,[117] is there any scope for the convergence of contract law doctrines in judicial review principles? The answer to this question lies outside the scope of this article but I would make the following preliminary observations.

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109 *Ibid* at 1533.
110 *Ibid* at 1536.
111 [2016] 2 SLR 489 (CA).
112 *Ibid* at para 65.
113 *Ibid* at para 85.
114 *Ibid* at para 86.
115 *Ibid* at paras 86, 87 [emphasis added].
116 *Ibid* at paras 89, 90.
117 McLean, *supra* note 101 at 16.

First, there have already been instances of such convergence on the availability of remedies. For instance, since 1 May 2011, the courts have been empowered to award damages or other equitable or restitutionary reliefs as a remedy in an application for judicial review (subject to the provisions of the *Government Proceedings Act*[118]) albeit such reliefs may only be granted where the applicant "has a cause of action that would have entitled the applicant to any relevant relief if the relevant relief had been claimed in a separate action".[119]

Second, arguably, convergence of this sort would be more readily driven by Parliament, as was the case with amendments to Order 53 to allow damages to be awarded. After all, this would involve more searching scrutiny of public bodies, which would require the courts to exercise a greater degree of restraint, owing to the separation of powers and the institutional competence of the courts.[120] *Starkstrom* is illuminating in this regard. There, the Court of Appeal declined to definitively rule out the acceptance of the doctrine of legitimate expectations in judicial review—a doctrine which has its roots in contractual estoppel[121]—but provided the following cautionary note:

> In our judgment, the acceptance of the doctrine of substantive legitimate expectations as a part of our law would represent a significant departure from our current understanding of the scope and limits of judicial review (as described above). Such a development would potentially change the understanding of the role of the courts in undertaking judicial review of administrative or executive actions, and could cause us to redefine our approach to the doctrine of separation of powers and the relative roles of the judicial and the executive branches of Government. As such, we prefer to defer such a question to an occasion when it is essential for us to decide it. Only then, would attention be focused on the possible difficulties that inhere in recognising the doctrine. In our judgment, it was not appropriate to determine such an important issue when it did not arise on the facts and indeed should never have been raised.[122]

Third, that said, the willingness of courts to consider (albeit reject) the convergence of contract law principles could itself invariably exert a magnetic pull or, in the language of behavioural economics, "anchoring effect" on how judicial review principles will evolve. Judges are, after all, humans and the anchoring effect has proven to be "one of the most reliable and robust results of experimental psychology".[123] Notably, while the Court of Appeal in *Starkstrom* appeared less than enthusiastic about wholly accepting the doctrine of substantive legitimate expectations, it did conclude by proposing a possible middle ground:

> Finally, we note that there is a range of possible measures between recognising a judicial power to enforce substantive legitimate expectations at one end, and

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[118] Cap 121, 1985 Rev Ed.

[119] *Rules of Court, supra* note 85, O 53 r 7.

[120] *Starkstrom, supra* note 45 at para 58.

[121] See Tham Lijing, "Legitimate Expectations and Good Administration" (2015) L Gaz.

[122] *Starkstrom, supra* note 45 at para 59.

[123] Daniel Kahneman, *Thinking, Fast and Slow* (Allen Lane, 2011) at 119.

> holding that a public authority may entirely disregard a clear representation it has made even if there has been reasonable and detrimental reliance, at the other end. In between those points, the public authority could, for instance, be required to confirm that it has considered its representation in coming to its conclusion that the public interest justifies defeating any legitimate expectation; or it could be required to give reasons for its assessment that this is so, which could then be assessed within the traditional framework of illegality, irrationality and procedural impropriety. We mention these as possibilities to demonstrate that the resolution of the issues that may arise in this context need not call only for a binary approach between a merits review and no review. These are all possibilities that will have to be examined and weighed if and when it is necessary for us to decide this issue.[124]

VII. Conclusion

The above analysis demonstrates how the common law represents an ongoing negotiation between past precedents, and present-day principles and policies. If, as it has been argued, the basis of the common law and judicial review in particular is the duty of the courts to protect individuals against those entities wielding a "giant's strength"[125] then we must be clear-eyed about who the Goliaths of the present-day and future are—not just private or public bodies exercising public functions but metanationals redefining public functions.[126]

Speaking extra-judicially in 1986, Lord Woolf presciently posed the following question which is even more relevant today:

> The interests of the public are as capable of being adversely affected by the decisions of large corporations and large associations, be they of employers or employees, and should they not be subject to challenge on *Wednesbury* grounds if their decision relates to activities which can damage the public interest? ... Should it not be possible for the court to intervene if the decision has been reached without a relevant consideration being taken into account or if the decision has been taken on the basis of some irrelevant consideration in the same way as it does in the case of a public body? **Powerful bodies, whether they are public bodies or not, because of their economic muscle may be in a position to take decisions which at the present time are not subject to scrutiny and which could be unfair or adversely affect the public interest**…[127]

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124 *Starkstrom, supra* note 45 at para 63.

125 *Datafin, supra* note 14 at 721.

126 I note that there is an ongoing debate on the theoretical foundations of judicial review, principally between: (a) those who conceive of judicial review as the enforcement of the limits of public power as intended by Parliament on the; and (b) those who conceive of judicial review as the enforcement of the limits of public power developed incrementally by the common law. This debate is summarised in Kenny Chng, "The Theoretical Foundations of Judicial Review in Singapore" [2019] Sing JLS 294. It is important to reiterate the point made earlier in this article that the limits developed by the common law relate to *de facto* power generally, not just public power.

127 Lord Woolf, "Public law—private law; why the divide?—a personal view" [1986] Public L 220 at 224, 225.

Should we sit back and wait for Mr Zuckerberg's "constitutional compromise" to appear on our feed?

Certainly not when the writing is already on the wall. The future promises to be one with metanational organisations disrupting the power of States and the lives of individuals. Rather than parse the finer points of the public-private function distinction, we should turn our attention to examining how judicial review *principles*—developed over centuries to control dominant power—can be adapted to regulate our relationships with these all-powerful organisations.