

Accountable Algorithms: Adopting the Public Law Toolbox Outside the Realm of Public Law

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Abstract It is well known that artificial intelligence, especially machine learning, has the potential for hugely beneficial impacts on all areas of life, but also carries with it dangers such as lack of transparency, over-rigidity of decision-making, negative feedback loops and unreasonable inferences. Such dangers also have the potential to be scaled across a whole area of decisions. There is, therefore, an increasing sense that we need greater accountability of algorithmic decision-making systems and it is argued here that public law and the grounds of judicial review are a ready-made toolkit specifically designed to render decision-makers accountable and to make precisely the kinds of trade-offs we will need to make between effectiveness and efficiency on the one hand and fairness on the other. These tools can therefore provide a blueprint as we work out how to govern ADM and render it accountable, even in a private context. This can take place by using the public law toolkit in interpreting existing legislation, informing future regulation and even through the exercise of a common law supervisory jurisdiction.

Key words: algorithms; accountability; public law; algorithmic decision making

1. Introduction

It is well known that artificial intelligence, especially machine learning, has the potential for hugely beneficial impacts on all areas of life. In medicine, we have already seen systems that can outperform humans in the detection of skin¹ and breast cancer.² And the ability to process

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¹ TV Pham, CM Luong, VD Hoang and others, ‘AI outperformed every dermatologist in dermoscopic melanoma diagnosis, using an optimized deep-CNN architecture with custom mini-batch logic and loss function’ (2021) 11 Nature Sci Rep 17485 <<https://doi.org/10.1038/s41598-021-96707-8>>.

² D Killock, ‘AI Outperforms radiologists in mammographic screening’ (2020) 17 National Review of Clinical Oncology 134 <<https://doi.org/10.1038/s41571-020-0329-7>>.

information far more rapidly than humans has been harnessed to make key discoveries in protein folding,³ in the identification of new antibiotics to tackle antibiotic-resistant strains of bacteria such as *E. coli*,⁴ as well as during the COVID-19 pandemic.⁵ And yet we have also received many warnings of the potential pitfalls of such systems when applied in other contexts, such as Cathy O'Neill's *Weapons of Math Destruction*,⁶ and the AI Now Report from NYU in 2018⁷ pointing out that the impact of the case-by-case decisions of even a biased or flawed individual 'has nowhere near the magnitude or scale that a single flawed [Automated Decision System] can have across an entire population'. The dangers of such systems include their potential lack of transparency,⁸ over-rigidity of decision-making, the fact that the decreased cost of such systems may increase our tolerance for correspondingly decreased accuracy (by whatever metric we choose to measure that)⁹ and that they might create the kind of negative feedback loops O'Neill identifies, whereby the system itself produces precisely the result (e.g. recidivism) that it is supposed to predict. In addition, Wachter and Mittelstadt identify what they call the 'dangers of unreasonable inferences',¹⁰ noting among other examples,¹¹ Target's (alleged) ability to predict pregnancy in customers,¹² insurers'

³ E Callaway, "It will change everything": DeepMind's AI makes gigantic leap in solving protein structures' (2020) 588 Nature 203 <<https://doi.org/10.1038/d41586-020-03348-4>>.

⁴ J Marchant, 'Powerful antibiotics discovered using AI' (*Nature News*, 20 February 2020) <<https://doi.org/10.1038/d41586-020-00018-3>>.

⁵ See, eg O Kadioglu, M Saeed, H Johannes Greten and T Efferth, 'Identification of novel compounds against three targets of SARS CoV-2 coronavirus by combined virtual screening and supervised machine learning' (June 2021) 133 Comput Biol Med 104359 <10.1016/j.combiomed.2021.104359>; <<https://joinzoe.com/our-science>>.

⁶ C O'Neill, *Weapons of Math Destruction* (Penguin Random House 2016).

⁷ M Whittaker and others, 'AI Now Report 2018' (AI Now Institute, December 2018) <https://ainowinstitute.org/AI_Now_2018_Report.pdf> 18.

⁸ See, eg F Pasquale, *The Black Box Society: The Secret Algorithms that Control Money and Information* (HUP 2015).

⁹ See further R Williams, 'Rethinking Administrative Law for Algorithmic Decision-Making' (2021) 42 Oxford Journal of Legal Studies 468 <<https://doi.org/10.1093/ojls/lqgab032>>.

¹⁰ S Wachter and B Mittelstadt, 'A right to Reasonable Inferences: Re-thinking Data Protection Law in the Age of Big Data and AI' [2019] Columbia Business Law Review 1.

¹¹ *ibid* at 15.

¹² See C Duhigg, 'How Companies Learn Your Secrets' *NY Times* (16 February 2012) <<https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html>> <<https://perma.cc/7Y84-6MWV>>, cited *ibid* but for doubt cast on this specific example see <<https://nickthings.tumblr.com/post/126543056206/harry-brignull-on-twitter-how-target-disguises>>.

use of social media data to set premiums,¹³ the ability to infer user satisfaction with search results using mouse tracking¹⁴ and China's far-reaching social credit scoring system.¹⁵ Our challenge therefore is clear: how do we harness the benefits of this technology while at the same time avoiding its disadvantages?

Of course, it is wrong automatically to assume that because the technology is new, so too must be the problems it creates. We know that humans are not perfect in their decision-making either, being influenced by all sorts of factors such as sports team performance and having their own biases, conscious or unconscious.¹⁶ Errors and 'algorithms' can apply even in a purely analogue context, as examples from administrative law illustrate.¹⁷ We should therefore not assume that simply because a case involves algorithmic, rather than human decision-making, it is therefore inevitably novel. But as I have argued elsewhere,¹⁸ there are ways in which algorithmic decision making (ADM) does present new challenges. First, while we are used to the idea of nonlinear systems of machine learning, in particular, being less transparent,¹⁹ in other ways even machine learning systems, and certainly rules-based systems can in fact be more predictable and transparent in terms of the rules on which the latter are based, or even the specificity of instruction, labelling of data, metrics of accuracy chosen and training method used in relation to the former. Even the forms and mechanisms of discrimination and other problems which arise from such systems may therefore in fact be more predictable and transparent. We can think of this as an increased surface area on which the law has the potential to bite, giving rise to the potential for increased litigation. In addition, as I have also explained previously, not only are the metrics for assessing the performance of a system more transparent, they also raise interesting policy questions regarding which metrics we should use in which contexts.²⁰ The

¹³ L Scism, 'New York Insurers Can Evaluate Your Social Media Use—If They Can Prove Why It's Needed' *Wall Street Journal* (30 January 2019) <<https://www.wsj.com/articles/new-york-insurers-can-evaluate-your-social-media-use-if-they-can-prove-why-its-needed-11548856802>> (on file with the Columbia Business Law Review).

¹⁴ Y Chen, Y Liu, M Zhang and S Ma, 'User Satisfaction Prediction with Mouse Movement Information in Heterogeneous Search Environment' (2017) 29 *IEEE Transactions on Knowledge & Data Engineering* 2470.

¹⁵ S Denyer, 'China's Plan to Organize Its Society Relies on 'Big Data' to Rate Everyone' *Washington Post* (22 October 2016) <<https://perma.cc/Z3KP-KK2T>>.

¹⁶ R Brauneis and E Goodman, 'Algorithmic Transparency for the Smart City' (2018) 20 *Yale Journal of Law and Technology* 103; O Eren and N Mocan, 'Emotional Judges and Unlucky Juveniles' (2018) 10(3) *Am Econ J – Appl Econ* 171.

¹⁷ *EK (Ivory Coast)* [2014] EWCA Civ 1517; *R (Guillard) v Secretary of State for Justice* [2009] EWHC 2951.

¹⁸ Above n 9.

¹⁹ Above n 8.

fact that such systems make predictions on the basis of correlations, while humans make decisions on the basis of more causal factors can also present challenges, and of course there is always the scalability point made earlier; whatever a human does they cannot possibly do it at the scale of an ADM system operating across a whole field.²¹ Creel and Hellman point out that this scalability across a whole sector can mean that, for example, a job seeker or loan applicant can be excluded not just by one employer or bank but from a whole sector, so that whereas in the past an unfairly excluded applicant could apply elsewhere, this possibility can be closed off, not just by the use of the same algorithm but even by the use of different algorithms provided by different companies but trained on the same or similar data.²²

There is, therefore, an increasing sense that we need greater accountability of ADM systems and artificial intelligence more generally, something which becomes apparent from the large numbers of international standards, declarations and moves towards harder forms of regulation that have been produced,²³ including, of course, the

²⁰ Above n 9.

²¹ Above n 7.

²² K Creel and D Hellman, 'The Algorithmic Leviathan: Arbitrariness, Fairness, and Opportunity in Algorithmic Decision-Making Systems' (2022) 52 *Canadian Journal of Philosophy* 26. doi: 10.1017/can.2022.3.

²³ Such as, for example, Artificial Intelligence Committee, *AI in the UK: ready, willing and able?* (HL 2017-19, 100); DoD Office of the Secretary of Defense, 'Artificial Intelligence Ethical Principles for the Department of Defense' (2020); EAD1e IEEE, 'Ethically Aligned Design, A Vision for Prioritizing Human Well-being with Autonomous and Intelligent Systems' (First Edition (EAD1e), IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems 2019) <https://standards.ieee.org/content/ieee-standards/en/industry-connections/ec/autonomous-systems.html> accessed 21 September 2022; European Commission, Directorate-General for Research and Innovation, European Group on Ethics in Science and New Technologies, *Statement on artificial intelligence, robotics and 'autonomous' systems: Brussels, 9 March 2018* (Publications Office 2018) <<https://data.europa.eu/doi/10.2777/531856>>; Executive Order No 13960—Promoting the use of Trustworthy Artificial Intelligence in the Federal Government, 3 CFR 480 (2020); European Parliament resolution of 12 February 2019 on a comprehensive European industrial policy on artificial intelligence and robotics (2018/2088(INI)); L Floridi and others, 'AI4People – An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles and Recommendations' (2018) *Minds and Machines* 28(4); Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L119/1 <<http://data.europa.eu/eli/reg/2016/679/oj>>; Independent High-Level Expert Group on Artificial Intelligence, 'Ethics Guidelines for Trustworthy AI', presented to the EU Commission in April 2019; Information Commissioner's Office and Alan Turing Institute, 'Explaining decisions made with AI' (2019) <<https://ico.org.uk/for-organisations/guide-to-data-protection/key-dp-themes/explaining-decisions-made-with-ai/>> accessed 21 September 2022, section IIA; OECD, Recommendation of the Council on Artificial Intelligence (adopted on 22 May 2019) OECD/LEGAL/0449, <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>> accessed 21 September 2022; Justice and Home Affairs Committee, *Technology Rules? The advent of new technologies in the justice system* (HL 2021-22, 180).

proposed AI Act.²⁴ What all these proposals seek is a means to ensure that we can benefit from the huge advantages of AI systems in terms of their ability to outperform humans in a more cost-effective and efficient manner, while at the same time ensuring that they operate fairly and accountably, in other words that they do not abuse the power that they have. This involves finding a balance and managing trade-offs between factors such as cost, efficiency, fairness and so on.

Where such systems are used by government authorities there is obviously concern about the dangers arising in that context.²⁵ And to ensure that the balance identified above is struck correctly in that sphere I have argued previously²⁶ that public law tools need to be adapted and strengthened for use in this new, digital context. My argument here is that if this work is completed successfully in the public sphere, the resulting toolkit in fact has the capacity to be useful not just in public law, but potentially also in private contexts. Public law, and the grounds of judicial review, are a ready-made system of tools specifically designed to render decision-makers accountable and to make precisely the kinds of trade-offs mentioned above between effectiveness and efficiency on the one hand and fairness on the other. These tools are therefore, I argue, an obvious place to look for help as we work out how to govern ADM and render it accountable, even in a private context.

There are two levels to this claim. Many existing documents and efforts to regulate ADM or render it accountable refer to concepts that are already familiar to public lawyers. My first argument is therefore that in interpreting these concepts we can and should deploy the public law toolkit as just that; a toolkit that avoids our having to reinvent the wheel on the meaning of such concepts, and which allows us to benefit from the work that has been and will inevitably be done in understanding and elaborating on these concepts in the public sphere, even when they are being applied in the private sphere.

But I also argue that we could actually be more ambitious than that. For those who see even private law use of ADM as a more threatening version of private power, which further increases the imbalances between private entities and individuals, the public law toolkit might be more than just a source of understanding and interpretation of existing rules. It could become a source of inspiration for any further efforts to prevent abuse of this power. Wachter and Mittelstadt have already responded to the threats discussed above by proposing that there should

²⁴ AI Regulation COM(2021) 206 final 2021/0106 (COD) European Commission, Brussels 21.4.2021.

²⁵ See, eg J Maxwell and J Tomlinson, *Experiments in Automating Immigration Systems* (Bristol University Press 2022).

²⁶ R Williams (n 9).

be new private rights, in particular a ‘right to reasonable inferences.’²⁷ What I am proposing here is that rather than, or in addition to, any such specific private rights we could make use of public law as a more general framework of tools based on preventing decision-making wrongs and abuse of power. This could occur either by informing future regulation, or even through the exercise of a common law supervisory jurisdiction.

2. *Existing and Proposed Regulation of ADM*

Of course, there is already extensive existing regulation from various contexts relating to the use of ADM by private entities.

A. *Data Protection*

Thus, for example, the GDPR’s Article 13(2)(f), 14(2)(g) and 15(1) (h) state that ‘the data subject has the right to know the existence of automated decision-making including profiling and to have meaningful information about the logic involved (whatever that might mean)’²⁸ as well as the significance and envisaged consequences of such processing for the data subject. Recital 71 to the GDPR adds that this should include ‘an explanation of the decision reached after such assessment’, though of course recitals are not legally binding.²⁹ Article 22 also gives individuals ‘at least the right to obtain human intervention on the part of the controller to express his or her point of view and contest the decision’. Domestic legislation largely mirrors the GDPR rights. The 2018 Data Protection Act (DPA) S 14 provides that where a significant decision based solely on automated processing is required or authorised by law, the controller must as soon as reasonably practicable notify the data subject in writing that such a decision has been taken. The data subject then has one month to request the controller either to reconsider the decision or to take a new one not based solely on automated processing, then triggering a further month for the controller to consider, comply and inform the data subject. The Secretary of State can also make further regulations to provide additional measures to safeguard the data subject’s rights, freedoms and legitimate interests and similar provisions for the law enforcement and intelligence context are contained in ss 50 and 97 of the DPA 2018. In its recent consultation

²⁷ Above n 10.

²⁸ See further below, nn 33, 59 and surrounding text.

²⁹ Case 215/88 *Casa Fleischhandels* [1989] ECR 2789 [31].

and review of Data Protection Legislation the government has not only identified the need to clarify the precise scope of Article 22 but also the support for its retention and promises that ‘reforms will cast Article 22 as a right to specific safeguards, rather than as a general prohibition on solely automated decision-making. Reforms will enable the deployment of AI-powered automated decision-making, providing scope for innovation with appropriate safeguards in place’.³⁰

B. *Employment*

In the employment context, the Equality Act 2020 proscribes direct and indirect discrimination for protected characteristics, though indirect discrimination can be justified as a proportionate way to achieve a legitimate aim. But this only applies to the protected characteristics which are of course age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. In the wider employment context, there is also the possibility of controlling managerial discretion through doctrines such as that of unfair dismissal. And the EU has proposed a Platform Work Directive,³¹ which builds on Art 22 of the GDPR by including Article 6, which requires platforms to provide workers with information about automated monitoring systems as well as decision-making systems which ‘significantly affect’ working conditions. It also mandates human monitoring of ADM systems’ impact on working conditions in Article 7 and in Article 8 it mandates human review and a written statement of reasons for significant decisions such as decisions to suspend a worker’s account or refuse remuneration for work performed.

C. *Credit*

In the credit context, the FCA Handbook, the Consumer Credit Scorebook (CONC) Sections 5.2A and 5.51A, the Consumer Credit Directive Art 8 and FCA Guidance deal with the use of automated systems for assessment of, inter alia, creditworthiness.

³⁰ Department for Digital, Culture, Media and Sport, ‘Data: a new direction – government response to consultation’ (23 June 2022) <<https://www.gov.uk/government/consultations/data-a-new-direction/outcome/data-a-new-direction-government-response-to-consultation#executive-summary>> accessed 21 September 2022.

³¹ 2021/0414 COD, Com (23021) 762 final.

D. *Competition Law*

In competition law, Art 102 deals with abuse of a dominant position, while the proposed Digital Markets Act and Digital Services Act respectively target ‘gatekeepers’ and (following agreement with the European Parliament) other issues such as the use of dark patterns and nudging.³²

E. *The AI Act*

And of course the proposed AI Act prohibits some kinds of AI altogether,³³ including subliminal techniques leading to psychological harm; systems which exploit the vulnerabilities of a particular group due to age, physical or mental disability in order to distort the behaviour of their members in a manner likely to cause harm, whether physical or psychological; systems used by public authorities for classification on the basis of known or predicted personal or personality characteristics leading to detrimental or unfavourable treatment in unrelated contexts or detrimental or unfavourable treatment of persons or groups which is unjustified or disproportionate to their social behaviour or its gravity (social scoring) and biometric identification, except where this is strictly necessary in order to search for victims including missing children, to prevent specific, substantial and imminent threats to life or safety or to detect a perpetrator or suspect, in which case further safeguards must be implemented.

In addition, the proposed AI Regulation labels other forms of AI systems ‘High Risk’³⁴ where the AI system is a safety component or is itself the subject of harmonisation legislation; involves biometric identification and categorisation of natural persons; involves the management and operation of critical infrastructure; involves assigning and assessing people for education and vocational training; affects employment, the management of workers and access to self-employment; affects access to and enjoyment of essential private and public services, such as the dispatch

³² EU Council, ‘Press Release: Digital Services Act: Council and European Parliament provisional agreement for making the internet a safer space for European citizens’ (23 April 2022) <<https://www.consilium.europa.eu/en/press/press-releases/2022/04/23/digital-services-act-council-and-european-parliament-reach-deal-on-a-safer-online-space/>> accessed 21 September 2022.

³³ COM(2021) 206 final 2021/0106(COD) Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts, see Title II Art 5.

³⁴ Ibid Title III Articles 6 and 7 and Annex III.

of emergency services; where the system is in use by law enforcement, such as risk assessment, evidence evaluation, profiling and polygraphs or it deals with migration, asylum and border control management. Identification as a High Risk AI System leads to various controls contained in Articles 8-29 of the Act, including risk management systems, datasets which follow 'good practices', transparency, human oversight and 'an appropriate level of accuracy, robustness and cybersecurity' (Art 15). Outside these High Risk AI Systems, the regulation suggests the establishment of codes of conduct for other forms of AI (Art 69).

3. *Mind the Gap*

However, despite this variety of regulation, there are still two kinds of gaps in the protection they provide. First, gaps can arise from a lack of full understanding of what precisely some of the requirements in force actually entail, the classic example of this being the issue of 'meaningful information about the logic involved' in the GDPR.³⁵ Similarly in the new AI Act, for High Risk AI systems like employment or creditworthiness, although there are a series of protections such as transparency, human oversight and record-keeping which must be put in place, it is not clear what exactly each of these might entail. And nor is it clear what will count as an 'appropriate level of accuracy, robustness and cybersecurity' for the purposes of fulfilling the Article 15 requirement that High Risk AI systems should 'perform consistently in those respects throughout their lifecycle'. Indeed, this last requirement envisages, in some instances, further gap filling via harmonised standards with which providers can declare their systems in conformity.³⁶

And second, beyond this, there are also more substantive gaps. These can arise where the legislation does not apply at all. For example, GDPR Art 22 only applies where a decision is based *solely* on automated

³⁵ Arts 13(2)(f), 14(3)(b) and 15(1)(h), on which see the now well-known discussion: B Goodman and S Flaxman, 'EU Regulations on Algorithmic Decision-making and a "right to explanation"' (2017) 38(3) *AI Mag* 50; S Wachter, B Mittelstadt and L Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7(2) *International Data Privacy Law* 76, 83 and 84; A Selbst and J Powles, 'Meaningful information and the right to explanation' (2017) 7 *International Data Privacy Law* 233; M Kaminski, 'The Right to Explanation, Explained' (2019) 34 *Berkley Technology Law Journal* 189; and art 29 EC Data Protection Working Party (now the European Data Protection Board), 'Guidelines on Automated Individual decision-making and Profiling for the purposes of Regulation 2016/679' COM (6 February 2018) at 25-6. See further n 59 and surrounding text.

³⁶ Article 41.

processing, and as Wachter and Mittelstadt point out, it only really deals with the information to be given to the data subject, not with the quality of the decision-making itself.³⁷ Similarly, Aggarwal notes the ‘data protection gap in consumer credit markets’, arguing that ‘the existing regulatory frameworks governing algorithmic credit scoring in the UK do not deliver a satisfactory solution to [the necessary] trade-offs, and therefore do not strike an appropriate normative balance. In light of the market failure in datafied consumer credit markets, existing individualistic, market and rights-based mechanisms such as “informed consent” and data subject access rights are inadequate to safeguard consumers’ privacy and autonomy. Furthermore, existing balancing mechanisms under data protection regulation – notably, DPIAs – fall short in safeguarding consumer privacy due to a lack of sector-specific guidance and under-enforcement. This has resulted in a data protection gap in consumer credit markets’.³⁸ Similarly, equalities legislation only applies to certain protected characteristics, not to other characteristics such as, to take Borgesius’ example, low financial status.³⁹ This may of course overlap with a protected characteristic, but need not. Similarly, even the proposed AI Act only prohibits social scoring by public authorities, not private parties.⁴⁰

If we turn to Competition Law, this may well appear to be the perfect tool to fill some of these gaps, but that is not necessarily the case. One difficulty is that, as Ezrahi has argued, there is no clear consensus on the right scope of competition law,⁴¹ or on what level of intervention would be adequate, making it difficult to know precisely how Competition law would operate in this context. And even if enforcement is deemed necessary, the price-centric focus of the discipline and its past theories of harm may result in suboptimal application of it. For example, Article 102, to establish whether or not there has been an abuse of a dominant position, requires a definition of the market and a determination of market power to establish whether or not the entity is dominant. This can be difficult in the digital economy. Not unrelatedly it is also,

³⁷ Above n 10 at 79.

³⁸ N Aggarwal, ‘The Norms of Algorithmic Credit Scoring’ (2021) 80(1) *Cambridge Law Journal* 42 at 72.

³⁹ FJ Zuiderveen Borgesius, ‘Strengthening legal protection against discrimination by algorithms and artificial intelligence’ (2020) 24 (10) *International Journal of Human Rights* 1572 at 1584, section 5.2. See also G van Bueren QC, ‘Inclusivity and the law: do we need to prohibit class discrimination?’ (2021) 3 *European Human Rights Law Review* 274.

⁴⁰ Art 5(1)(c).

⁴¹ A Ezrahi, ‘Sponge’, (2017) 5(1) *Journal of Antitrust Enforcement* 49.

therefore, the case that competition actions can take a long time, as was the case in *Google Shopping*,⁴² and the limited remedies available at the end of the process may undermine the ability of competition law to restore competition and safeguard consumer interests. Even if competition agencies appreciate the need to adjust their implementation and develop new theories of harm they would have to convince the Court of this in order for their actions to be successful and since competition is a regulator-led field it is also inevitable that regulators will have to prioritise their time and resources in choosing which issues to tackle, thereby reducing the chances that any given individual will receive any redress or relief in a particular instance. For all these reasons, therefore, while competition law might in theory appear to be the perfect tool to fill the gaps, it is in fact, as Ezrachi argues,⁴³ a tool that is ill-suited to some of the new issues in the digital economy.

The same applies, as Ezrachi and Stucke point out, in the context of anticompetitive agreements and concerted practices. Here algorithms may facilitate collusion even without triggering the application of Article 101.⁴⁴ This can arise via incidental hub-and-spoke arrangements, where a third party offers dynamic pricing services for competitors; it can arise via tacit collusion, where the use of algorithms supports price alignment and where AI independently identifies price alignment as an optimal strategy. Here again, then, the same conclusion can be drawn; Competition Law is in principle an excellent tool, but not optimal for tackling new issues in the digital economy.

For precisely these, and other reasons, the EU Commission has therefore proposed the Digital Markets Act (DMA) and Digital Services Act (DSA). These may go some way towards closing the protection gap, but they do not do so completely. Thus, the DMA only applies to ‘gatekeepers’, i.e. those with a significant impact on the internal market, operating a ‘core platform service’ and enjoying an entrenched and durable position (the Commission can also designate gatekeepers following a market investigation). ‘Significant’ in this context means a turnover of EUR 7.5 billion or more, or market capitalization of EUR 75 billion where the entity also has more than 45 million monthly end users or more than

⁴² A seven-year investigation led to fine in 2017, upheld in 2021. Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* EU:T:2021:763.

⁴³ A Ezrachi and M Stucke, *Virtual Competition – The Promise and Perils of the Algorithm-Driven Economy* (Harvard UP 2016) and A Ezrachi, ‘Is This a Competition Problem? – The Challenge of Digitalisation and the Limits of Enforcement’ (2020) 1 *Keele Law Review* 60.

⁴⁴ *Virtual Competition*, *ibid.*

10,000 yearly active EU businesses. It focuses on economic behaviour such as ensuring that businesses can offer the same products through a competitor service at a lower price, ensuring that businesses can form additional contracts with end users without using the gatekeeper platform and protection against the requirement to sign up to additional services as a precondition of using the core platform services. It is to be enforced by the Commission, meaning that it is not ideal for individual redress and is likely again to be subject to regulatory prioritisation.

The DSA for its part covers content moderation and, as noted above, after an amendment by the EP, nudging, for example, to accept rejected cookies, but it too has an exemption for micro and small enterprises (Art 16) and specifically envisages judicial redress (Art 15) in relation to content moderation, leaving open the question of how that is to be achieved. Similarly, Regulation 2019/1150 applies only to online intermediation services (OIS), i.e. those which allow business users to offer goods or services to consumers, where there is a contractual relationship between the business user and the OIS.

In an instance where no protected characteristics were present, none of these pieces of legislation would therefore apply to a situation in which, for example:

- An employer used a hiring algorithm which discriminated against those from a low socioeconomic background.
- An algorithm used by a delivery or ride-hailing service rejected drivers born in the north of England.⁴⁵
- A bank disproportionately refused credit to those using one web browser rather than another.
- To take Wachter and Mittelstadt's example,⁴⁶ an insurer adjusts premiums based on social media use.

It is clear, therefore, that although there is some regulation of ADM, even in the private context, there are also still gaps either because there is no legislation in force or proposed, or because if there is such legislation it is not clear precisely what that entails. It is here that I argue the public law toolkit, or more specifically the grounds of judicial review, can play a useful and significant role.

⁴⁵ The proposed Platform Work Directive does contain, in Art 6, the requirement to inform workers that such a system is being used, and Arts 6(2)(b)(iv) and 8(1) require the giving of reasons for restricting, suspending or terminating a worker's account. But it is possible that the reason given to the driver could simply be the likelihood that that driver would reduce the productivity of the platform, and that conclusion could in turn have been based on the northern origins of the driver.

⁴⁶ Above n 10.

4. *The Public Law Toolkit*

Although they are no doubt familiar to most people, by way of a reminder, administrative law requires that a public decision-maker should follow a fair procedure, which means not being biased in the sense of having a stake in the outcome of the decision,⁴⁷ hearing from the right people and in some circumstances giving reasons for its decision.⁴⁸ The decision-maker must have the jurisdiction, or the power to make the decision,⁴⁹ it must take into account all the right considerations and only the right considerations in reaching its decision,⁵⁰ it must not fetter⁵¹ or delegate⁵² its discretion and its decision must be reasonable,⁵³ or in some circumstances proportionate.⁵⁴

5. *The Modest Claim*

To return to the modest version of my claim, many documents and existing efforts to regulate or render accountable algorithmic decision-making, even in a private context, refer to concepts that are already very familiar to public lawyers, or which open the door to the use of public law principles. My first argument, therefore, is that the public law toolkit can be used here to help to interpret those concepts without our needing to reinvent the wheel. Two examples can be used to illustrate this.

⁴⁷ Eg *Dimes v Grand Junction Canal Co* (1852) 3 HLC 759; *R v Amber Valley DC, ex parte Jackson* [1985] 1 WLR 298, [1984] 3 All ER 501; *Ex p Kirkstall Valley* [1996] 3 All ER 304.

⁴⁸ *R v UFC, ex p Institute of Dental Surgery* [1994] 1 WLR 242; M Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet?' [2011] Public Law 56.

⁴⁹ Eg *Moyna v Secretary of State for Work and Pensions* [2003] 1 ELR 1929; *Pendragon Plc v Revenue and Customs Commissioners* [2015] UKSC 37 at [49]-[51]; *R v Monopolies and Mergers Commission ex p South Yorkshire Transport* [1993] 1 WLR 23 HL.

⁵⁰ Eg *R v Governor of Brixton Prison ex p Soblen* [1963] 2 QB 243 at 302; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2013] EWHC 1502; *R v Rochdale MBC ex p Cromer Ring Mill* [1982] 3 All ER 761; *R v Westminster Corporation v LNWR* [1905] AC 426; *Tesco Stores v Secretary of State for the Environment* [1995] 1 WLR 759.

⁵¹ Eg *R v Inhabitants of Leake* (1833) 5 B & Ad 469; *British Oxygen v Minister of Technology* [1971] AC 610.

⁵² Eg *Carltona v Commissioners of Works* [1943] 2 All ER 560; *R (CCWMP) v Birmingham Justices* [2002] EWHC 1087.

⁵³ *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223 (CA).

⁵⁴ *R v Home Secretary, ex p Daly* [2001] UKHL 26; [2001] 2 AC 532; *Bank Mellat v HM Treasury* [2013] UKSC 39; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355.

A. *Use of the Public Law Toolkit in a Non-Digital Context*

The first is the decision in *Braganza v BP Shipping*.⁵⁵ This is in fact not an example from the digital, but rather from the purely analogue context. Mr Braganza was employed by BP shipping and was lost at sea. His widow claimed death benefits from BP, but the latter concluded that Mr Braganza had committed suicide and thus the benefits were not payable. His widow appealed and the question which arose for decision in the case was the standard that the decision of a contractual fact finder, here BP, had to reach. In other words, how reasonable did BP's finding of the fact that Mr Braganza had committed suicide, have to be? Baroness Hale, with whom Lord Kerr and Lord Hodge agreed, concluded that

‘Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to rewrite the parties’ bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.’⁵⁶

The court drew an ‘obvious parallel’ between cases where a contract assigns a decision-making function and cases where a statute or prerogative assigns a decision-making function to a public authority. ‘The court in such cases cannot’, held the majority, ‘substitute for the decision-maker and instead adopts the appropriate standard of review.’⁵⁷ While the majority noted that the decided cases reveal ‘an understandable reluctance to adopt the fully developed rigour of the principles of judicial review of administrative action in a contractual context’⁵⁸ they also pointed out that ‘at the same time they have struggled to articulate precisely what the difference might be’, concluding therefore that there are ‘signs that the contractual implied term is drawing closer and closer to the principles applicable in Judicial Review.’⁵⁹ As a result, the

⁵⁵ *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

⁵⁶ *Ibid* at [18].

⁵⁷ *Ibid* at [19].

⁵⁸ *Ibid* at [20].

⁵⁹ *Ibid* at [28].

majority held that on the facts the interpretation of the contract should be in accordance with both limbs of the public law *Wednesbury* test,⁶⁰ ensuring both that the right factors are taken into account and that the decision should not be one which no reasonable decision maker could reach. And *Braganza* is not an aberration; indeed Lim and Chan note a number of other contexts in which the courts have taken a similar approach.⁶¹

B. *Proposed Use of the Public Law Toolkit in a Digital Context*

The second example is almost the inverse of the first, since it does arise in the digital context but does not yet demonstrate the application of the public law toolkit by the courts, despite it being an area which is ripe for precisely that to happen. As noted above, Arts 13(2)(f), 14(2)(g) and 15(1)(h) of the GDPR all state that ‘the data subject has the right to know the existence of automated decision-making including profiling and to have meaningful information about the logic involved’. As is also well known, there has been a lively academic debate on what precisely this entails with Goodman and Flaxman arguing that it gives a full ‘right to explanation’ which would thus limit the ability to use ML algorithms.⁶² Conversely Wachter, Mittelstadt and Floridi have argued instead that ‘the GDPR’s right of access only grants an explanation ... addressing *system functionality*, not the rationale and circumstances of *specific decisions*’.⁶³ Selbst and Powles, on the other hand, think neither of these views is correct.⁶⁴ For them, the right to explanation should be interpreted functionally, flexibly and should, at a minimum, enable a data subject to exercise their GDPR and Human Rights (a view also shared by Kaminski, and one which fits with the view of the Article 29 Working Party (now the European Data Protection Board) that ‘The information provided should ... be sufficiently comprehensive for the data subject to understand the reasons for the decision’ such as ‘details of the main characteristics considered in reaching the decision, the source of this information and the relevance’.⁶⁵

But while this debate has been taking place in a GDPR-specific context, there is in fact already an area of public law that deals with precisely

⁶⁰ Above n 53.

⁶¹ E Lim and C Chan, ‘Problems with *Wednesbury* unreasonableness in contract law: lessons from public law’ (2019) 135 *Law Quarterly Review* 88.

⁶² Above n 35.

⁶³ Above n 35 at 89.

⁶⁴ Above n 35.

⁶⁵ *Ibid* at 25-6.

this issue. As I have argued previously,⁶⁶ the duty to give notice is already well-established at common law. Even in Closed Material Proceedings the Defendant must often be told the ‘gist’ of the case against them.⁶⁷ In *Bourgass* Lord Reed held that ‘a prisoner’s right to make representations is largely valueless unless he knows the substance of the case being advanced... that will not normally require the disclosure of the primary evidence... [but] what is required is genuine and meaningful disclosure of the reasons why [the decision was made].’⁶⁸ General statements about the prisoner’s behaviour or risk were not therefore held to be sufficient. As I have argued, therefore, it seems likely that this idea of ‘gisting’ could be extremely useful in furthering our understanding of ‘meaningful information about the logic involved’, in keeping with the view of Selbst and Powles. This suggestion also fits with the ICO guidance which states that ‘It is vital that individuals understand the reasons underlying the outcome of an automated decision, or a human decision that has been assisted by the results of an AI system. If the decision was not what they wanted or expected, this allows them to assess whether they believe the reasoning of the decision is flawed. If they wish to challenge the decision, knowing the reasoning supports them to formulate a coherent argument for why they think this is the case.’⁶⁹

This is not the only context in which the work already done by public law might be used to understand and interpret legislation in the digital context. More broadly, Article 5 of the GDPR states that personal data shall be processed lawfully, fairly and in a transparent manner, in relation to the data subject. These concepts are then defined in more detail to some extent elsewhere in the GDPR (e.g., fair and transparent processing is to be further achieved by provision of the information listed in Articles 13(2) and 14(2), such as the period for which the data will be stored and the ‘meaningful information’ provision just discussed). But beyond this, there is no formal definition of any of the terms such as ‘fairness’ or ‘lawfulness’. Similarly, Article 40 refers to the need to draw up codes of conduct to contribute to the proper application of the GDPR for the purpose of specifying the application of the Regulation, such as what is meant by ‘fair and transparent processing’, and there is

⁶⁶ Above n 9.

⁶⁷ See, eg *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] AC 269, following *A v United Kingdom* (2009) 49 EHRR 625 (GC).

⁶⁸ *R (Bourgass) v Secretary of State for Justice* [2015] UKSC 54, [2016] AC 384 at [100].

⁶⁹ ICO and Alan Turing Institute, ‘Explaining Decisions Made with AI’ (20 May 2020) <<https://ico.org.uk/for-organisations/guide-to-data-protection/key-dp-themes/explaining-decisions-made-with-ai/>> accessed 20 September 2022.

also reference in Article 13 of the proposed AI Act⁷⁰ to transparency requirements.

Article 10 of that Act states that High Risk AI systems that make use of techniques involving the training of models shall be developed according to a series of quality criteria. Developers must make relevant design choices in designing the system. Their data preparation processing operations such as annotating and labelling must also be relevant, and they must formulate relevant assumptions about what the data represents. The data sets must be assessed for suitability and developers must identify any possible data gaps or shortcomings. Training, validation and testing datasets shall again be relevant and have appropriate statistical properties, and they shall take into account the characteristics or elements that are particular to the context in which the system is to be used.

In all these contexts it seems highly likely that the work already done by public law could be used directly to assist with interpretation. Whereas this concept of relevance is relatively undefined in the regulation, public law already has a developed understanding of what relevance might require in certain instances.⁷¹ Of course, there is no suggestion that public law is perfect on this front, and I have previously identified in particular challenges that public law may have with factors which are highly correlative but not causative of the target outcome. Administrative law will need to develop rules to govern the relevance or irrelevance of such factors.⁷² But the point is that once this development has taken place it can then be used in interpreting the meaning of 'relevant' outside public law too.

Similarly, the requirement that users of High Risk AI systems should examine gaps in their data is very similar to the requirement that public authorities should take into account relevant considerations and the same can be said of the requirement that users of High Risk AI systems specifically should take into account certain factors such as the purpose, characteristics or elements which are relevant to the particular application of that AI system. Of course, it may well be the case that the list of 'relevant' factors in a private context may be different from that in a public law context, and again there is a great deal of work to be done on the concept of relevance in either domain. But the key point for present

⁷⁰ Above n 33.

⁷¹ Above n 50.

⁷² Above n 9. See also M Oswald, 'Algorithm-assisted decision-making in the public sector: framing the issues using administrative law rules governing discretionary power' (2018) 376 *Philosophical Transactions of the Royal Society A* < 6th August 2018, section 4>.

purposes is that that work can and should be undertaken in tandem, ensuring a coherent and consistent approach across the two sectors.

If then, application and thus the effectiveness of these pieces of legislation depends on our being able to understand what, precisely, they require, where better to look for guidance on the meaning of these concepts than in an area of law based on achieving precisely those things in relation to public authorities? Indeed, if we look at the way in which the GDPR is set up, its whole approach is similar to that of public law. To process data lawfully Art 6 states that there must be a lawful basis for processing, (such as consent, a legal obligation, necessity for performance of a contract). In other words, in public law terms, it is necessary to find specific *vires* for data processing. And there are other aspects of the GDPR which also echo public law, such as Article 22(3)'s requirement that 'the data subject must have at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision', which is highly reminiscent of public law's rules on over-delegation, fettering and fair hearings.⁷³ Our existing and future work on these concepts in public law is therefore ripe for deployment in interpreting such terms in legislation, whether or not the case involves a public authority.

6. *The More Ambitious Claim*

But beyond the use of public law as a toolkit to interpret existing rules, a more ambitious claim can be made for its usefulness in rendering algorithmic decision-making more accountable.

There are those who see the use of ADM even in the private context as posing a particular threat that represents the rise of a new species of power. For example, Shoshana Zuboff analogises the growth of what she calls 'instrumentarianism' to the growth of totalitarianism, arguing that just as we failed initially to recognise or to name totalitarianism so we are doing the same with the new and rising challenge of instrumentarianism.⁷⁴ This new form of power operates through the means of behavioural modification and in her view, 'converges with the digital to achieve its own unique brand of social domination', not as a political project like totalitarianism, but through the market. And if we return to the dangers of unreasonable inferences that Wachter and Mittelstadt

⁷³ Above nn 51 and 52 and surrounding text.

⁷⁴ S Zuboff, *The Age of Surveillance Capitalism* (Profile Books 2019) 360.

identify, there is no question that there are gaps in the existing legislation that lead to their calls for new protection from these forms of private power.⁷⁵ Their own solution of course, as their title suggests, is to argue for a new ‘right to reasonable inferences’ as part of data protection law, arguing that the latter should extend further into examining what is done with that data subsequently.⁷⁶

But there are three potential arguments against taking this approach. First, as they acknowledge themselves, referring to the work of Purtova, the danger is that this turns the law of data protection into ‘the law of everything’.⁷⁷ (A similar argument could of course be made in relation to attempts to extend competition law to fill the gap).⁷⁸ A second argument is that not only is the issue *not* necessarily one of data protection, it is that it *is* in fact something else. Thus Gandy points out that ‘the issue is not simply a question of privacy’. Citing Klaus Lenk’s suggestion that ‘the real issue at stake... is power gains of bureaucracies, both private and public, at the expense of individuals and the non-organized sectors of society’,⁷⁹ Gandy concludes that the real problem is what he calls ‘the panoptic sort’; ‘a kind of high-tech, cybernetic triage through which individuals and groups of people are being sorted according to their presumed economic or political value.’⁸⁰ Now of course it could be argued that privacy is not data protection,⁸¹ and as noted further below, the latter did indeed have its origins in these kinds of concerns.⁸² Nonetheless, it is not clear that even data protection in its current form is best suited to dealing with Gandy’s ‘panoptic sort’. This is at least in part because, third, an individual rights approach of the kind suggested by Wachter and Mittelstadt may not be the best means for resolving the problem for two reasons. First, it requires there to be someone with sufficient standing to bring the claim, which if the damage is diffuse there may not be, and indeed those being harmed may not, as Mantelero points out, even be aware that this is the case, a concept familiar from other

⁷⁵ Above n 10.

⁷⁶ Ibid at 88.

⁷⁷ Ibid at 121, citing N Purtova, ‘The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law’ (2018) 10 *Innovation & Tech* 40.

⁷⁸ See further Ezrachi, ‘Sponge’ (n 41).

⁷⁹ K Lenk, ‘Information technology and society’ in G Friedrichs and A Schaff (eds) *Microelectronics and Society: For Better or Worse* (Pergamon Press 1982), cited in O Gandy, *The Panoptic Sort: A Political Economy of Personal Information* (OUP 2021) Ch 2 n 155.

⁸⁰ Gandy, *ibid*, at 15–16.

⁸¹ They are, for example, distinct rights in the EU Charter of Fundamental Rights, see Articles 7 and 8.

⁸² Below n 117 and surrounding text.

contexts such as those dealing with workers' and consumers' rights.⁸³ And second, Viljoen points out that if we focus on individual rights we lose sight of the social, relational aspects of data and what she calls the 'supraindividual interests' to which it can give rise. 'Properly representing and adjudicating among those interests', she argues, 'necessitates far more public and collective (i.e. democratic) forms of governing data protection. Individualist data-subject rights cannot represent, let alone address, these population-level effects.'⁸⁴

My suggestion, therefore, is that we should change our approach and rather than looking at how we might use private rights, we should instead, or at least in addition, examine the potential offered by a public wrongs approach, focusing on the decision-maker's abuse of its power. Now of course there is, even within public law, a discussion over the extent to which public law focuses on private rights as opposed to public wrongs. It is well known that Sedley J in *ex p Dixon*⁸⁵ stated that public law is about public wrongs not private rights,⁸⁶ but we also know that writers such as Taggart⁸⁷ and Varuhas⁸⁸ have suggested that it might not be so simple. For my purposes here it is not necessary for us to enter those debates. The very fact that public law is an area used to considering and entertaining both those perspectives means that it is very well set up to play exactly the role that Viljoen and Mantelero suggest is necessary. This approach also puts the focus more directly on what we really want, which is the ability to harness the benefits of the decision-making process without enabling the capacity for abuse of power and systemic damage; to have the ability to balance the need of the decision-maker to use ADM for its own purposes without interference, against the need for compliance with a minimum set of rules to prevent abuse of power on the part of the decision maker.

A. *Using the Public Law Toolkit to Inform Future Regulation*

So how exactly would this work? The first option would be to use the public law toolkit to inform the shape of any future regulation of this

⁸³ A Mantelero, 'Personal data for decisional purposes in the age of analytics: From an individual to a collective dimension of data protection' (2016) 32 Computer Law & Security Review 238.

⁸⁴ S Viljoen, 'A Relational Theory of Data Governance' (2022) 131 Yale Law Journal 573 at 573.

⁸⁵ *R v Somerset County Council and ARC Southern Ltd* [1998] Env L R 111.

⁸⁶ *Ibid* at 121.

⁸⁷ M Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] NZLR 423.

⁸⁸ J Varuhas, 'Taxonomy and Public Law' in M Elliott, J Varuhas and S Wilson Stark (eds) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart 2018) 39.

area. This is a natural extension of the suggestion above that it should be used to interpret existing regulation. As outlined there, some of these principles in the public law toolkit⁸⁹ are already operating in the private context, such as the connection between notice and reasons in administrative law and the ‘meaningful information’ requirement in the GDPR or the effective requirement of vires for processing.⁹⁰ But other grounds of review can be developed for use in this context too. The requirement that decision-makers take into account all the right considerations and only the right considerations might also be a better, ‘public wrongs’ way to deal with the reasonable inference problem in a manner that also deals with the ‘supra-individual’ issues which might arise from considering the wrong factors or indeed failing to consider the right ones. And the public law rule that decision-makers should not make unreasonable or disproportionate decisions might give us another means of tackling those unreasonable inferences, as well as any negative feedback loops or other kinds of decision giving rise to supra-individual harm of the kind identified by Viljoen.⁹¹ Another great advantage of the public law toolkit is that in addition to these substantive grounds, public law is also an excellent source of inspiration on balancing the interests of the individual with those of the general public, the discretion of the decision maker and so on. This balancing approach could therefore be openly used in crafting regulation which would not just give a right to what Crawford and Schulz⁹² call algorithmic due process, but protection from algorithmic abuse of power. A further benefit of the public law approach is its potential for both ex post and ex ante application (via the ‘judge over the shoulder’).⁹³ The precise form any new regulation should take,⁹⁴ and in particular the question of whether it should be upfront as opposed to retrospective is an important question that must inevitably go beyond the scope of this paper. But it is clear that public law can provide helpful guidance in either event.

⁸⁹ Above nn 47–54 and surrounding text.

⁹⁰ See above, section 5.B: ‘Proposed use of the public law toolkit in a digital context’.

⁹¹ Above n 84. For examples of how these can already work in a public context, see above n 9.

⁹² K Crawford and S Schultz, ‘Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms’ (2014) 55 Boston College Law Review 93.

⁹³ Government Legal Department, ‘Guidance: The judge over your shoulder – a guide to good decision making’ (18 July 2016) <<https://www.gov.uk/government/publications/judge-over-your-shoulder>>.

⁹⁴ For a discussion of these issues in the policing context, see M Oswald, ‘A three-pillar approach to achieving trustworthy and accountable use of AI and emerging technology in policing in England and Wales: Lessons from the West Midlands data ethics model’ (2022) 13 European Journal of Law and Technology <<https://ejlt.org/index.php/ejlt/article/view/883>>

B. *A Common Law Supervisory Jurisdiction?*

Public law can therefore clearly be used as inspiration for regulation which has to strike a difficult balance between permitting and prohibiting certain behaviour. But could it do more than this? Could the grounds of judicial review be used directly by the courts even in the private context and even in the absence of specific regulation entitling them to do so?

Even before *Braganza* there has been a history of academic commentary in favour of the use of public law in relation to private parties. This arose from its use in a variety of well-known cases dealing with restraint of trade, such as *Nagle v Feilden*⁹⁵ and *Bradley v Jockey Club*,⁹⁶ as well as those dealing with common callings such as innkeepers and ferrymen (and one might wonder what a digital ferryman might be; a potentially wider version of the Commission's gatekeeper concept perhaps?)⁹⁷ Commentators writing from the mid-80s to 90s in support of this expansion of public law included Woolf,⁹⁸ Laws⁹⁹ and Borrie, then Director General of Fair Trade, who argued that 'the natural concern of public law to ensure the accountability of *public* bodies might usefully be complemented by further adaptation and expansion so as to ensure that powerful *private* bodies are made more accountable',¹⁰⁰ citing 'the growing acceptance of a philosophy that *all* those who wield power should be accountable and should be subject to general principles of good administration indicates possibilities for developing the role of the courts in controlling the power of *private* corporations and self-regulatory bodies.'¹⁰¹ This line of thinking was of course famously developed by Oliver in her 1997 article¹⁰² and 1999 book¹⁰³, suggesting that both public and private law shared five common values,¹⁰⁴ so that there was no difficulty with an overlap in substance between the two fields. In her view, therefore, the distinction between them was merely procedural, focusing on what was then the Order 53 public law procedure as opposed to the procedural rules of private law.

⁹⁵ *Nagle v Feilden* [1966] QB 633.

⁹⁶ *Bradley v Jockey Club* [2005] EWCA Civ 1056.

⁹⁷ See above n 32 and surrounding text.

⁹⁸ Lord Woolf, 'Public Law – private law: why the divide? – a personal view' [1986] Public Law 220.

⁹⁹ J Laws, 'Public law and employment law: abuse of power' [1997] Public Law 455.

¹⁰⁰ G Borrie, 'The regulation of public and private power' [1989] Public Law 552 at 554, emphasis in the original.

¹⁰¹ Ibid at 558, emphasis in the original.

¹⁰² D Oliver, 'Common values in public and private law and the public/private divide' [1997] Public Law 630. See also

¹⁰³ *Common values and the Public-Private Divide* (CUP 1999).

¹⁰⁴ Autonomy; dignity; respect; status and security of the weaker parties.

Just as there were those arguing that public law might be expanded to private entities, at a similar time Parkinson was arguing from the private perspective that ‘companies are able to make choices which have important social consequences: they make private decisions which have public results. It is possession of this kind of power that gives rise to a distinct need for justification, and which forms the basis for the claim that companies must be required to act in the public interest’.¹⁰⁵ His approach and suggestions for effecting this outcome focus on the development of company law, along with other techniques such as board structure, disclosure and consultation duties rather than public law directly, though of course disclosure and consultation are also to be found in public law. Support for the adoption of public law tools in a private law context also comes from Sales’ more recent article,¹⁰⁶ though his focus is on *Padfield* and coherence with the joint endeavour and proper purposes by reference to the agreement, rather than on *Wednesbury* and the imposition of any external constraints.

It is also worth noting that in Scotland, *West v Secretary of State for Scotland*¹⁰⁷ held that Judicial Review is available ‘to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument’.¹⁰⁸ ‘The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review under Rule of Court 260B as a public law remedy’.¹⁰⁹ This did not mean that the substance of English and Scots law would be completely separate, because ‘[t]here is no substantial difference between English law and Scots law as to the grounds on which the process of decision-making may be open to review. So reference may be made to English cases in order to determine whether there has been an excess or abuse of the jurisdiction, power or authority, or a failure to do what it requires’.¹¹⁰ The scope of judicial review in Scotland is not identical to that suggested here, being determined instead by the existence of a ‘tri-partite relationship, between the

¹⁰⁵ JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Clarendon Press 1995) at 10.

¹⁰⁶ P Sales, ‘Use of powers for proper purposes in private law’ (2020) *Law Quarterly Review* 384.

¹⁰⁷ *West v Secretary of State for Scotland* (1992) SC 385.

¹⁰⁸ *Ibid* at 412-3, per Lord Hope, giving the judgment of the Court.

¹⁰⁹ *Ibid* at 413, per Lord Hope.

¹¹⁰ *Ibid* at 413.

person or body to whom the jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted, and the person in respect of or for whose benefit that jurisdiction, power or authority is to be exercised,¹¹¹ whereas here the focus is not so much on setting out finite boundaries of the supervisory jurisdiction as on its aptness to balance benefits against potential abuses of what is often an imbalance of power, wherever that might arise. Nonetheless, it could be argued that cases of ADM do involve the delegation of power, and the idea of the courts policing the boundaries of vires is in keeping with the 'vires for processing' idea noted above.¹¹²

So could this work? Could the idea of a common law supervisory jurisdiction based on the toolkit of public law be given new life in the digital context? Oliver is certainly right that the distinction between public and private power in English and Welsh law is hard to track. There are typically two factors which determine the application of public law; a public law element and some kind of imbalance or monopoly of power.¹¹³ But as Lord Neuberger has pointed out in *YL*,¹¹⁴ what one regards as a public function is so inherently the product of one's own political beliefs that it cannot actually do any useful work in drawing the distinction,¹¹⁵ meaning that imbalance of power is the key consideration even in a public context. And the GDPR accepts that such an imbalance of power preventing true consent can arise even outside the public context.¹¹⁶ It is also well known, as Wachter and Mittelstadt point out, that privacy and data protection themselves stem from the idea that an individual should have the right to be left alone by the state and that the right to privacy was originally proposed as a defence mechanism against governmental surveillance,¹¹⁷ all of which suggests that public and private law are not so separate as we might think, and that the use of tools from the one context in the other is not impossible.

However, lest this be thought a bid for public law imperialism, it is important to note that, contrary to Oliver's position, even at a substantive level there must remain a distinction between public and private law

¹¹¹ Ibid. It does not extend to contractual rights and obligations or to the merits of the decision.

¹¹² Above, text before n 73.

¹¹³ See, eg *R v Panel on Takeovers and Mergers, ex p. Datafin* [1987] QB 815.

¹¹⁴ *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

¹¹⁵ Ibid at [128].

¹¹⁶ GDPR, above n 22, Recital 43.

¹¹⁷ Above n 10 at 83. See also R Mahieu, 'The Right of Access to Personal Data: A Genealogy' [2021] *Technology and Regulation* 62, s 4, "Rodotà: Access as Power Reversal".

in the sense that administrative law in its application to public authorities is applied constitutional law in a way that supervisory jurisdiction over private parties would never be. Questions of judicial competence vis-à-vis the original decision-maker would no doubt arise in both private and public contexts, and as noted above in relation to *Braganza*,¹¹⁸ public law's variability and flexibility in responding to such challenges in the public context is precisely why it would be an ideal tool to strike a similar balance in the private context. But it is evident in public law that that question of relative institutional competence is shot through with concerns about the maintenance of the separation of powers and the constitutional balance¹¹⁹ in a way that would never be applicable to a question in private law. The proposal, therefore, is not that public law itself should intrude on the private sphere, but rather that the courts could develop a common law supervisory jurisdiction in private law, akin to that developed in cases such as *Nagle, Bradley and Braganza* which makes use of the toolkit developed in public law.¹²⁰

There are, of course, arguments against this proposal. Responding to the work of Woolf, Laws, Borrie and Oliver outlined above, Williams has argued¹²¹ that their approach is uncertain and that it is not clear that it is public law's role to prevent abuse of power as opposed to the role of contract or tort. He cites Hoffman LJ (as he then was) in *Aga Khan*¹²² to the effect that it is improper to patch up the remedies available against domestic bodies by pretending that they are organs of government, and notes that public law remedies such as declarations and injunctions may be at once too weak or too strong for use in a private context.

But there are responses to each of these points. First, in response to the challenge of uncertainty, the very fact that private law would be drawing on an existing toolkit in public law actually has the potential to *reduce* the level of uncertainty. The point is to avoid reinventing the

¹¹⁸ Above n 55, particularly at 57 and surrounding text.

¹¹⁹ See, eg *R v Secretary of State ex p FBU* [1995] 2 All ER 244; *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.

¹²⁰ Note also a discussion over the potential existence of a public/private divide *within* judicial review in Scotland, on which see *Davidson v Scottish Ministers (No1)* [2005] UKHL 74, 2006 SC (HL) 41 criticised by A McHarg, 'Public Law, Private Law and the Distinctiveness of Scots Judicial Review' (*UK Constitutional Law Blog*, 20 January 2012) <<https://ukconstitutionallaw.org/2012/01/20/aileen-mcharg-public-law-private-law-and-the-distinctiveness-of-scots-judicial-review/>> accessed 20 September 2022; though contrast S Thomson, 'The doctrinal core of the supervisory jurisdiction of the Court of Session' [2016] Public Law 670.

¹²¹ A Williams, 'Judicial review and monopoly power: some sceptical thoughts' (2017) Law Quarterly Review 133.

¹²² *R v Disciplinary Committee of the Jockey Club, ex p. Aga Khan* [1993] 1 WLR 909

wheel by creating new concepts in private law when public law may already hold the necessary answers. Public law must in any event provide sufficient certainty to public authorities to act as an effective ‘judge over the shoulder’¹²³ and this certainty can then be carried over into the private context. Second, in response to the argument that this is not necessarily the role of public law as opposed to that of contract or tort, it is important to recall that my argument is that the *tools* of public law, not public law itself should be deployed. These public law tools are specifically designed to control abuses of power in decision-making, making them very well suited to this area, as demonstrated by their close proximity to existing regulation. It is also worth noting that contract and tort share the same problems of narrow standing and a limited ability to deal with supra-individual interests as well as the fact that many of their rules can be excluded by contract, all of which make them less well suited to this role than a toolkit focused on public wrongs. There is, therefore, contrary to Williams’ more general concerns, no suggestion in my argument that we should pretend private entities using ADM are somehow organs of government; my proposal lies entirely within private law. And finally, while it may in some instances be the case that public law remedies might be too weak or too strong for the private context, it is worth noting that in Scots law the remedies of advocacy, suspension and reduction are applicable in both public and private law.¹²⁴ Certainly there may be occasions where what English lawyers regard as public law remedies may be apt, and they may certainly be better than no remedy at all where that is currently the alternative.

7. Conclusion

In conclusion, therefore, there may well be some cases where of course such control would be better imposed formally, via Parliament, through regulation, drawing on the principles of public law as a blueprint. This would also deal with concerns of uncertainty over when the rules would arise and give the opportunity for the creation of specifically tailored remedies if declarations and injunctions are indeed thought to be too blunt. It is well known that in the private sphere more generally there are specific regulations to address the imbalance for consumers and in some instances employment, and we could thus simply add the algorithmic

¹²³ Above n 93.

¹²⁴ See further Thomson (n 113).

imbalance to these as Mantelero suggests.¹²⁵ But equally there are advantages to the common law approach too. It is capable of providing individual redress, but also of balancing this against a need to consider the public interest, and defer where appropriate to the expertise of the original decision-maker. This would work well alongside regulators' concerns to strike the right balance between effective regulation and chilling effects of overregulation. When the law does intervene, public law takes an approach that can adopt both a private rights and a public wrongs perspective, focusing on both individual and supra-individual harms. And it is a bottom-up approach, not a top-down regulatory one, meaning that it is not subject to regulatory prioritization. Of course, resourcing is still an issue and as with public law more generally, litigants would be reliant on charities and NGOs to help fund and organise litigation, but such groups do exist.

In any event, therefore, whether through regulation or the common law, the tools we have developed to deal with fairness, accuracy, legality and transparency of decision-making in a public context can and should operate as a blueprint for controlling decision-making in a private context, as both contexts navigate the same transition from human, adjudicative decision-making to engineered, decision making by statistical inference.

¹²⁵ Above n 78.