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Section 6 of the Human Rights Act 1998: The Meaning of 'Public Authority'

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03 MAR 2009



Acknowledgments

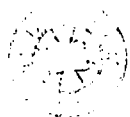
I would like to thank **Chris Knight**, **Hélène Tyrrell** and **Andrew Williams** for incisive and useful comments on earlier drafts of this work. I am extremely grateful for their time and feel privileged to have had access to such fine legal minds.

I am grateful, too, to **Andrew Hayward** and **Jessica Uguccioni** for spirited discussion over undrinkable coffee in the Law School at Durham, and to **Professor Gavin Phillipson** and **Professor Ian Leigh** for their extensive guidance throughout the year. Particular thanks go to Gavin Phillipson for his encouragement and advice during the preparation of '*YL v Birmingham City Council: Contracting out and "functions of a public nature"*' [2008] EHRLR 524, various arguments from which feature throughout the work.

Finally, I would like to thank my parents, who have guarded my sanity as best they could through their seemingly unfaltering willingness to indulge my research-related conversation over the past twelve months.

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1.

Introduction

The only bodies directly amenable to European Convention¹ challenges under the Human Rights Act 1998 are public authorities.² The three species are courts and tribunals,³ ‘core’ public authorities and ‘hybrid’ public authorities, the latter being private persons who perform ‘functions of a public nature’ and a particular, public, act.⁴ The courts have grappled to disappointing effect with the meaning of the public authority provisions since the HRA’s entry into force. In particular, they have attracted concentrated and sustained criticism for their restrictive treatment of ‘functions of a public nature’, which treatment has left the law ‘out of step with reality’ by excluding an overwhelming majority of private providers from the scope of s 6(3)(b) when providing public services on behalf of local and central government.⁵ In March 2007, the Joint Committee on Human Rights adopted its predecessor’s observations on the ‘highly problematic’ resultant human rights implications, particularly for the elderly and infirm recipients of such services,⁶ declaring it ‘a matter of some urgency to consider what action is

¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR).

² Human Rights Act 1998 (HRA), s 6(1).

³ *Ibid.*, s 6(3)(a).

⁴ *Ibid.*, ss 6(3)(b) and 6(5).

⁵ The Joint Committee on Human Rights’ Ninth Report of Session 2006-07, ‘The Meaning of Public Authority under the Human Rights Act’ HL (2006-07) 77, HC (2006-07) 410 [4].

⁶ *Ibid.*, [3], affirming the Seventh Report of Session, ‘The Meaning of Public Authority under the Human Rights Act’ HL (2003-04) 39, HC (2003-04) 382.

necessary to bring about a solution.’⁷ In June of that year however, a bare majority of the House of Lords reaffirmed the restrictive approach in *YL v Birmingham City Council* by ruling that a private provider of care and accommodation acting on behalf of a local authority was not exercising ‘functions of a public nature’ under s 6(3)(b).⁸ The Human Rights Act 1998 (Meaning of Public Function) Bill,⁹ currently before the House of Commons and due for Second Reading on 17 October 2008, was introduced by the Joint Committee’s Chairman to ‘reinstate unambiguously the wide interpretation of the term “public function” [*sic.*] that was understood to be the meaning... when the Act was passed’.¹⁰ It is hoped that Parliament will do so in a convincing, coherent and workable fashion.

In the meantime however, the Health and Social Care Act 2008 (HSCA) received the Royal Assent on 21 July 2008. Section 145(1), not yet in force, aims to address the immediate care home problem:

‘A person (“P”) who provides accommodation, together with nursing or personal care, in a care home for an individual under arrangements made with P under... [*inter alia*, ss 21 and 26 of the National Assistance Act 1948¹¹] is to be taken for the purposes of subsection (3)(b) of section 6 of the Human Rights Act 1998... to be exercising a function of a public nature in doing so...’

⁷ *Ibid.*, [11].

⁸ [2007] UKHL 27, [2008] 1 AC 95. The Joint Committee on Human Rights supported the minority approach in its Eighteenth Report of Session 2006-07, ‘The Human Rights of Older People in Healthcare’ HL (2006-07) 156-I, HC (2006-07) 378-I [159].

⁹ Human Rights Act 1998 (Meaning of Public Function) HC Bill (2007-2008) [45].

¹⁰ Hansard HC vol 469 col 739 (18 December 2007) (Mr Andrew Dismore MP).

¹¹ HSCA, s 145(2)(a).

The HSCA is not a panacea. Section 145(1) applies only to care homes and not to other private providers of central and local government services; the Joint Committee's Chairman, whilst welcoming the 'interim solution' in the HSCA, stressed during the passage of the HSCA through Parliament that he would continue to pursue a more general reinterpretation of 'functions of a public nature' through the Human Rights Act 1998 (Meaning of Public Function) Bill.¹² Additionally, the HSCA does not distinguish a care home's 'private' acts from its public ones, as required by s 6(5) HRA. This is an unfortunate omission given that under s 6(5), private persons performing public functions are only required to comply with the Convention in respect of *public acts*.¹³

With these observations in mind, the thorough doctrinal analysis which follows in this thesis of the meaning of the 'public authority' and related provisions within the HRA seems timely. Despite the recent enactment of the HSCA, the thesis makes extensive and deliberate reference to the care home context for three reasons. First, s 145 HSCA is not yet the applicable law of the land. Until it enters into force, the House of Lords' ruling in *YL* remains the authoritative statement on the meaning of 'functions of a public nature' under s 6(3)(b) HRA in that context. Second, the judicial *dicta* in care home cases often apply more widely to other instances of contracting out, and wider still to the general scope of s 6(3)(b). It is therefore difficult to try to conduct a searching analysis of the meaning of 'public authority' in isolation from the care home context. Third, s 145 HSCA, even when in force, will not without more have clearly overruled the result in *YL* that private care home providers are not hybrid public authorities.

¹² Hansard HC vol 472 col 47 (18 February 2008) (Mr Andrew Dismore MP).

¹³ HRA, s 6(5): 'In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.'

The HSCA's failure to address the application of s 6(5) is likely to preserve the controversy over the scope of the public authority provisions in the care home context by igniting an alternative and equally intense debate on the distinction between 'public' and 'private' acts. Chapters 3 and 5 illustrate the difficulties which might confront care home users seeking to deploy their Convention rights against service providers without a direct action under s 6(3)(b); their findings are pertinent, lest judges instinctively opposed to the application of Convention rights in the private sphere attempt to exploit the uncertainty surrounding s 6(5) in order to cast the hybrid public authority net narrowly.

I proffer an original and expanded 'two-strand' approach to the hybrid public authority provisions in Chapter 6. First, however, I challenge three traditional assumptions concerning the hybrid public authority concept. The first is that the oft-neglected 'core' public authority concept plays little or no part in the interpretation of 'functions of a public nature' under s 6(3)(b). Chapter 4 demonstrates in the course of its lengthy analysis that the essential distinction between core public authorities and private persons rests upon that between selflessness on the one hand, and selfishness on the other. Not only does this finding represent a significant first principle from which to infer the meaning of 'functions of a public nature' under s 6(3)(b), but its reflection in Strasbourg jurisprudence concerning 'state' and 'citizen' also aids in the deconstruction of the second traditional assumption, namely that Strasbourg jurisprudence serves as a relevant interpretative aid to s 6(3)(b). As Chapter 5 shows, in its current form, Strasbourg jurisprudence evinces no doctrine of hybridity and is relevant only to the interpretation of the core public authority concept. This in turn

counters the third assumption, namely that hybrid public authorities are incapable of relying on their own Convention rights when performing ‘functions of a public nature’.

Before proceeding with the analysis however, I consider two preliminary issues. The first is the effect of the duties to take into account Strasbourg jurisprudence under s 2 HRA, and to interpret legislation as far as possible in a Convention-friendly manner under s 3. Chapter 2 questions academic commentators who perceive a general warrant through s 2 to expand on the level of protection available in Strasbourg, but notes due to Strasbourg’s irrelevance to s 6(3)(b) that this conclusion would bear only upon the core public authority concept. Regarding s 3 HRA, Chapter 2 doubts that s 3 could lend *direct* support to the argument that ‘functions of a public nature’ should be read more expansively. However, Chapter 6 observes that s 3 *could* apply so as to preserve the Convention rights of hybrid public authorities, weakening the arguments in favour of interpreting s 6(3)(b) narrowly.

The second preliminary issue is the extent to which Convention rights can already be applied domestically so as to alter the legal relationships between private individuals. ‘Horizontal effect’, as it is known, can occur through the courts’ duties as public authorities to act compatibly with the ECHR when developing the common law, or through the injunction in s 3 – which draws no distinction between disputes involving a public authority and those involving only private persons – to interpret legislation compatibly with the Convention. Chapter 3 argues that the first form of horizontal effect, properly understood,

requires the courts only to apply the *values* underlying the Convention rights rather than the rights themselves when developing the common law. Chapter 3 then applies these findings, in conjunction with the courts' current treatment of s 3 HRA, to *YL's* care home context in order to illustrate the difficulties which recipients of contracted out services might face when trying to vindicate their rights against service providers without a direct action under s 6(3)(b).

Chapter 7 draws together the main strands to the analysis and concludes that the hybrid public authority concept is a sheep in wolf's clothing when analysed against the framework of the HRA and ECHR. All ss 6(3)(b) and 6(5) would appear to do is to allow a private complainant the opportunity to air his grievance in court against a private defendant exercising 'functions of a public nature' and performing a particular, public act. When in court however, the litigants remain private individuals and the defendant hybrid public authority retains the ability to utilise the indirect horizontal effect of the Convention by deploying its rights against the court as any other private person could. Section 6(3)(b) is not a provision whose application to contracted out service providers the judiciary should fear.

2.

The Effect of Sections 2 and 3 HRA

Before conducting a detailed analysis of the term ‘public authority’ within the HRA, it is necessary to consider the preliminary issues of how ss 2 and 3 might affect its width. Both ss 2 and 3 are capable at first sight of affecting the ordinary meaning of the public authority provisions by injecting relevant Strasbourg jurisprudence for consideration from abroad (s 2) and by requiring a Convention-compatible reading of domestic legislation as far as possible (s 3). It is argued that whilst s 2 may dictate to some extent the meaning of the core public authority concept (since it is not clear from s 2 that a general warrant exists to extend the level of protection provided for by Strasbourg), neither provision can be deployed to manipulate the meaning of the term ‘functions of a public nature’ within s 6(3)(b) and thereby widen – or narrow – the category of hybrid public authorities beyond the boundaries set by an interpretation using ordinary principles of statutory construction. Each of ss 2 and 3 are analysed in turn.

A. TAKING STRASBOURG JURISPRUDENCE INTO ACCOUNT

Section 2(1) HRA provides that ‘A court or tribunal determining a question which has arisen in connection with a Convention right *must take into account* any... [Strasbourg jurisprudence] whenever made or given, so far as... is

relevant'.¹⁴ Senior judges appear to have treated s 2(1) largely as a duty to *follow* Strasbourg jurisprudence,¹⁵ even though this does not on its face appear to be what s 2(1) requires. This approach has generated criticism notably from Masterman,¹⁶ Wicks¹⁷ and Lewis,¹⁸ who propose alternative solutions such as treating Strasbourg jurisprudence as persuasive rather than binding authority¹⁹ or taking into account broad Strasbourg *principles* rather than jurisprudence as such.²⁰ These commentators' criticisms contain two distinct threads. The first thread I refer to as 'generic' criticisms, which relate to the undesirability in given circumstances of domestic courts binding themselves to particular Strasbourg rulings. An example would be that states are only bound in Strasbourg to abide by rulings to which they are parties and that certain rulings may therefore be unsuitable for other states to follow if, for instance, they rely on margins of appreciation not designed for those states.²¹ A further example of generic criticism is that a Strasbourg ruling's age can sometimes make it a questionable authority to apply.²² Hence, domestic courts may decline to follow such rulings and, indirectly, expand on Strasbourg protection in these circumstances.

¹⁴ Emphasis added.

¹⁵ See e.g. *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 [26] (Lord Slynn), cited with approval in *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 [18] (Lord Bingham); *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 2 WLR 781 [37] (Lord Bingham).

¹⁶ R. Masterman, 'Section 2(1) of the Human Rights Act 1998: binding domestic courts to Strasbourg?' [2004] PL 725.

¹⁷ E. Wicks, 'Taking Account Of Strasbourg? The British Judiciary's Approach To Interpreting Convention Rights' (2005) 11(3) EPL 405.

¹⁸ J. Lewis, 'The European ceiling on human rights' [2007] PL 720.

¹⁹ Masterman (fn 16) 736.

²⁰ *Ibid.*, 735. See also Lewis (fn 18) 747.

²¹ Masterman (fn 16) 728-730. For a fuller account, see Wicks (fn 17) 406-407 and 414 and R. Clayton, 'The Human Rights Act six years on: where are we now?' [2007] EHRLR 11, 18-19.

²² Wicks (*ibid.*) 408-409.

The second and more implicit ‘expansionist’ thread to the commentators’ criticisms argues that domestic courts should not bind themselves to Strasbourg jurisprudence under s 2 because it fetters their apparently *general* discretion to depart from Convention jurisprudence by offering greater protection to Convention rights than Strasbourg would allow for.²³

A detailed critique of the first thread is beyond the scope of this chapter, partly due to lack of space and partly because it is only the second thread which relates *directly* to the scope of Convention protection and hence to the width of the definition of ‘public authorities’ against whom Convention rights can be domestically enforced. Additionally, the thrust of the ‘generic’ criticism is that there will be individual circumstances where it is inappropriate to follow Strasbourg rulings. This is a sensible proposition, and one with which domestic courts seem to agree by reserving situations of ‘good reason’ which allow them to depart from Strasbourg rulings despite an approach that otherwise closely follows that jurisprudence.²⁴ Although the precise content and boundaries of ‘good reason’ are unclear, they could include a decision by Strasbourg ‘fundamentally at odds with the separation of powers under the British constitution’²⁵ or, as Lewis observes, legally erroneous or unclear and outdated Strasbourg jurisprudence.²⁶ Such circumstances, I suggest, are adequately explicable by reference to Parliament’s intent: when reading together the court’s

²³ See Wicks (*ibid.*); Masterman (fn 16) 725-726; S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell, London 2000) 20.

²⁴ *Anderson* (fn 15) [18] (Lord Bingham); *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653 [44] (Lord Slynn).

²⁵ *Alconbury* (fn 15) [76] (Lord Hoffmann).

²⁶ Lewis (fn 18) 730-731, citing *R v Lyons (No. 3)* [2002] UKHL 44, [2003] 1 AC 976 and *Hansard* HL vol 583 col 514 (18 November 1997) (Lord Irvine of Lairg). See further R. Masterman, ‘Aspiration or foundation? The status of the Strasbourg jurisprudence and the “Convention rights” in domestic law’ in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge 2007) 72.

duties to act compatibly with the Convention and to take Convention jurisprudence into account, it is arguable if not obvious that Parliament would not intend such jurisprudence to be followed – even at the risk of denying a domestic Convention remedy – if it emasculated existing constitutional principle such as the separation of powers or was legally erroneous or temporally ‘stale’.²⁷

Hence, I wish to focus on the second thread. Although space does preclude a full analysis of the issue,²⁸ the second thread, in my opinion, is not obviously correct in contending that domestic courts possess a *general* warrant under s 2 to expand on the level of Convention protection that Strasbourg would give. In *N v Secretary of State for the Home Department*,²⁹ Lord Hope (with whom Lords Nicholls, Walker and Brown agreed) stated that:

‘[Allowing the applicant’s appeal] would amount to an extension of the... [Strasbourg jurisprudence]. As I said at the start of this opinion, it is not open to the national court to extend the scope of the Convention in this way.’³⁰

Expansionists criticise this approach, highlighting s 2(1)’s non-binding wording (‘take into account’) and the government’s views during the passage of the Bill through Parliament that domestic courts would be ‘free to give a lead to Europe

²⁷ *Osman v United Kingdom* (App no 23452/94) (2000) 29 EHRR 245 might be regarded by domestic courts as a legally erroneous judgment: Lord Hoffmann, ‘Human Rights and the House of Lords’ (1999) 62 MLR 159, 162. *McCann v United Kingdom* (App no 19009/04) [2008] BLGR 474 may be another: *Doherty v Birmingham City Council* [2008] UKHL 57, [2008] 3 WLR 636 [20] (Lord Hope) and [82] (Lord Scott).

²⁸ As Wicks (fn 17) observes, the true meaning of s 2 relates to the more complex concepts of public international law, such as the status and appropriateness of each of the doctrines of monism and dualism in English law: 412-413.

²⁹ [2005] UKHL 31, [2005] 2 AC 296.

³⁰ *Ibid.*, [52]. See also [71] (Baroness Hale).

as well as be led.’³¹ In response, it is unclear that, in the government’s eyes, ‘giving a lead’ to Strasbourg necessarily meant a *general* ability to expand on the scope of protection for which Strasbourg would allow. The example which Lord Irvine gave of domestic courts appropriately ‘giving a lead’ to Strasbourg was of an instance ‘where there has been no precise ruling on the matter and a commission opinion which does so has not taken into account subsequent Strasbourg court case law.’³² Additionally, the scheme of the HRA as a whole seems to seek only to guarantee *compatibility* with the Convention rather than additional protection beyond what Strasbourg would give.³³ Although Lewis would attempt to counter this by arguing that the differing schemes of the ECHR and HRA could indicate a different and more expansive reading of ‘Convention rights’ under the HRA,³⁴ Lewis’ ‘discovery’ of the HRA’s intention to develop a divergent and expanded set of rights is questionable. An expanded set of domestic rights risks undermining Parliament’s basic intention to make Convention rights domestically enforceable, since a more extensive reading of ‘Convention rights’ would render it less likely that courts could read legislation Convention-compatibly under s 3 HRA and more likely that they would issue a declaration of incompatibility under s 4.³⁵ Moreover, a divergent domestic

³¹ Masterman (fn 16) 729, citing Hansard HL vol 583 col 514 (18 November 1997) (Lord Irvine of Lairg). See also Grosz, Beatson and Duffy (fn 23) 20 and Wicks (fn 17) 409.

³² Hansard (*ibid.*) (Lord Irvine of Lairg). See further Hansard HL vol 584 col 1269 (19 January 1998) (Lord Lester of Herne Hill).

³³ This is apparent from the text of ss 3(1), 4(2), 10(1), 6(1) and 19(1). Masterman argues that ‘Equal attention must be paid to the aims of... [the Convention]’ in order to infer *principles* such as the need for national authorities ‘to further realise human rights and fundamental freedoms’: R. Masterman, ‘Taking the Strasbourg jurisprudence into account: developing a “municipal law of human rights” under the Human Rights Act’ (2005) 54 ICLQ 907, 920 and 912 (emphasis added). This is attractive and would circumvent the obstacle of the HRA’s focus on *compatibility* but, I suggest, risks diverting the courts’ attention – at the expense of Parliament’s obvious intention – away from *judgments, decisions and opinions* of the Strasbourg organs to which s 2 instructs the courts to have regard.

³⁴ Lewis (fn 18) 724-725.

³⁵ Cf Phillipson (fn 50 and fn 53), whose theory of self-reflection (see Part B below) would produce a maximal reading of the words ‘so far as it is possible’ under s 3, thus rendering Lewis’

meaning of ‘Convention rights’ would deprive Strasbourg of a useful dialogue with national courts which sees those courts giving a reasoned and thorough exposition of the Convention’s requirements from which Strasbourg can then draw.³⁶ The efforts of the domestic courts are of far less use if, as Lewis contends, their analytical exercises relate more to constitutionally idiosyncratic ‘municipal rights’ than the Convention itself.

Impact on the ‘Public Authority’ Provisions

Given the above findings, this chapter treats expansionist criticisms with caution; it is not clear that courts possess a *general* warrant to expand on the level of protection offered in Strasbourg.

How does this conclusion relate to the ‘public authority’ provisions under s 6 HRA? Since the ECHR is an international treaty, only states can be liable in Strasbourg. As Quane explains, the state’s international responsibility can be engaged in two ways.³⁷ First, the organs of the state can behave in ways which breach the rights of the individual. I shall call this ‘active’ liability. Second, the state may be under a positive obligation to intervene to prevent the interference by a private individual with another private individual’s Convention rights. I shall call this ‘passive liability’. Passive liability, i.e. the law on positive

expanded meaning of ‘Convention rights’ less of a practical obstacle to the use of s 3. Space precludes a fuller analysis of the issue. However, self-reflection theory, I respectfully suggest, is not obviously correct. By producing a maximal reading of the words ‘so far as it is possible’, it appears to shrink to vanishing point *Parliament’s* role in securing rights protection. This is contrary to Parliament’s evident desire in ss 3(2) and 4 HRA to reserve a portion of this responsibility to itself.

³⁶ C. Warbrick, ‘The European Convention on Human Rights and the Human Rights Act: the view from the outside’ in Fenwick, Phillipson and Masterman (fn 26) 25, 55.

³⁷ H. Quane, ‘The Strasbourg jurisprudence and the meaning of “public authority” under the Human Rights Act’ [2006] PL 106, 108. See also *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95 [92] (Lord Mance).

obligations, is of no relevance to the identification of bodies as ‘public authorities’ under s 6. As Quane explains, *any* individual – such as a prisoner killing a cellmate – can potentially behave in a way which puts a state in breach of its positive obligations and, consequently, it would be unrealistic to render that individual a public authority.³⁸ It is clear from the active liability concept that Strasbourg has its own perception of which bodies constitute the core of the state. Additionally, Strasbourg must often decide for the purposes of Art 34 and the admissibility of claims to the European Court which bodies are ‘non-governmental’ organisations capable of bringing claims and which, by contrast, are ‘governmental’ organisations incapable of so doing.³⁹ Both situations are potentially analogous to the domestic concept of ‘public authority’ under s 6 since they both attempt to draw the basic distinction between ‘state’ and ‘private’ persons.

In my view, which will be expanded on in Chapters 4 and 5 in the context of hybrid public authorities, Strasbourg jurisprudence in its current form bears no relation to the hybrid public authority concept and is relevant only to the domestic identification of *core* public authorities under s 6(1) HRA. Therefore, the lack of a general warrant to expand on Strasbourg protection does not affect

³⁸ Quane (*ibid.*) 108. Cf *YL (ibid.)* [60] (Baroness Hale). Quane, I suggest, is correct. Since Strasbourg jurisprudence on positive obligations appears to render the state liable regardless of whether the private individual in question is performing a ‘public’ or ‘private’ act, the possibility arises, if Baroness Hale is correct, that s 6(5) HRA is Convention-incompatible by relieving defendants of liability resulting from private acts. This is because it would restrict the circumstances in which a domestic remedy could be given against Convention interferences which *would* generate a remedy in Strasbourg. See Chapter 3 on the accommodation within domestic law of passive liability jurisprudence.

³⁹ Art 34: ‘The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation... of the... Convention.’

the width of the hybrid public authority category.⁴⁰ But as regards the core public authority category, the lack of a general warrant does imply that domestic courts should not, in general, interpret the core public authority category more expansively than Strasbourg would interpret its own category of ‘state’ bodies.

As will be seen in Chapter 4, the same basic ‘public interest’ theme underlies the identification of core public authorities under s 6(1) HRA and core ‘state’ bodies in Strasbourg. This makes it unlikely, therefore, that the domestic and Strasbourg courts would diverge on their interpretation of the core of the state in practice. Against this, however, is the potential, as Chapter 4 demonstrates, for the interpretation of the core public authority concept under s 6(1) to depend at times upon principles not necessarily deriving from Strasbourg jurisprudence, such as the need under *Fewings* for public bodies to demonstrate specific legal authority for their actions,⁴¹ or the desirability following *Datafin*⁴² of including ‘adopted’ private persons within the category of core public authorities. Strasbourg jurisprudence is not yet sufficiently developed to reveal whether or not such principles are at odds with its conception of the ‘state’. Should Strasbourg jurisprudence in this area develop to reveal a disparity, domestic courts will be required to adhere to binding domestic precedent over later inconsistent Strasbourg jurisprudence.⁴³ Should no binding domestic precedent exist, the courts’ current approach to s 2 HRA would seem to require them to follow the Strasbourg jurisprudence save for ‘good reason’ as expressed in cases like

⁴⁰ Hence, this casts doubt on the majority’s approach in *YL* (fn 37) [88] (Lord Mance) and [161] (Lord Neuberger). See further Chapter 5.

⁴¹ *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513 (QB) 524 (Laws J).

⁴² *R v Panel of Take-overs and Mergers, ex p Datafin Plc* [1987] 2 WLR 699, [1987] QB 815 (CA).

⁴³ *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 WLR 570.

Anderson.⁴⁴ Whether or not domestic courts can accommodate these domestic core public authority principles within the good reason exception remains to be tested by reference to how that concept develops over time and, presumably, the extent of any disparity between the domestic principles and relevant Strasbourg jurisprudence.

In sum, it is not obvious that domestic courts possess a *general* warrant to expand on the level of Strasbourg protection. This chapter therefore favours the courts' current approach, which is in effect to follow Strasbourg jurisprudence under s 2 HRA save for 'good reason'. Domestic courts will need to bear this approach in mind when identifying core public authorities in future.

B. THE INTERPRETATIVE OBLIGATION

Section 3 HRA provides, so far as is relevant:

'(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

(2) This section...

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation...'

The duty to interpret legislation compatibly with the Convention is a comprehensive one which can involve substantial judicial re-interpretation of a provision regardless of whether or not that provision contains ambiguous

⁴⁴ *Anderson* (fn 15).

language.⁴⁵ The legislative provision in question must, however, be *prima facie* incompatible with the Convention before the interpretative obligation under s 3 begins to bite.⁴⁶

Despite recent judicial *dicta* to the effect that s 3 ‘was not intended to be used in construing the [Human Rights] Act itself’,⁴⁷ the position is not yet settled; Lord Bingham’s assertion that it was the HRA’s ‘plain’ intention not to allow s 3 to apply to other provisions of the HRA⁴⁸ is of questionable accuracy given that the Act draws no distinction itself between HRA and other legislative provisions.

Nevertheless, at first sight, it would be difficult to see how the ‘public authority’ provisions within s 6 – which seek to *protect* Convention rights by making it unlawful for such bodies to act incompatibly with the Convention – could be *prima facie* incompatible with it from the victim’s perspective.⁴⁹ However, Phillipson’s theory of self-reflection argues that s 3 can apply to itself.⁵⁰ Since s 3, seeking to ensure Convention-compliance *as far as possible* with Convention rights would also seem on its face to be nothing other than Convention-compatible, Phillipson’s theory invites closer inspection. I shall argue in this part of the chapter that this reasoning, positing a situation different from that concerning the ‘public authority’ provisions within s 6 HRA, is inapplicable to

⁴⁵ *R v A (No. 2)* [2001] UKHL 25, [2002] 1 AC 45, 68 (Lord Steyn).

⁴⁶ See e.g. *A (ibid.)* 72 and 86 (Lord Hope); *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 [24] (Lord Nicholls) and [60] (Lord Millett).

⁴⁷ *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153 [15] (Lord Bingham). Cf [246] (Lord Brown).

⁴⁸ *Ibid.*, [15].

⁴⁹ As will be seen in Chapter 6 however, it may, if interpreted so as to strip rights from hybrid public authorities, be incompatible from their perspective.

⁵⁰ G. Phillipson, ‘(Mis)-reading section 3 of the Human Rights Act’ (2003) 119 LQR 183.

them. Section 3 cannot be used to read the ‘public authority’ provisions more widely than ordinary principles of interpretation would allow for.

Self-Reflection Theory

The essence of self-reflection as argued for by Phillipson is that s 3 must apply to itself in order to widen the words ‘so far as is possible’ under that section, thus maximising the circumstances under which courts can provide a substantive remedy by reading legislation compatibly with the Convention and minimising those under which courts are forced to resort to the declaration of incompatibility under s 4.

Observing the need for *prima facie* incompatibility in a statute before s 3 can apply,⁵¹ Phillipson argues that s 3 can apply to itself for two reasons. First, he says, the need for *prima facie* incompatibility is:

‘[S]imply a practical one, designed to discourage the courts from wasting time trying to apply section 3(1) to statutes which were Convention-compliant in the first place. However, where the correct interpretation of section 3(1) *itself* is the issue, the courts are, by definition, already engaged with that provision and so cannot somehow also ignore it’.⁵²

Phillipson’s second argument is that a judge opting to issue a declaration of incompatibility under s 4 rather than providing a useful remedy by using s 3 would have ‘failed to interpret section 3(1) itself in a Convention-friendly

⁵¹ *Ibid.*, 187-188.

⁵² *Ibid.*, 187 (emphasis original).

manner, because he would have interpreted it in a way that allowed continuing violations by public authorities of the relevant Convention rights'.⁵³

Inapplicability to Section 6

It will be seen immediately that the first argument fails to apply in respect of the public authority provisions, where the 'correct interpretation' in issue is that of s 6, rather than s 3(1). The courts would not therefore already be engaged with s 3, leaving accusations of judicial time-wasting to stand. However, Phillipson's second argument – that judges would be failing to read s 3 compatibly with the Convention by allowing continuing Convention violations when resorting too quickly to s 4 – might, at first sight, also be thought to apply to the courts when considering the public authority provisions in s 6. Is a court also failing to comply with s 3's statutory injunction to read legislation (i.e. s 6) compatibly when resorting too quickly to a finding that a particular person is not a 'public authority' against whom Convention rights can be directly enforced in domestic law?

Closer analysis reveals not. First, whether or not the courts would be allowing a continuing Convention violation by a *public authority* prejudices, where s 6 is concerned, the very issue in question. Second, judicial interpretation of s 6 using ordinary principles of statutory interpretation would leave no continuing violation of the Convention anyway, since such principles already provide for the protection which Strasbourg requires. As will be seen in Chapters 4 and 5, the

⁵³ *Ibid.* Hickman has criticised this reasoning on the ground that that the Convention does 'not mandate any particular degree or method of incorporation': T. Hickman, 'Constitutional dialogue, constitutional theories and the Human Rights Act 1998' [2005] PL 306 at fn 114, a recent rebuttal to which can be found in G. Phillipson, 'Deference, Discretion, and Democracy in the Human Rights Act Era' (2007) 60 CLP 40, 62-63.

core public authority concept in s 6(1) seeks to replicate those bodies which Strasbourg would regard as 'state' bodies, and the hybrid public authority concept in s 6(3)(b) expands on this by creating a further category of hybrid public authorities – private persons exercising functions of a public nature – who are also directly amenable to Convention challenges. Moreover, as will be seen in Chapter 3, situations where Strasbourg indicates that the state is under a positive obligation to regulate private activity in order to comply with the Convention are absorbed as far as the HRA allows into the courts' development of the common law under the horizontal effect doctrine, and play no part in the interpretation of s 6's 'public authority' provisions. In short, unlike the situation of interaction between ss 3 and 4 with which Phillipson's self-reflective theory is concerned, this is not an instance where Strasbourg jurisprudence requires a remedy which is then *denied* by the courts' interpretation – using ordinary principles of statutory construction – of the public authority provisions under s 6.

C. CONCLUSIONS

As regards s 2 and the judicial duty to take Strasbourg jurisprudence into account, within the available space, it is my conclusion that expansionist criticisms of the courts' current approach do not convincingly reveal a general statutory warrant through s 2 to expand on the level of protection which Strasbourg would provide.

For the width of the term 'public authority' under s 6, the consequences are twofold. Regarding hybrid public authorities, my views as developed in Chapter

5 that Strasbourg jurisprudence does not in its current form apply to ‘functions of a public nature’ under s 6(3)(b) means that the courts, on a true reading of s 6(3)(b), should interpret the term without reference to Strasbourg jurisprudence. Section 6(3)(b) was seemingly intended as a ‘domestic’ provision *designed* to expand on the scope of Convention protection as provided by Strasbourg.

As will be seen in Chapters 4 and 5, core public authorities, as demonstrated by their institutional characteristics, are closely analogous to Strasbourg’s conception of ‘the state’ in active liability and under Art 34 ECHR. Such jurisprudence will be relevant and should be followed by domestic courts save for ‘good reason’. Therefore, they should not, in the absence of additional statutory authority, interpret the category of core public authorities more widely than Strasbourg would interpret its category of ‘state’ bodies.

As regards s 3, the interpretative obligation would not appear to generate a wider interpretation of s 6’s ‘public authority’ provisions than ordinary principles of statutory construction would allow for. Despite Phillipson’s suggestion through self-reflection theory that statutory provisions seeking to give effect to Convention rights may also be subject to s 3’s interpretative obligation, s 6, I have sought to argue, is not subject to such an obligation.

3.

Horizontal Effect

Although Convention rights are only directly enforceable ‘vertically’ through s 6 HRA against public authorities, ‘horizontal effect’ of these rights can nevertheless occur by their application in such a way as to alter the legal relationships between private individuals. There are two routes to horizontal effect in domestic law. The first is through the designation in s 6 of courts and tribunals as public authorities required to act compatibly with the Convention under the HRA,⁵⁴ which has given rise to the widespread view that courts are bound to develop the common law in a Convention-friendly fashion whether or not the dispute at hand involves a public authority. The second route is through the interpretative obligation in s 3(1) which requires, without drawing a distinction between those disputes involving a public authority and those involving only private individuals, that legislation be read Convention-compatibly as far as possible.

Aside from the first route arising directly from the meaning of ‘public authority’ under the HRA and therefore falling conveniently for discussion in a thesis on that term, there are two further reasons why it is necessary to address horizontal effect. First, as for the ‘hybrid public authority’ concept in s 6(3)(b) HRA which

⁵⁴ HRA, ss 6(1) and 6(3)(a).

seeks to subject persons exercising ‘functions of a public nature’ to human rights challenges, horizontal effect is a viable way of employing the HRA to ensure rights redress against private persons. Ascertaining the doctrine’s limits therefore helps to identify the role and purpose of the hybrid public authority concept. Second, as will be seen, common law horizontal effect allows for the accommodation in domestic law – as far as possible without intruding into Parliament’s sphere – of the Strasbourg jurisprudence on positive obligations. Finding a suitable home in domestic law for such jurisprudence bolsters the case in Chapters 4, 5 and 6 for an interpretation of the ‘public authority’ provisions without reference to such jurisprudence and, more generally, lends credence to my arguments on how domestic courts should interpret those provisions in future.

The first part of this chapter examines the technical doctrinal limits to common law horizontal effect. I intend to conduct a detailed analysis of the limits to only common law horizontal effect since the general requirements of statutory horizontal effect under s 3 are relatively settled, with academic debate focussing specifically upon the single issue of the outer limits of the term ‘so far as it is possible’.⁵⁵ By contrast, there has not yet for instance been *any* authoritative ruling on the horizontal effect requirements of s 6, indicating perhaps that space remains within the academic debate for the contribution which this chapter seeks to provide. Having sought to ascertain the doctrinal limits to common law horizontal effect, the second part then attempts to demonstrate the limits to common law and statutory horizontal effect in the widely-litigated context of

⁵⁵ For a brief overview, see the debate between D. Nicol, ‘Are the Convention rights a no-go zone for Parliament?’ [2002] PL 438 and A. Kavanagh, ‘Statutory interpretation and human rights after *Anderson*: a more contextual approach’ [2004] PL 537.

care homes. This exercise represents an effort to highlight the need for a broader reading of ‘functions of a public nature’ under s 6(3)(b) in order to ensure effective redress against service providers performing services pursuant to contracts with core public authorities.

A. THE COURTS AS PUBLIC AUTHORITIES: DEVELOPING THE COMMON LAW

Section 6(1) HRA states that ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’, before providing in s 6(3)(a) that ‘public authority’ includes ‘a court or tribunal’. Four broad views of the effect of these provisions exist. The first is that they give rise to direct horizontal effect whereby domestic courts, in order to act compatibly with the Convention, must develop the common law by creating new causes of action for rights-based challenges between private individuals.⁵⁶ The second and dichotomous view is that the provisions generate no horizontal effect at all, since the Convention rights themselves are rights which can exist only against the state and not private individuals.⁵⁷ The third and fourth views – both variants of ‘indirect horizontal effect’, where domestic courts do not create new causes of action but must nevertheless develop the common law so as to act compatibly with the Convention – lie between these extremes. The first variant, known as ‘strong indirect horizontal effect’, accepts that the courts are not required by s 6 to create new rights-based causes of action, but argues instead that in order to fulfil their

⁵⁶ W. Wade, ‘Human rights and the judiciary’ [1998] EHRLR 520 and ‘Horizons of horizontality’ (2000) 116 LQR 217; S. Pattinson and D. Beyleveld, ‘Horizontal applicability and horizontal effect’ (2002) 118 LQR 623; J. Morgan, ‘Questioning the “true effect” of the Human Rights Act’ (2002) 22 LS 259.

⁵⁷ R. Buxton, ‘The Human Rights Act and private law’ (2000) 116 LQR 48.

duty to act compatibly, the courts must ensure that all law which they apply accords with the Convention.⁵⁸ The second variant, known as ‘weak indirect horizontal effect’, argues that domestic courts are not required by s 6 to *apply* the Convention rights as under the strong model but instead that they must develop the common law consonantly with Convention *values*.⁵⁹

Due to the judiciary’s continuing failure to address the horizontal effect issue, it would be a fruitless task to try to distil a coherent impression of the judicial position from the existing case law. In *Campbell v MGN Ltd*,⁶⁰ for instance, confusion even appeared to exist within individual judgments themselves.⁶¹ The decided cases do however reveal that *some* horizontal effect exists, but that this stops short of requiring the creation of new rights-based causes of action.⁶² The polar extremes of ‘direct horizontal effect’ and ‘no horizontal effect’ therefore appear to have been judicially rejected.⁶³ These broad observations set the scene for the analysis which follows. It argues in favour of ‘weak’ rather than ‘strong’ horizontal effect as the preferable interpretation of Parliament’s intent which, in the event, the judiciary should adopt. Reference is made to direct horizontal effect where helpful to illustrate the chapter’s arguments, though I do not contend given the apparent rejection of direct horizontal effect that the courts would give it serious thought in practice.

⁵⁸ M. Hunt, ‘The “horizontal effect” of the Human Rights Act’ [1998] PL 423.

⁵⁹ G. Phillipson, ‘The Human Rights Act, “Horizontal Effect” and the Common Law: a Bang or a Whimper?’ (1999) 62 MLR 824.

⁶⁰ [2004] UKHL 22, [2004] 2 AC 457.

⁶¹ G. Phillipson, ‘Clarity postponed: horizontal effect after *Campbell*’ in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge 2007) 143, 158-165. The confusing judgments are those of Lords Hope, Nicholls and Hoffmann.

⁶² *Ibid.*, 152.

⁶³ See *Douglas v Hello!* [2001] 2 WLR 992, [2001] QB 967 (CA) on the rejection of ‘no horizontal effect’, and *Campbell* (fn 60) [132] (Baroness Hale) and *X v Y* [2004] EWCA Civ 662, [2004] ICR 1634 [54] (Mummery LJ) on the rejection of direct horizontal effect.

I make no attempt in this chapter to add to the ‘burgeoning’⁶⁴ literature by engaging exhaustively with the technical doctrinal and theoretical arguments in favour of each position on horizontal effect. Instead, I will start by supplying a much-needed analysis of the Strasbourg jurisprudence on positive obligations in order to argue that the legal community should be wary of accepting either the ‘strong indirect’ or ‘direct’ horizontal effect approaches. Weak indirect horizontal effect, it is contended, is a preferable interpretation of s 6’s requirements.

Positive Obligations

Aside from states being under negative duties to abstain from interfering with Convention rights, Strasbourg jurisprudence emphasises that they may also be under duties to take positive steps in order to ensure effective respect for a right,⁶⁵ and that such positive obligations ‘may involve the adoption of measures designed to secure [rights]... even in the sphere of the relations of individuals between themselves.’⁶⁶ Domestic courts are required to take such jurisprudence into account. The Convention jurisprudence on positive obligations and passive liability falls logically for consideration under the HRA’s ‘horizontal effect’ provisions since both Strasbourg and HRA schemes indicate a duty upon the organs of the state to regulate private activity in order to comply with the Convention.

⁶⁴ Morgan (fn 56) 260.

⁶⁵ *Marckx v Belgium* (App no 6833/74) (1979-80) 2 EHRR 330 [31].

⁶⁶ *X and Y v The Netherlands* (App no 8978/80) (1986) 8 EHRR 235 [23].

The words used in s 6(1), it is recalled, are ‘*incompatible* with a Convention right.’⁶⁷ As Phillipson observes, prior to the interpretation of s 6(1) is the issue of ‘whether there are any Convention obligations in play at all’.⁶⁸ In other words, ‘is there an obligation on the UK to provide a measure of protection for Convention rights in situations such as the one that has arisen in the litigation[?]’⁶⁹ It is to this vexed question which the chapter now turns.

Uncertainty

The question of the requirements of positive obligations comprises two issues.⁷⁰ The first is whether the state is required to regulate private activity in a given situation. If so, the second issue is the extent of that requirement, i.e. the nature of the regulation required. Strasbourg has recently stated that it ‘does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which Convention guarantees should be extended to relations between private individuals *inter se*.’⁷¹ Thus, domestic courts must attempt themselves to distil Strasbourg jurisprudence in order to resolve these issues.

Strasbourg is unhelpful regarding the first issue (*when* a duty arises), stating no more than that positive obligations ‘may’⁷² or ‘sometimes’ arise.⁷³ Moreover, Strasbourg is even unclear on why such obligations arise at all. Whereas some

⁶⁷ Emphasis added.

⁶⁸ Phillipson (fn 61) 149.

⁶⁹ *Ibid.*

⁷⁰ For a comprehensive overview in relation to specific Convention rights, see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Oxford 2004).

⁷¹ *VgT Verein gegen Tierfabriken v Switzerland* (App no 24699/94) (2002) 34 EHRR 4 [46].

⁷² *X and Y* (fn 66) [23]; *Whiteside v United Kingdom* (App no 20357/92) (1994) 18 EHRR CD 126, CD 127.

⁷³ *Plattform ‘Ärzte für das Leben’ v Austria* (App no 10126/82) (1991) 13 EHRR 204 [32].

cases emphasise the wording inherent in the individual Convention articles themselves,⁷⁴ others root the doctrine in the obligation under Art 1 to ‘secure’ the Convention’s rights and freedoms to those within the jurisdiction⁷⁵ or, as has elsewhere been observed, a combination of these and other factors such as the need to ensure an adequate remedy for Convention breaches under Art 13 and ‘the principle set out in Convention case law that protection of rights is intended to be “practical and effective” not merely theoretical’.⁷⁶

As to the second issue (*extent of the duty*), Strasbourg emphasises that states possess a wide margin of appreciation regarding the choice of the means used to secure compliance with positive obligations.⁷⁷ Although it has at times sought to delineate this margin by stating that the relevant measures adopted by the state must be ‘reasonable and appropriate’,⁷⁸ the extent of this requirement is stated in varying terms.⁷⁹ At any rate, the requirements of a positive obligation ‘will vary considerably from case to case’.⁸⁰

The result is that ‘Beyond the decided cases, it is not always easy to predict when a positive duty will be imposed by the Strasbourg institutions’ or what will be required when it is.⁸¹ When novel factual situations arise domestically and courts

⁷⁴ *Plattform (ibid.)*; *X and Y* (fn 66) [23].

⁷⁵ See e.g. *Siliadin v France* (App no 73316/01) (2006) 43 EHRR 16 [77]; *VgT* (fn 71) [45]; *Whiteside* (fn 72) CD 127.

⁷⁶ J. Wadham, H. Mountfield, A. Edmundson and C. Gallagher, *Blackstone’s Guide to the Human Rights Act 1998* (4th edn OUP, Oxford 2007) [2.44].

⁷⁷ See e.g. *Plattform* (fn 73) [34]; *X and Y* (fn 66) [24].

⁷⁸ *Plattform (ibid.)*.

⁷⁹ For instance, the Grand Chamber of the European Court in *Ilaşcu v Moldova and Russia* (App no 48787/99) (2005) 40 EHRR 46 phrased the question as ‘to what extent a *minimum* effort was nevertheless possible and whether it should have been made’: [334] (emphasis added).

⁸⁰ *Myzsk v Poland* (App no 28244/95) (1998) 26 EHRR CD 76, CD 78.

⁸¹ S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell, London 2000) 92. Clapham has sought to order the jurisprudence using his

must try to infer Strasbourg's position on an issue, three situations can be distinguished. The first is where Strasbourg jurisprudence reveals that Strasbourg would hold an opinion on the relevant issue, *and* reveals with reasonable clarity what that opinion would be. The second is where Strasbourg jurisprudence reveals that Strasbourg would hold an opinion, but does *not* reveal with reasonable clarity what that opinion would be. I shall refer to this second situation colloquially as 'haziness'. The third situation is where Strasbourg jurisprudence reveals that Strasbourg would hold no opinion at all on the relevant issue, i.e. where that issue would fall outwith the European Court's jurisdiction.

A domestic court faced with a horizontal effect situation in novel factual circumstances may be able to 'join the dots' from the decided Strasbourg cases and infer the potential position in Strasbourg were the dispute to reach the European Court. Such may be the case in the context of the right to privacy between private individuals under Art 8. This is a context upon which much of the academic literature, domestic case law and a fair amount of Strasbourg litigation have focussed and in which academics and judges alike seem to feel confident in interpreting Strasbourg's position. Indeed, following *Von Hannover v Germany*,⁸² 'it is clear beyond doubt that Article 8... requires a remedy in national law [in the event of a breach]'.⁸³ Privacy can therefore be equated with the first situation above, namely where Strasbourg jurisprudence reveals both that Strasbourg would hold an opinion *and*, with reasonable clarity, what the

'dignity' and 'democracy' analysis: A. Clapham, *Human Rights in the Private Sphere* (Oxford Monographs in International Law, OUP, Oxford 1993) 240 and Chapter 5. However, the continuing confusion on Strasbourg's part as to the basis for positive obligations renders Clapham's analysis more normatively attractive than practically helpful.

⁸² (App no 59320/00) (2005) 40 EHRR 1.

⁸³ H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (OUP, Oxford 2006) 671.

opinion would be.⁸⁴ Outwith this context however, it is possible that the general uncertainty surrounding the law on positive obligations leaves courts unable to ‘join the dots’ and rule confidently on situations other than those with identical or substantially similar facts to existing Strasbourg decisions. If so, for a domestic court facing a horizontal effect situation with novel facts, Strasbourg jurisprudence would therefore equate to the second situation above since it reveals that Strasbourg would profess *an* opinion (it does reveal *a* doctrine of positive obligations), but does not reveal with reasonable clarity what the opinion would be.⁸⁵ In this situation, the domestic court would have a choice. First, it could presume that the state would not be responsible for the relevant infringement on the international plane. Second, it could try to reach a decision by reasoning from first principles which may be found in Convention jurisprudence, such as ‘democracy’ or ‘autonomy’.⁸⁶ Third, the court could presume that the state *would* be responsible on the international plane. The court, logically, cannot sidestep the issue and must choose one of these: the jurisprudence in this situation does reveal that Strasbourg would profess *an* opinion were the matter to come before it. Although none of the above options are ideal since all involve a degree of speculation or presumption in an uncertain area of law, domestic courts should not, I suggest, prefer either of the first two options. The first option amounts to the presumption that the European Court would not intend a remedy to be given beyond the highly fact-specific situations

⁸⁴ See A. Clapham, *Human Rights Obligations of Non-State Actors* (Collected Courses of the Academy of European Law, OUP, Oxford 2006) 400, and the recent ruling in *Murray v Express Newspapers Plc* [2008] EWCA Civ 446, [2008] ECDR 12 [60] (Sir Anthony Clarke MR).

⁸⁵ There are, of course, situations where the text of the right makes it harder if not impossible for positive obligations to attach: Art 3 of the First Protocol, guaranteeing the right to free elections, would be an example.

⁸⁶ Democracy, at least, is a guiding principle of Convention interpretation: R. Clayton and H. Tomlinson, *The Law of Human Rights* (OUP, Oxford 2000) [6.21]-[6.22].

on which it has been given the chance to rule; this is impossible to sustain in practice when the inherently haphazard nature of litigation will continue to present novel scenarios in which Strasbourg would doubtless wish to intervene. The second option of reasoning from first principles *may* produce a result with which Strasbourg would agree. Similarly however, it may not: this is an area of law, it is recalled, where Strasbourg jurisprudence is sufficiently hazy to prevent domestic courts from inferring with reasonable clarity what Strasbourg's position would be. Any first principles which a domestic court purported to identify could be tenuously helpful at best since if those principles *did* enable domestic courts to infer with reasonable clarity what Strasbourg's position would be, this area of law would not be one of 'haziness' at all. The third option of presuming that the state *would* be responsible, I suggest, is preferable.

Admittedly, this does outstrip Strasbourg's view that positive obligations to regulate private activity *may* exist and that the measures used to fulfil the obligation lie principally within the state's margin of appreciation. Parliament, however, is nevertheless likely to have intended such a result, because the alternative options would involve domestic courts adopting a position which automatically risked allowing Convention breaches potentially actionable in Strasbourg to go domestically unregulated.

Juxtaposing Positive Obligations and Horizontal Effect

In order to appreciate the significance of the above analysis, it is necessary briefly to explore the concepts of direct and strong indirect horizontal effect. Wade advocates direct horizontal effect, whereby domestic courts create new

rights-based causes of action between private individuals. According to him, s 6's designation of courts as public authorities bound to act compatibly with the Convention implies that 'if a Convention right is relevant, a court deciding a case must decide in accordance with it, no less in a case between private parties than... against a public authority.'⁸⁷

Drawing primarily on s 6(1)'s evident desire to subject only public authorities to the duty to act compatibly with the Convention, Hunt infers instead that 'there are persons who are *not* bound to act compatibly with the Convention at all'.⁸⁸ In Hunt's view, 'private relationships are left undisturbed insofar as they are not regulated by law, but once law becomes involved in regulating those relationships, they have lost their truly private nature... [The state is bound to act] in a way which upholds and protects the rights.'⁸⁹ Hence, he concludes, the Convention applies through s 6 to all law⁹⁰ whilst 'falling short of immediately conferring new causes of action.'⁹¹ Baroness Hale appeared to endorse this position in *Campbell*.⁹²

Nevertheless, the distinction between situations concerning existing causes of action and those where none exist is open to objection for generating arbitrary practical results, especially since the content of that cause of action is subsequently ignored by the court when it applies the relevant Convention right

⁸⁷ Wade, 'Horizons of horizontality' (fn 56) 217-218.

⁸⁸ Hunt (fn 58) 438.

⁸⁹ *Ibid.*, 434-435.

⁹⁰ *Ibid.*, 442.

⁹¹ *Ibid.*, 424.

⁹² *Campbell* (fn 60) [132]. For commentary, see Phillipson (fn 61) 158.

pursuant to its duty under ss 6(1) and 6(3)(a).⁹³ As Morgan explains, ‘The cause of action becomes merely an empty shell, into which any Convention right can be poured.’⁹⁴

As Phillipson explains, a court adopting a Wade or Hunt approach could not allow non-Convention factors such as existing common law principles to justify overriding a Convention right, since it would not be acting compatibly with the *Convention* if it did.⁹⁵ Advocating weak indirect horizontal effect, Phillipson observes that Wade’s approach (and, seemingly, also that of Hunt in circumstances where an underlying cause of action exists) would involve subjecting private law to a ‘full-scale takeover by the Convention... in a particularly drastic way that would threaten whole swathes of the common law with replacement by private HRA actions.’⁹⁶

It is only when applying the earlier analysis on positive obligations that the full extent of this takeover becomes clear. Given the uncertainty surrounding the law on positive obligations, it is at least arguable that a domestic court obliged to ‘act compatibly’ with the Convention must presume when faced with a novel private dispute that a positive obligation to regulate private activity exists for *any* right and, due to the difficulty of ascertaining the limits of the margin of appreciation, that such a duty requires the regulation for which the claimant contends in *all* circumstances. If ‘acting’ compatibly as under the Wade and Hunt approaches means *applying* the Convention rights, the takeover would operate to maximum

⁹³ Morgan (fn 56) 271.

⁹⁴ *Ibid.*

⁹⁵ Phillipson (fn 61) 153.

⁹⁶ *Ibid.*, 152; Phillipson (fn 59) 824.

effect in domestic law. Whereas commentators advocating direct horizontal effect rightly link their arguments to the HRA's need to ensure that remedies *available in Strasbourg* are provided in domestic law,⁹⁷ their omission fully to consider the potential domestic effects of the uncertainty in the Strasbourg jurisprudence seems to result in the collective presumption that such a disruptive result would not materialise. Even Morgan, advocating direct horizontal effect, flippantly remarks that the application of Convention rights between third parties in every case 'would entail deep incursions by the law into the heart of the private sphere, to a degree which no one would find acceptable.'⁹⁸ Deep incursions, I have sought to argue, may necessarily flow from anything stronger than weak indirect horizontal effect.

Defending Weak Indirect Horizontal Effect

It follows from the foregoing analysis that once the nature of Strasbourg jurisprudence on positive obligations is considered, the full extent of the potential for disruption which the Wade and Hunt approaches may have on existing common law principles becomes apparent. Consequently, weak indirect horizontal effect, I suggest, is a preferable reading of s 6 HRA's provisions. Weak indirect effect appeared to receive the support of Lord Nicholls in *Campbell*.⁹⁹ However, typical of the confusion in this area, his Lordship also seemed in the same judgment to endorse strong indirect horizontal effect, having earlier opined a third view that it was unnecessary to decide whether s 6(1)

⁹⁷ Wade, 'Human rights and the judiciary' (fn 56) 525; Pattinson and Beyleveld (fn 56) 640-641; Morgan (fn 56) 259.

⁹⁸ *Ibid.*, 267.

⁹⁹ *Campbell* (fn 60) [17].

obliged or prevented the court from giving domestic effect to Art 8 ECHR.¹⁰⁰ Having argued from the above analysis of the jurisprudence surrounding positive obligations that weak indirect effect would be a preferable reading of s 6(1)'s requirements, this chapter now sets about defending it.

Advocating direct horizontal effect, Morgan invokes three principal criticisms against the weak model:¹⁰¹ first, the requirements of an approach necessitating common law 'development' as distinct from the creation of new causes of action are imprecise; second, the approach results '*at least sometimes*'¹⁰² in a failure to protect rights which (third) should be discounted in view of s 3 HRA's requirement that legislation be construed Convention-compatibly.

Regarding the first criticism, it is difficult to see why such a blurred line exists between 'development' and 'creation of new causes of action'. The concept of 'values' as distinct from 'rights' may generate some confusion over what, exactly, the court is striving to develop the common law consonantly with, but even this can be clarified. As Phillipson's analysis reveals, the concept may be more amorphous than that of rights but essentially relates to the '*values* represented by those rights.'¹⁰³ 'Privacy' would therefore seem to underlie Art 8, 'the sanctity of life' Art 2, 'expression' Art 10 and so on. A values-based approach requires the court not to *apply* a right but to *consider* and *weigh* its underlying values against countervailing factors which, because courts – unlike

¹⁰⁰ Phillipson (fn 61) 163.

¹⁰¹ Morgan (fn 56) 271-273.

¹⁰² *Ibid.*, 273 (emphasis original).

¹⁰³ Phillipson (fn 59) 830 (emphasis original).

under the strong indirect or direct approaches – need not treat the right as a *rule*, may derive from outwith the text of the right itself.¹⁰⁴

As for Morgan's second criticism, the fact that the interpretation of a HRA provision leaves rights unprotected does not mean that Parliament could not have intended that interpretation.¹⁰⁵ However, the greater the potential for rights to be left unprotected, the greater the likelihood that Parliament intended something else in an Act designed to give 'further effect' to Convention rights.¹⁰⁶ Although – it is true – under the weak indirect horizontal effect approach the court would not be obliged to *apply* the right in question, they would function as 'mandatory principles' such that the courts would be 'obliged to have regard to the values represented by the rights in their development and application of the common law.'¹⁰⁷ Since these values as mandatory principles rather than *rules* may be displaced by non-Convention factors, a balancing exercise ensues between the desirability of upholding the value on the one hand and non-Convention factors such as existing common law principles on the other. This chapter earlier argued that due to the uncertainty inherent in the Strasbourg jurisprudence on positive obligations, domestic courts should presume in factual circumstances not identical or closely analogous to cases already decided in Strasbourg that Strasbourg would hold the state responsible. In other words, the line should be taken to be drawn on the side of responsibility. But this is a different issue to the *brightness* with which that line is drawn. Whereas in 'haziness' cases domestic courts should *presume* the state to be responsible internationally, cases will have

¹⁰⁴ *Ibid.*, 837.

¹⁰⁵ Section 3(1), which requires legislation to be construed compatibly with the Convention only *as far as possible*, is an example.

¹⁰⁶ This purpose is stated in the HRA's preamble.

¹⁰⁷ Phillipson (fn 59) 843.

been decided in Strasbourg (albeit in rare situations) involving factual situations which *are* identical or closely analogous to the domestic dispute at hand. If the state is found to be responsible by Strasbourg in those cases, the ‘responsibility line’ is drawn more brightly and domestic courts *know* – or at least *strongly suspect* – rather than simply *presume* the state to be responsible for the interference with the Convention rights in the dispute at hand. *Knowing* or *strongly suspecting* that the state would be responsible internationally should, I suggest, be placed as a relevant factor in the balance between Convention values and countervailing factors and, given the HRA’s desire to give further effect to Convention rights, result in a stronger presumption that Convention values should outweigh the relevant common law principles than in ‘haziness’ cases where domestic courts merely *presume* the state to be responsible.¹⁰⁸ Therefore, in cases where Strasbourg jurisprudence *does* suggest the state’s responsibility, a proper appreciation of the nuances of the weak indirect horizontal effect approach reveals the potential for a gravitational pull towards the protection of the right in question.

Despite the balance being weighted more in favour of protecting the right in circumstances where Strasbourg decisions reveal clearly that the state would be responsible internationally,¹⁰⁹ there may nevertheless be circumstances where domestic courts choose to uphold common law principles; namely, I suggest, in instances where they feel that incremental common law development would be unable to protect the right and larger-scale reform would be needed. Parliament

¹⁰⁸ This may represent an alternative solution to what Phillipson (*ibid.*) regards as the ‘difficult’ question of how much *prima facie* weight to attach to a Convention value: 844.

¹⁰⁹ There would, of course, still need to be interference by the private individual with the victim’s rights in order for the behaviour to be *Convention-incompatible*.

has declared that failure to legislate is not an ‘act’ capable of generating domestic Convention liability.¹¹⁰ If Parliament is not to be impugned for failing to legislate and cannot legally be compelled to do so,¹¹¹ it would seem to strain the language of the HRA to allow the courts to fashion the common law by ‘legislating’ when providing a remedy.¹¹² Although the difference between judicial interpretation and legislation may be incapable of precise definition,¹¹³ judicial ‘law-making’ is incremental, constrained by precedent and based on interpretative reasoning rather than being purely forward-looking like Parliamentary legislation.¹¹⁴ Hence, s 6(6) arguably represents an injunction upon the courts to refrain from fashioning a common law remedy in order to protect a Convention right if to do so would go beyond incremental development or run counter to existing precedent.¹¹⁵ In this sense, s 6(6) delimits the meaning of s 6(1)’s ‘horizontal effect’ provisions.¹¹⁶ Morgan’s concern that the weak indirect horizontal effect

¹¹⁰ HRA, s 6(6).

¹¹¹ Some political compulsion does exist, however, in the form of declarations of incompatibility made under s 4 HRA.

¹¹² It might be thought that Parliament had somehow ‘donated’ through the HRA the responsibility of protecting rights to the judiciary, but such a conclusion is incompatible with the message in s 6(6) that Parliament is under no obligation to legislate. Had the courts had such power to protect rights donated to them, it would be unnecessary to consider compelling Parliament to legislate since a remedy would already be available.

¹¹³ A. Kavanagh, ‘The elusive divide between interpretation and legislation under the Human Rights Act 1998’ (2004) 24 OJLS 259.

¹¹⁴ *Ibid.*, 271-273.

¹¹⁵ Morgan’s view that the ‘pre-Act approach to common law development is no longer valid... if the Act requires a different approach’ (fn 56, 272 and 273) fails to take account of s 6(6), a provision which he omits to mention. Pattinson and Beyleveld (fn 56) argue that the judicial creation of causes of action is not necessarily judicial ‘legislation’ since courts are constitutionally permitted to find existing principles embedded in the common law and apply them to settle a case: 642. However, the courts are not finding principles embedded in the *common law* in the present context. The principles derive from the Convention, an international treaty which cannot be domestically incorporated other than by Parliament as the sovereign law-maker: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, [1989] 3 WLR 969. Parliamentary sovereignty would, I suggest, be flouted by *de facto* incorporation of the treaty unless the terms of the HRA – the instrument seeking to give effect to the Convention – clearly allowed for the creation of new causes of action. This is the very issue in question.

¹¹⁶ ‘Section 6(6) was included in order to preserve Parliamentary sovereignty and prerogative power: in this case, the power of the *executive* to introduce legislation’: H. Fenwick, *Civil Liberties and Human Rights* (4th edn Routledge-Cavendish, Abingdon 2007) 215 (emphasis added).

approach risks failing to protect rights therefore seems to miss the point: domestic courts can apply the value so as to protect the right (indeed, they will usually do so where Strasbourg jurisprudence does indicate that the state would be responsible internationally) or, alternatively, they will refuse to do so where the HRA requires them to refrain from transcending the boundaries of common law development into the legislative sphere.¹¹⁷

Morgan's third argument, relating to the interpretative obligation under s 3, therefore appears to fall away. Domestic courts could not, when using s 3, depart 'substantially from a fundamental feature of an Act of Parliament'.¹¹⁸ Since Parliament has emphasised at various points within the HRA the desire to maintain its sovereignty,¹¹⁹ I would suggest – even leaving the apparent effect of s 6(6) to one side – that an interpretation of s 6(1)'s horizontal effect requirements which allowed the courts to intrude into Parliament's role by 'legislating' rather than 'developing' the common law would depart from a fundamental feature of the HRA.

The Courts as Public Authorities: Conclusions

Strasbourg jurisprudence on positive obligations is infused with uncertainty, both as to *when* a duty arises and *what* it requires. An arguable concomitant of such uncertainty is the need for domestic courts, giving effect to the Convention rights through the HRA, to presume in novel factual circumstances involving private individuals that Strasbourg *would* find state responsibility were the case to reach

¹¹⁷ See, *mutatis mutandis*, Grosz, Beatson and Duffy (fn 81) 91. My approach in this chapter differs by arguing based on the *uncertainty of the law surrounding positive obligations* that courts should refrain from 'legislating' in order to protect rights.

¹¹⁸ *Re S and Re W* [2002] UKHL 10, [2002] 2 AC 291 [40] (Lord Nicholls).

¹¹⁹ See e.g. ss 3(2) and 4.

the European Court. Given the injunction in ss 6(1) and 6(3)(a) for the courts to act compatibly with the Convention, labouring under this presumption would require them when faced with a dispute to engage in *some* common law development at all times in order to ‘act’ compatibly under s 6(1) HRA. But if, as under the Hunt and Wade approaches, ‘acting compatibly’ means *applying* the right, the full-scale takeover against which Phillipson protests would generate maximum disruption in domestic law. The weak indirect horizontal effect model, providing for development of the common law consonantly with Convention *values*, is therefore a preferable inference of Parliament’s intent when enacting ss 6(1) and 6(3)(a). The relative sophistication of this approach’s balancing exercise between Convention values and existing common law principles allows for the substantive protection of a *right*, but only where the common law can accommodate such a step. Judicial development which would amount in substance to ‘legislation’ is not *required* by the approach. Nor, it would seem, is it even *permitted* due to s 6(6).

B. THE LIMITS IN PRACTICE

The question whether private care homes providing care and accommodation pursuant to contract with a local authority are performing ‘functions of a public nature’ under s 6(3)(b) HRA has plagued the courts since the HRA’s entry into force. The early decision of the Court of Appeal in *R (Heather) v Leonard Cheshire Foundation*¹²⁰ attracted staunch academic criticism by giving a

¹²⁰ [2002] EWCA Civ 366, [2002] 2 All ER 936.

negative answer;¹²¹ the House of Lords nevertheless reaffirmed the *Leonard Cheshire* principle in *YL v Birmingham City Council*.¹²² As Chapter 1 explained, s 145 of the Health and Social Care Act 2008 (HSCA), when it enters into force, will designate the provision of care and accommodation pursuant to arrangements like those in *YL* a public function under s 6(3)(b) HRA. Nevertheless, *YL* remains good law until s 145 enters into force. Additionally, the following analysis illustrates the difficulties of enforcing Convention rights using horizontal effect. This analysis helps to demonstrate why judges instinctively hostile to the application of Convention rights in the private sphere should not simply invoke the HSCA's failure to address the application of s 6(5) HRA in order to maintain the *status quo* and deny that Parliament intended that the ECHR apply to care homes.

In Chapters 5 and 6, I introduce and defend a general interpretation of s 6(3)(b) which expands on the current position taken by the courts. In this part of the current chapter I take the care home context as a topical one within which to demonstrate the practical limits to the horizontal effect of the HRA, thereby highlighting the need for a wider reading of the public authority provisions than that currently taken by the courts in order to provide service users with an appropriate remedy for relevant interferences with their Convention rights. I consider the horizontal effect of each of ss 6 and 3 HRA in turn, discounting the possibility that either could assist a service user in such a context.

¹²¹ See, notably, P. Craig, 'Contracting out, the Human Rights Act and the scope of judicial review' (2002) 118 LQR 551; C. Donnelly, '*Leonard Cheshire* again and beyond: private contractors, contract and s.6(3)(b) of the Human Rights Act' [2005] PL 785; the Joint Committee on Human Rights' Seventh Report of Session 2003-04, 'The Meaning of Public Authority under the Human Rights Act' HL (2003-04) 39, HC (2003-04) 382.

¹²² [2007] UKHL 27, [2008] 1 AC 95.

Developing the Common Law

In response to the House of Lords' ruling in *YL*, I briefly explored how service users might take advantage of common law horizontal effect in order to vindicate their Art 8 right to respect for the home:

‘[T]hose in *YL*'s position might in future take Hunt's advice¹²³ and remain in the home until physically evicted, whereupon they could allege battery and, relying on the HRA's "horizontal effect", try to persuade the courts to interpret the common law on battery in accordance with their Art 8 rights.’¹²⁴

Applying the findings from Part A of this chapter reveals the difficulties which a service user might encounter in this respect. Due to the uncertainty surrounding the law on positive obligations, a domestic court required to act compatibly with the Convention should presume the state to be responsible in Strasbourg. Under the weak indirect horizontal effect model which I argued above is the more appropriate reading of the requirements of ss 6(1) and 6(3)(a) HRA, a balancing exercise then ensues between the ‘value’ of a home life and non-Convention factors. There seems to be no Strasbourg case directly in point which suggests a positive obligation on the state to regulate the behaviour of private individuals in this instance.¹²⁵ Therefore, there is no necessary ‘gravitational pull’ towards the application of this value so as to protect the service user's Art 8 right as there would have been had such Strasbourg jurisprudence existed. Additionally, there are common law principles which a court may decide to weigh in the balance

¹²³ Hunt (fn 58) 442.

¹²⁴ A. Williams, ‘*YL v Birmingham City Council*: Contracting out and “functions of a public nature”’ [2008] EHRLR 524, 531. I do not propose to examine Art 3 here following Buxton LJ's observations in *YL* (fn 135) that potential Art 3 interferences will usually be redressed by the existing criminal law.

¹²⁵ *YL* (fn 122) [92] (Lord Mance).

against upholding the Convention value in this case. One such principle is commercial autonomy.¹²⁶ Developing the common law of battery so as to provide a remedy against a service provider seeking to evict a service user (as in both *Leonard Cheshire* and *YL*) would inhibit the ability of a private service provider – ‘neither a charity nor a philanthropist’ – to perform a ‘socially useful business for profit’,¹²⁷ which sits uncomfortably with ‘the ordinary private law freedom to carry on operations under agreed contractual terms’.¹²⁸ Furthermore, a domestic court may be unreceptive to the distortion of the common law of battery – aimed at safeguarding personal bodily integrity¹²⁹ – into a cause of action which protected the right to a home.¹³⁰

Hence, a domestic court may decide that protecting the service user’s Art 8 right to a home would encroach into the legislative sphere and decline to offer that protection. These observations do not, of course, attempt to predict with certainty how a domestic court would or should rule, but they do expose real difficulties which a service user might experience in seeking to invoke common law horizontal effect as a method of vindicating their Convention rights.

The Interpretative Obligation

The interpretative obligation under s 3 HRA could be of *prima facie* use in two situations: first, when a service user brings an action against the local authority

¹²⁶ Despite growing exceptions in the form of regulatory legislation, autonomy can still be said to underlie the modern law of contract: Treitel (fn 147) 1-8.

¹²⁷ *YL* (fn 122) [26] (Lord Scott).

¹²⁸ *Ibid.*, [116] (Lord Mance).

¹²⁹ S. Deakin, A. Johnston and B. Markesinis, *Markesinis and Deakin's Tort Law* (5th edn OUP, Oxford 2003) 415; T. Weir, *A Casebook on Tort* (10th edn Sweet & Maxwell, London 2004) 321.

¹³⁰ Certain *dicta* in *Campbell* (fn 60) to the effect that courts are required by s 6 to develop *relevant* common law causes of action or those with the same underlying *values* as the Convention right in question may lend implicit judicial support to this point: see [132] (Baroness Hale) and [43] (Lord Hoffmann).

contracting out the services and, second, when the service user brings an action against the private provider itself.

Action Against Local Authority

The National Assistance Act 1948 (NAA) seeks ‘to terminate the existing poor law and to provide... for the assistance of persons in need’.¹³¹ In *Leonard Cheshire* and *YL*, local authorities discharged their duties under s 21 to arrange to provide care and accommodation for the appellants by contracting with private organisations (Leonard Cheshire Foundation and Southern Cross Healthcare respectively) for the provision of the services.¹³² Had the local authorities continued to provide the services, the service users would have been able directly to seek redress for breaches of the Convention occurring during service delivery due to the local authorities’ status as core public authorities required to comply with the Convention in respect of all of their acts.¹³³ Since it was held in *Leonard Cheshire* and *YL* that private service providers are not public authorities required to comply with the Convention, service users lack such action in the event of a local authority’s decision to arrange with a private organisation for the provision of the services.

A service user might therefore try to claim that the local authority had breached their Convention rights by deciding to outsource the services and, in doing so, try to persuade the court to use the interpretative obligation under s 3 HRA to render s 26 NAA Convention-compatible. This, it seems, would fail for two reasons.

¹³¹ Preamble, NAA.

¹³² Section 26(1): ‘arrangements under section 21 of this Act may include arrangements made with a voluntary organisation or with any other person who is not a local authority’.

¹³³ See further Chapter 4.

First, it is difficult to say that s 26 NAA is *prima facie* Convention-incompatible unless it is successfully argued that *outsourcing*, by diminishing the level of Convention protection which service users are able to seek, is itself a breach of the Convention. This contention was firmly rejected at first instance by Forbes J in *R (Johnson) v Havering London Borough Council*¹³⁴ and by the Court of Appeal in *YL*.¹³⁵ As Buxton LJ (with whom Dyson LJ and Sir Anthony Clarke MR agreed) explained, the resident would not suffer ‘any significant loss of protection’ from Art 3 as a result of outsourcing since behaviour amounting to a breach of Art 3 will usually engage the criminal law anyway.¹³⁶ Regarding the service user’s submission that outsourcing would result in the breach of Art 8, Buxton LJ pointed to the extensive regulatory regime enacted through the Care Standards Act 2000¹³⁷ (which applies equally to private providers and, his Lordship said, exceeded the level of protection required by Art 8) and concluded that ‘the residents lost nothing in article 8 terms by the transfer.’¹³⁸ Furthermore, depriving the residents of a *direct* action against their carer would not amount to an Art 8 breach because ‘it would seem impossible to say that there is an article 8 obligation to maintain a particular type or level of provision when discharging duties under section 21.’¹³⁹ Even if such an obligation did exist, there is no reason to presume that diminution in the level of provision would ‘*necessarily* entail a breach of article 8.’¹⁴⁰

¹³⁴ [2006] EWHC 1714 (Admin) [44].

¹³⁵ [2007] EWCA Civ 26, [2008] QB 1.

¹³⁶ *Ibid.*, [11].

¹³⁷ It is not thought following an examination of the provisions of this Act that a service user could successfully invoke the interpretative obligation here.

¹³⁸ *YL* (fn 135) [12].

¹³⁹ *Ibid.*, [16].

¹⁴⁰ *Ibid.* (emphasis original).

The second reason why s 3 HRA would be of no benefit in an action against the local authority is that, even if s 26 were *prima facie* Convention-incompatible, interpreting it so as to allow for Convention redress against the local authority in the event of outsourcing would go beyond what is ‘possible’ under s 3. Since s 26 NAA expressly *permits* outsourcing, it ‘cannot be read or given effect compatibly with the Convention rights. The local authority is accordingly protected [by s 6(2)(b) HRA¹⁴¹] from its alleged breach of the Convention by the fact that in privatising the homes it is giving effect to section 26’.¹⁴²

Action Against Private Service Provider

It is difficult to see how a service user could successfully mount a claim against a service provider and try to persuade the court to invoke s 3 HRA. The service user experiencing or threatened with potentially Convention-infringing behaviour such as inhuman treatment or eviction may try to bring a claim for breach of contract or trespass to the person¹⁴³ against the service provider and allege, since s 26 permits outsourcing, that it should be interpreted so as to require the service provider to respect the Convention upon outsourcing. Since the service user’s action would lie against the service provider as a private person rather than public authority however, the court’s power to grant such relief ‘as it considers just and appropriate’¹⁴⁴ would not apply – even if s 3 could be used to read s 26

¹⁴¹ Section 6(2)(b): a public authority acting incompatibly with a Convention right does not act unlawfully if ‘in the case of one or more provisions of... primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce [them]...’

¹⁴² *YL* (fn 135) [23] (Buxton LJ).

¹⁴³ The interpretative obligation, it is recalled, is engaged when legislation is interpreted and does not appear to require that a claim be brought through a *statutory* cause of action.

¹⁴⁴ HRA, s 8(1).

in this way¹⁴⁵ – and its ability to offer adequate redress by making a specific order greatly diminished.¹⁴⁶

An alternative would be for the service user to argue that s 26 should be read so as to allow for a specific remedy against the provider.¹⁴⁷ It seems however that this claim would be likely to fail. The service user in this case would essentially contend that s 26 fails to provide an adequate remedy against interferences by the private provider with their Convention rights. As Lord Nicholls (with whom all of their Lordships agreed) explained in *Re S*:

‘In Convention terms, failure to provide an effective remedy for infringement of a right set out in the Convention is an infringement of article 13. But article 13 is not a Convention right as defined in section 1(1) of the Human Rights Act 1998. So legislation which fails to provide an effective remedy for infringement of [a Convention right]... is not, for that reason, incompatible with a Convention right within the meaning of the Human Rights Act.’¹⁴⁸

In sum therefore, s 3’s interpretative obligation would seem of little assistance to a service user in the care home context.

¹⁴⁵ This attempt to read s 26 compatibly with the Convention would still relate more, in the words of Hale LJ, to ‘what the Act does not say than what it does.’ *Re S and Re W* [2001] EWCA Civ 757, [2001] HRLR 50 [50].

¹⁴⁶ The relative inadequacy of ‘private law’ damages as compared to specific remedies under the HRA is explored in Chapter 5.

¹⁴⁷ This would therefore reflect the HRA’s preference for specific remedies over damages (see s 8) and contrast with the law of contract, which prefers damages and only allows for specific performance ‘if it is, in the circumstances, the most appropriate remedy’: G. H. Treitel, *The Law of Contract* (11th edn Sweet & Maxwell, London 2003) 1026.

¹⁴⁸ *Re S* (fn 118) [60].

C. CONCLUSIONS

This chapter has advocated ‘weak indirect horizontal effect’, under which courts are required to develop the common law compatibly with Convention *values* rather than apply the rights themselves, as the correct interpretation of the courts’ obligation under s 6(1) HRA. Especially when considered against the backdrop of the uncertainty in Strasbourg jurisprudence surrounding positive obligations, strong indirect and direct horizontal effect models risk seriously disrupting sophisticated principles of common law to a degree which, I suggest, Parliament should not be regarded as having intended. I have also sought to argue that the nuances of the weak indirect horizontal effect model generate a balancing exercise allowing for a gravitational pull towards the application of the value so as to protect the right in those circumstances where Strasbourg jurisprudence does reveal that the state would be responsible in Strasbourg. Where applying a value so as to protect a right would involve the courts intruding into Parliament’s sphere by undertaking development akin to ‘legislation’ however, s 6(6) informs the limits of s 6(1)’s duty by suggesting that the courts should decline to afford such protection.

Applying common law and statutory horizontality to the topical context of outsourced care home services exposes the difficulties which service users would encounter in seeking to enforce their Convention rights against private service providers. Consequently, it seems, rights redress can only adequately be provided by adopting a wider reading of the public authority provisions than that currently taken by the courts.

4.

Core Public Authorities

Section 6 HRA provides, so far as is relevant:

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right...

(3) In this section 'public authority' includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature...

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private...

'Public authority' is undefined in the Act, but s 6(3) is evidently non-exhaustive by its use of the word 'includes'. This has led commentators such as Oliver to reason that other public authorities must exist independently of s 6(3), and therefore by virtue of the use of the term 'public authority' in s 6(1).¹⁴⁹ This chapter is concerned with this 'other' category of public authority, which are also commonly referred to as 'core', 'true' or 'standard' public authorities. Due perhaps to the views of Oliver¹⁵⁰ and some of their Lordships in *Aston*

¹⁴⁹ D. Oliver, 'The frontiers of the State: public authorities and public functions under the Human Rights Act' [2000] PL 476.

¹⁵⁰ *Ibid.*

*Cantlow*¹⁵¹ that the core public authority category should be narrowly construed (an argument which I later address), core public authorities have received less academic and judicial attention than their hybrid counterparts. It is important not to overlook this category however, and in this chapter I conduct a thorough analysis of it. First, I examine the nature of core public authorities and (second), relying on Oliver's work, I identify a basic institutional 'public interest' theme to such bodies. Third, I examine relevant existing jurisprudence and argue that the views of Strasbourg and the domestic courts concerning which bodies constitute 'the state' are also built upon public interest foundations. Fourth, I attempt to refine the public interest theme with particular reference to charitable organisations and voluntary regulators. I do not propose to consider the issue of core public authorities relying on their own Convention rights in this chapter. Although Davis has advanced compelling normative arguments as to why they should be able to do so when in the public interest,¹⁵² Strasbourg has repeatedly affirmed the rule that Art 34 ECHR prohibits governmental organisations from ever relying on their own Convention rights.¹⁵³ Art 34 is reflected domestically in s 7(7) HRA,¹⁵⁴ rendering the issue of core public authorities relying on their own Convention rights academic (as Davis acknowledges)¹⁵⁵ for the foreseeable future.

¹⁵¹ *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

¹⁵² H. Davis, 'Public Authorities as "Victims" Under the Human Rights Act' [2005] CLJ 315.

¹⁵³ See e.g. *Ayuntamiento de Mula v Spain* (fn 170). This rule, as explained later, is subject to rare instances of public policy as in *Radio France*, where Strasbourg seems prepared to classify a core state body as a non-governmental organisation under Art 34 in order for that body to enforce its Convention right to free expression.

¹⁵⁴ Section 7(7): '...a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.'

¹⁵⁵ Davis (fn 152) 316.

A. THE NATURE OF CORE PUBLIC AUTHORITIES

Differing assumptions are frequently made on the *nature* of core public authorities and therefore how to define them. An analysis of the Parliamentary material reveals three approaches. The first is an institutional approach, which defines a core public authority by *who it is*. Lord Irvine provided an apt example when stating that ‘the Armed Forces are obviously at the heart of government and ought to be... [regarded as core public authorities].’¹⁵⁶

A distinction where core public authorities are concerned can be drawn between the *factual* and *legal* nature of functions. As will shortly be seen, core public authorities are liable in respect of acts whether performed pursuant to public or private functions. To this end therefore, all functions and acts performed by core public authorities are, in the HRA’s eyes, *legally* public.¹⁵⁷ However, a core public authority’s functions, *factually* speaking, can be private if performed for the primary benefit of the core public authority:¹⁵⁸ employing cleaning staff for local authority offices would be an example. Although the analysis of the function’s *factual* nature has no bearing on the liability of the core public authority itself, it is relevant, I suggest (and this will be developed more fully in Chapter 6 in relation to hybrid public authorities), to the contracting out context, where core public authorities’ functions are performed by institutionally private persons who are alleged by claimants to be performing ‘functions of a public nature’ under s 6(3)(b) HRA.

¹⁵⁶ Hansard HL vol 584 col 1359 (19 January 1998) (emphasis added).

¹⁵⁷ As Lord Hope stated, ‘Section 6(1)... *assumes* that everything that a “core” public authority does is a public function’: *Aston Cantlow* (fn 151) [41] (emphasis added).

¹⁵⁸ See Part D.

The institutional approach, which focuses on who the body is, can be contrasted with the second, functional approach, which defines a core public authority by *what it does*. Mr Straw's contention that a core public authority is a body 'all of whose functions are [factually] public' encapsulates this.¹⁵⁹

The third, combined, approach to core public authorities is an amalgam of the first two and assumes all of a core public authority's functions to be factually public *precisely because* of who it is. A further observation by Lord Irvine demonstrates the combined approach:

'Clause 6 is designed to apply not only to *obvious public authorities* such as government departments and the police, but also to *bodies which are public in certain respects but not others*. Organisations of this kind will be liable under Clause 6 of the Bill for any of their acts, unless the act is of a private nature.'¹⁶⁰

The bodies 'public in certain respects but not others' to which Lord Irvine refers are clearly hybrid bodies under s 6(3)(b) HRA; this then implies that the 'obvious' or core public authorities are public in *all* respects including, presumably, their functions. The functional and combined approaches are similar in that they both assume all of a core public authority's functions to be public, but they differ in how to identify a core public authority. Whereas the functional approach would seem to require all of a body's functions to be listed and labelled factually 'public' before it could qualify as a core public authority, the combined approach would require the identification of a public authority by who it is – like

¹⁵⁹ Hansard HC vol 314 col 409 (17 June 1998).

¹⁶⁰ Hansard HL vol 582 col 1232 (3 November 1997) (emphasis added).

the institutional approach – *and then* assume all of that body’s functions to be factually public by virtue of its institutional status.

Arbitrating between institutional and functional approaches, Oliver favours the former, firstly because the very words ‘public authority’ in s 6(1) place the emphasis on the nature of the institution.¹⁶¹ I would agree that the HRA’s focus is on the institutional rather than the functional because of the sheer impracticality – which would no doubt have been known to Parliament – of a court having to list *all* of the functions of, for instance, the Foreign Office or the Armed Forces in order to satisfy itself that they were all public and hence that those bodies were core public authorities.¹⁶²

The combined approach would at least meet this objection since it aims to identify a core public authority by institutional factors rather than the ‘listing’ method which would seem integral to the functional approach, but the combined approach should also be discounted in favour of the institutional approach. As Oliver observes, ‘it is clear that some of the functions of government departments are private.’¹⁶³ Although a proponent of the combined approach would seek to counter this observation by arguing that these functions were actually of a factually public nature *by virtue of* their being performed by a core public authority, a function such as employing cleaning staff would undoubtedly be private when performed by a private person. The combined approach

¹⁶¹ Oliver (fn 149) 480. Cf *Aston Cantlow* (fn 151) [85] (Lord Hobhouse).

¹⁶² See also P. Cane, ‘Church, state and human rights: are parish councils public authorities?’ (2004) 120 LQR 41, 43-44.

¹⁶³ Oliver (fn 149) 478. See also *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95 [72] (Baroness Hale) and [110] (Lord Mance); P. Craig, *Administrative Law* (6th edn Thomson Sweet & Maxwell, London 2008) 571.

therefore says nothing useful about the nature of the *functions themselves*. Rather, it merely restates the institutional nature of the body performing a particular function. This, too, is potentially misleading: if all of a core public authority's functions are factually public because of who it is, it could be taken to mean that all of a private person's functions are private because of who he or she is. Such a sharp divide between public and private would sit uncomfortably with s 6(3)(b), which clearly presupposes some elision between public and private by rendering persons 'certain of whose functions are functions of a public nature' public authorities.

Oliver's second argument in favour of an institutional approach is that:

'[I]t would be circular [due to the HRA binding both core public authorities and private persons exercising public functions] to define an authority as a [core] public authority solely or even largely by virtue of the fact that it performed some public functions.'¹⁶⁴

This argument, with respect, is harder on its face to follow than her first, but appears to suggest a difficulty in determining public functions without a previous idea in mind of what the state's core – and therefore what public activity – actually is. Oliver's argument is forceful when seen in this way. Every state possesses a nucleus of bodies performing essential functions, which bodies differ fundamentally in character and activity from ordinary 'private' persons. The composition of this nucleus may differ from state to state and may even change within a single state over time, but will remain present in some form or

¹⁶⁴ Oliver (*ibid.*) 480-481.

another.¹⁶⁵ A purely functional approach, seeking to ascribe ‘core’ status to a particular body simply by analysing the nature of its functions, would essentially distinguish core public authorities from hybrid persons due to the *number* of public functions each performed: if they were *all* public, the public authority would be core; if only *some* were public, it would be hybrid. This would amount to the constitutionally artificial proposition that private persons exercising public functions are institutionally no different to and possess the same inherent objectives as those bodies comprising the nucleus of the state.

It is the fundamental institutional difference between core public authorities and private persons which not only illustrates the need for an institutional approach to s 6(1) HRA, but is also significant in any attempts to define ‘core public authority’ and ‘functions of a public nature.’

Section 6(5) Inapplicable

For the sake of completeness it should be emphasised that s 6(5), which states that ‘In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private’, is inapplicable to core public authorities.¹⁶⁶ Aside from this following from s 6(5)’s reference only to hybrid public authorities under s 6(3)(b),¹⁶⁷ Strasbourg jurisprudence also demonstrates upon examination that the core of the state must comply with the

¹⁶⁵ See e.g. *Aston Cantlow* (fn 151) [159] (Lord Rodger).

¹⁶⁶ It would now appear judicially settled that this is the case: see e.g. *Aston Cantlow* (*ibid.*) [11] (Lord Nicholls), [35] and [41] (Lord Hope) and [85] (Lord Hobhouse); *YL* (fn 163) [37] (Baroness Hale), [81], [110] and [119] (Lord Mance), [129] and [169] (Lord Neuberger). Cf *R (Haggerty) v St Helens Council* [2003] EWHC 803 (Admin) [24] (Silber J).

¹⁶⁷ *Oliver* (fn 149) 479.

Convention whether engaging in public or private activity.¹⁶⁸ It is clear, for instance, that Strasbourg regards local authorities – bodies which s 6 HRA would recognise as core public authorities¹⁶⁹ – as governmental organisations *always* precluded from enforcing their own Convention rights.¹⁷⁰ Additionally, a neat homogeneity exists between ‘governmental organisations’ under Art 34 and ‘core’ state bodies engaging state responsibility under the active liability principle.¹⁷¹ The message, therefore, would seem to be that bodies regarded by Strasbourg as the core of the state are *always* regarded as the core of the state, whether acting in public or private capacities.

B. THE BASIC ‘PUBLIC INTEREST’ THEME

Prior to the enactment of the HRA, the government and members of the Houses of Commons and Lords gave various examples of bodies which in their opinion would qualify as core public authorities under s 6. These included ‘the police, the courts..., government departments and prisons’,¹⁷² the armed forces,¹⁷³ central

¹⁶⁸ Oliver (*ibid.*) cites *Young, James and Webster v United Kingdom* (App nos 7601/76 and 7806/77) (1982) 4 EHRR 38 as authority for the proposition that ‘the obligations of states... extend into the exercise of private functions’. However, this appears to misapply *Young* since the European Court in that case proceeded on the basis that British Rail was an institutionally *private* person: [49]. Consequently, the relevant functions were not those of a body analogous to a core public authority in domestic law at all.

¹⁶⁹ See e.g. *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, 67 (Lord Woolf CJ); S. Grosz, J. Beatson and P. Duffy, *Human Rights: The 1998 Act and the European Convention* (Sweet & Maxwell, London 2000) 65.

¹⁷⁰ *Ayuntamiento de Mula v Spain* (App no 55346/00) (unreported); *Danderyds Kommun v Sweden* (App no 52559/99) (unreported); *RENFE v Spain* (App no 35216/97) (1997) DR 90-B. See, *mutatis mutandis*, *Breisacher v France* (App no 76976/01) (unreported).

¹⁷¹ *Danderyds Kommun* (*ibid.*), applied in that respect in the Scottish case of *Grampian University Hospitals NHS Trust v Napier* 2004 JC 117; *Hautanemi v Sweden* (App no 24019/94) (1996) 22 EHRR CD155; *Islamic Republic of Iran Shipping Lines v Turkey* (App no 40998/98) (2008) 47 EHRR 24[81].

¹⁷² Hansard HL vol 583 col 796 (24 November 1997) (Lord Irvine of Lairg).

¹⁷³ Hansard (fn 156) (Lord Irvine of Lairg).

government (including executive agencies) and local government and immigration officers.¹⁷⁴

It is difficult to see at first sight what underlies the character of these ‘obvious’ public authorities. In the House of Lords, Baroness Young assumed that all core public authorities were created by statute.¹⁷⁵ However, As Jack Straw MP observed in the House of Commons, this would not include Secretaries of State, which are not established by statute and most of whose powers derive from the prerogative or common law.¹⁷⁶ As Oliver pertinently observes:

‘[T]he most reliable indicator of “publicness” which the government and other bodies mentioned above have in common is that generally in our constitutional theory they are regarded as being under duties to act *only* in the public interest as they perceive it to be... Private bodies exercising public functions, on the other hand, may be entitled to act for profit and generally in their own or their shareholders’ interests when not exercising public functions...’¹⁷⁷

Oliver identifies various factors which indicate a body’s status as a core public authority.¹⁷⁸ Although none are of themselves conclusive, they include the exercise of ‘authority’ itself by the possession of special or coercive powers, public funding, a statutory basis (since there ‘exists a strong presumption that Parliament only legislates if it considers it to be in the public interest to do so’)¹⁷⁹ and democratic accountability.

¹⁷⁴ Home Office, ‘Rights Brought Home: The Human Rights Bill’ (Cm 3782, 1997) [2.2].

¹⁷⁵ Hansard HL vol 583 col 800 (24 November 1997).

¹⁷⁶ Hansard HC vol 314 col 413 (17 June 1998).

¹⁷⁷ Oliver (fn 149) 483-484 (emphasis original).

¹⁷⁸ *Ibid.*, 481-483.

¹⁷⁹ *Ibid.*, 482.

The possession of ‘special’ (i.e. particular) powers would seem to be an important factor. As *Fewings* makes clear, for the purposes of administrative law, ‘public’ bodies must show specific legal authority for their actions whereas private persons possess the residual liberty to act as they wish within the confines of the law.¹⁸⁰ Although existing principles of administrative law are not coterminous with the scope of the ‘public authority’ provisions within s 6 HRA,¹⁸¹ it would be highly surprising if a body regarded institutionally as a core public authority were not also amenable to judicial review as a public body.¹⁸² One would therefore expect core public authorities, properly classified, to be caught by the *Fewings* principle in administrative law. This in turn suggests that bodies not imbued with particular legal authority beyond the residual liberty possessed by private individuals to perform their day-to-day activities should not be regarded as core public authorities since they would otherwise be paralysed by the need in administrative law to show specific legal authority for their actions.

An approach to core public authorities based on the public interest objectives of such bodies would seem correct for three reasons. First, not only does it take the more favourable institutional rather than functional or combined approach to core public authority, but it is also constitutionally realistic by recognising the nucleus

¹⁸⁰ *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513 (QB) 524 (Laws J), affirmed in the Court of Appeal [1995] 1 WLR 1037, [1995] 2 All ER 20 (CA) 1042 (Sir Thomas Bingham MR). Cf *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] Ch 344, [1979] 2 WLR 700 (Ch) 367, where Sir Robert Megarry V-C declared that if telephone tapping by the Post Office ‘can be carried out without any breach of the law, it does not require any statutory or common law power to justify it’. As Harris notes, *Malone* ‘does not appear to have been confidently recognised in the UK courts’: B. Harris, ‘The “third” source of authority for Government action revisited’ (2007) 123 LQR 225, 229. See also I. Leigh, *Law, Politics and Local Democracy* (OUP, Oxford 2000) 42.

¹⁸¹ See Chapter 5.

¹⁸² As Craig observes on the possibility of *some* link between judicial review and s 6 HRA, ‘legal claims do not arise in isolation. There will be many cases where a claim based on the HRA will be juxtaposed to one concerning *Wednesbury* unreasonableness, consistency, etc.’: P. Craig, *Administrative Law* (5th edn Thomson Sweet & Maxwell, London 2003) 595-596.

of the state and the differing character and purposes of the bodies comprising that nucleus. Second, the same public interest theme can be detected in leading Strasbourg and domestic cases. Third, as will be seen in Chapter 5 in the context of hybrid public authorities, Oliver's approach, when used to analyse the Strasbourg jurisprudence, aids in the *convincing* attribution of a proper role to that jurisprudence when determining the meaning of 'public authority' under the HRA.

However, Oliver's 'public interest' theme should not be left in its present form and needs refinement; this occurs in Part D of this chapter.

C. EXISTING JURISPRUDENCE: DEMONSTRATING THE THEME

In my view, which will be expanded on in Chapter 5 in the context of hybrid public authorities, Strasbourg jurisprudence is relevant only to the domestic identification of *core* public authorities under s 6(1) HRA. The contrary views expressed by Quane,¹⁸³ the Court of Appeal in *R (West) v Lloyd's of London*¹⁸⁴ and the House of Lords in *YL v Birmingham City Council*¹⁸⁵ are based on a misreading of *Aston Cantlow*,¹⁸⁶ a misunderstanding of the relevant Strasbourg jurisprudence, or both.

¹⁸³ H. Quane, 'The Strasbourg jurisprudence and the meaning of "public authority" under the Human Rights Act' [2006] PL 106.

¹⁸⁴ [2004] EWCA Civ 506, [2004] HRLR 27.

¹⁸⁵ *YL* (fn 163).

¹⁸⁶ *Aston Cantlow* (fn 151).

It is presently sufficient, however, to keep in mind their Lordships' views in *Aston Cantlow* that Strasbourg jurisprudence is relevant only to identifying core public authorities. In that case, a Parochial Church Council (PCC) sought to enforce chancel repair liability against lay rectors who contended that to do so would interfere with their right to respect for property under Art 1 of the First Protocol of the Convention. The House of Lords unanimously dismissed the lay rectors' contentions and, in so doing, unanimously held that the PCC was not a core public authority, and by a majority (Lord Scott dissenting) that the PCC was not a hybrid public authority. Their Lordships evidently had only core public authorities in mind when arguing for the utility of Strasbourg jurisprudence to the 'public authority' concept in s 6 HRA. Having introduced the relevant background to the case, Lord Nicholls began by stating:

'The expression "public authority" is not defined in the Act, nor is it a recognised term of art in English law... [T]he broad purpose sought to be achieved by section 6(1) is not in doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights.'¹⁸⁷

It is crucial to remember that by using the words 'It is unlawful for *a* public authority to act in a way which is incompatible with a Convention right',¹⁸⁸ s 6(1) HRA uses the term 'public authority' not just to introduce the concept of *core* public authorities, but also as an umbrella term to refer to *all* species of public authority including hybrid public authorities. It is clear that Lord Nicholls was using 'public authority' not in the umbrella sense but instead to refer only to

¹⁸⁷ *Ibid.*, [6].

¹⁸⁸ Emphasis added.

core public authorities by the nature and examples of bodies he believed were caught by the term. In the next paragraph, he stated:

‘Conformably with this purpose, the phrase “a public authority” in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights. Hence, under the Human Rights Act a body of this nature is required to act compatibly with Convention rights in everything it does. The most obvious examples are government departments, local authorities, police and the armed forces.’¹⁸⁹

Similarly, Lord Hope saw the relevance of the Strasbourg law on non-governmental organisations under Art 34¹⁹⁰ only to core public authority under s 6(1):

‘The test as to whether a person or body is or is not a “core” public authority for the purposes of section 6(1) is not capable of being defined precisely. But it can at least be said that a distinction should be drawn between those persons who, in Convention terms, are governmental organisations on the one hand and those who are non-governmental organisations on the other.’¹⁹¹

Lord Rodger said:

¹⁸⁹ *Aston Cantlow* (fn 151) [7] (emphasis added). See, for concurrent interpretations of *Aston Cantlow*, H. Fenwick, *Civil Liberties and Human Rights* (4th edn Routledge-Cavendish, Abingdon 2007) 219; C. Turpin and A. Tomkins, *British Government and the Constitution: Text and Materials* (Law in Context, 6th edn CUP, Cambridge 2007) 750.

¹⁹⁰ Art 34: ‘The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation... [of] the Convention.’

¹⁹¹ *Aston Cantlow* (*ibid.*) [47].

‘A purposive construction of that section [6(1)] accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs.’¹⁹²

This could be taken to refer to ‘public authority’ in its umbrella sense, but Lord Rodger was keen to keep his consideration of the PCC’s status as a ‘core’ public authority distinct from that of its status as a ‘hybrid’ public authority. The latter issue received separate consideration later on in his judgment.¹⁹³ It is therefore clear that his Lordship’s comment relating to the relevance of Strasbourg jurisprudence was made only in the context of *core* public authorities. Furthermore, Lord Scott, in ‘complete agreement’ with the reasoning of both Lord Hope and Lord Rodger on the core public authority point,¹⁹⁴ evidently believed them to speak with one voice on the issue.

The only member of the House not to state an explicit opinion was Lord Hobhouse, but even he tacitly agreed with Lord Hope’s approach when declaring during his analysis of whether the PCC was a core public authority that ‘The Strasbourg jurisprudence has already been deployed... [by Lord Hope] and I need not repeat it.’¹⁹⁵

It is now possible, with a clearer view in mind as to how the relevant Strasbourg jurisprudence relates to the domestic ‘public authority’ concept within s 6 HRA, to examine that jurisprudence more closely. I argue in this part of the chapter that in the jurisprudence on ‘governmental organisations’ under Art 34 and on active

¹⁹² *Ibid.*, [160].

¹⁹³ *Ibid.*, [169]-[173].

¹⁹⁴ *Ibid.*, [129].

¹⁹⁵ *Ibid.*, [87].

state liability, Strasbourg's view on which bodies constitute the core of the state is underlain by a 'public interest' theme; that is to say, Strasbourg regards as the core of the state those bodies whose primary purpose is to serve the public – rather than their own – interest. This is also reflected in two relevant domestic cases.

ECHR: Article 34 and Governmental Organisations

The effect of Art 34 ECHR,¹⁹⁶ as previously mentioned, is that governmental organisations cannot file applications in Strasbourg alleging the infringement of their Convention rights. Consequently, a rich tapestry of jurisprudence has emerged from Strasbourg on which bodies do or do not constitute such organisations.

Holy Monasteries v Greece

In *Holy Monasteries*,¹⁹⁷ the applicant monasteries alleged breaches of Art 1 of the First Protocol and Arts 6, 9, 11, 13 and 14 ECHR after Greek legislation required the transfer of certain of the monasteries' property to the Greek state. The government's preliminary objection that the applicants were governmental organisations incapable of making an Art 34 application was rejected by the European Court, which noted 'at the outset that the applicant monasteries do not exercise governmental powers.'¹⁹⁸ To support its findings, the court drew attention to four factors.¹⁹⁹ First, the monasteries possessed essentially spiritual and ecclesiastical rather than public administration objectives. Second, their

¹⁹⁶ See text to fn 190.

¹⁹⁷ *Holy Monasteries v Greece* (App nos 13092/87 and 13984/88) (1995) 20 EHRR 1.

¹⁹⁸ *Ibid.*, [49].

¹⁹⁹ *Ibid.*

classification as public law entities in domestic law demonstrated only the domestic legislature's desire to *protect* them to the same extent as – rather than equate them with – other public law entities. Third, the monastery councils' only power consisted of making rules concerning spiritual life and the internal administration of monasteries. Fourth, the monasteries were under the supervision of the local archbishop rather than the state, and as such were 'completely independent' of the state.²⁰⁰

The court's second stated factor emphasises that the domestic categorisation of a body will not be conclusive of its status in Strasbourg. When taken as a whole, factors one, three and four, I suggest, amount to the conclusion that the monasteries were not bodies whose primary purpose was to serve the public interest. The court's reference to 'public administration' objectives in the first of its stated factors is illuminating. Despite omitting an explanation as to what would constitute such objectives, the court seems to have had in mind those bodies whose objectives are to manage and/or provide for society and therefore to serve the public interest. Public administration objectives may be incapable of precise definition but the clear message, in the court's view, is that the lack of a public administration objective meant that the monasteries lacked an obvious public interest purpose. The possession of ecclesiastical and spiritual objectives *per se* was seemingly insufficient in the court's view to amount to such a public interest purpose, although it is unclear why. One possible explanation, however, could lie in the difficulty of confidently asserting a correlation between the religious and the public interest without first addressing the theological issue of

²⁰⁰ *Ibid.*

whether the religious views held by the particular body in question are defensible. Whether or not this did underlie the court's reasoning is unknown, but suffice it to say that the increasing societal trend towards secularism is likely to render this argument – that religious interests do not necessarily correlate with the *public* interest – more socially realistic with the passing of time.²⁰¹

The possession of 'special authority, in the sense of [for example] coercive powers over the civil and political rights of individuals' may be a relevant factor as to whether a body has as its primary purpose the service of the public interest because, as Oliver observes, many core public authorities possess such authority.²⁰² The thrust of the court's third stated factor (that the monastery councils could only regulate the monasteries' internal workings), it would seem, is that the regulatory authority possessed by the monastery councils only allowed the monasteries to bind themselves, and consequently did not extend to any authority over *other* individuals at all.

The court's fourth stated factor (independence) is also relevant to the public interest. Private persons are free within the constraints of the law to further their own rather than the public interest.²⁰³ The stronger their institutional ties to and assimilation with the state's nucleus however, the greater is the *possibility* that they behave like the nucleus and that their primary purpose is to serve the public interest rather than their own. Bodies with restricted institutional independence from the state's nucleus may, therefore, be governmental organisations and core

²⁰¹ For interesting related comments on growing secularism, see D. Nicholls, *The Pluralist State* (Macmillan, London 1975).

²⁰² Oliver (fn 149) 481.

²⁰³ *Fewings* (fn 180).

public authorities. Whether this is so will of course depend on the specific facts of each case, but the logical relevance of institutional independence to the applicants' objectives explains the court's mention of it.

Further Cases

In *Ayuntamiento de Mula*,²⁰⁴ a local borough council lodged an application alleging the breach of Art 6(1) ECHR after a domestic dispute over the ownership of a town castle. Dismissing the application under Art 34, the European Court of Human Rights said:

'[L]ocal-government organisations are public-law bodies which perform official duties assigned to them by the Constitution and by substantive law. They are therefore quite clearly governmental organisations.'²⁰⁵

Although *Holy Monasteries* demonstrates that the domestic law classification of a body is not conclusive of its status in Strasbourg, the court's reference in *Ayuntamiento de Mula* to 'public-law bodies' and 'official duties' assigned by the constitution, echoing the Commission's language in the earlier case of *Consejo General*,²⁰⁶ appears to reveal Strasbourg's view that the bodies comprising the core or 'nucleus' of the state differ fundamentally in institutional character and behaviour from private persons. As I argued in Part B of this chapter, Oliver's view that the distinguishing feature of such core bodies is their

²⁰⁴ *Ayuntamiento de Mula v Spain* (fn 170), applied in this respect in *Assanidze v Georgia* (App no 71503/01) (2004) 39 EHRR 32 [148].

²⁰⁵ *Ayuntamiento de Mula* (*ibid.*) This is so even if those councils are independent legal persons: *Danderyds Kommun v Sweden* (fn 170).

²⁰⁶ *Consejo General de Colegios Oficiales de Economistas de España v Spain* (App nos 26114/95 and 26455/95) (1995) DR 82-B. Here, the Commission held that the General Council of Spanish Economists, a professional regulatory body created by statute, was a governmental organisation incapable of filing an application under Art 34.

duty to serve the public as opposed to their own interest is accurate. *Consejo General* and *Ayuntamiento de Mula* may not be explicit authority for Strasbourg's 'public interest' approach therefore, but the public interest theme does usefully explain *why*, particularly, 'public-law bodies' performing 'official duties' constitute governmental organisations under Art 34.

Radio France: a Public Policy Exception

In *Radio France*,²⁰⁷ the claimants alleged the breaches of Arts 6, 7 and 10 ECHR after encountering domestic sanction for broadcasting damning stories about the former deputy mayor of Paris. In reaching its decision that Radio France, a state-financed radio broadcaster, was a non-governmental organisation capable of filing an Art 34 application, the court said that in order to identify a governmental organisation:

'[A]ccount must be taken of its [the body's] legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of independence from the political authorities.'²⁰⁸

The court then noted that domestic law placed Radio France under the direct control of an independent regulator, that Radio France operated in a sector open to competition rather than holding a monopoly and that it exercised no 'authority' in the form of 'powers beyond those conferred by ordinary law'.²⁰⁹ It continued:

²⁰⁷ *Radio France v France* (App no 53984/00) (2005) 40 EHRR 29. The relevant decision is the admissibility decision of 23 September 2003.

²⁰⁸ *Ibid.*, [26].

²⁰⁹ *Ibid.*

‘Thus, although Radio France has been entrusted with public-service missions and depends to a considerable extent on the State for its financing, *the legislature has devised a framework which is plainly designed to guarantee its editorial independence and institutional autonomy...* The court accordingly concludes that Radio France is a “non-governmental organisation” within the meaning of Article 34...’²¹⁰

Despite being subject to ordinary company law, Radio France was (a) created by law, (b) required by law to undertake public service missions in the general (i.e. public) interest where other providers were not similarly so required, (c) under government supervision, (d) financed by taxes and (e) subject to particular public service obligations such as the need to ensure public service continuity in staff recruitment.²¹¹ Radio France would therefore appear to be a body established to serve the public interest and consequently a ‘governmental organisation’ under Art 34, but the court drew heavily upon Radio France’s institutional independence to support its conclusion that it was a non-governmental organisation.

There are two possible interpretations, I suggest, of the court’s decision in *Radio France*. The first is that Radio France’s independence rendered it a body whose primary purpose was to serve its own interests as opposed to those of the public. The second, ‘public policy’, interpretation is that Radio France was an institutionally governmental organisation, but that the fundamental importance of media freedom required it to vindicate its own rights against the state by filing an Art 34 application and, as such, required it to be treated as a non-governmental organisation in this case.

²¹⁰ *Ibid.* (emphasis added).

²¹¹ *Ibid.*, [24].

The first interpretation is unconvincing. First, Radio France was undeniably required to serve the public interest in its activities. As the court observed, domestic law imposed upon it ‘more than a hundred obligations, concerning its educational, cultural and social missions in particular.’²¹² Second, that independent, institutionally private persons are generally free to further their own rather than the public interest within the confines of the law does not logically produce the conclusion that independent bodies will always have as their purpose the furtherance of their own interests.²¹³ Despite its relevance,²¹⁴ a body’s institutional independence is therefore a factor of uncertain general moment whose precise significance will depend on the facts of each case. The court’s treatment of it as highly persuasive if not decisive in *Radio France* is questionable given Radio France’s clear public interest objectives.

Given this, the public policy argument that media organisations should be able to enforce their right to freedom of expression (and any rights incidental to the enforcement of that right) against the state and should consequently be treated as non-governmental organisations is more convincing. The particular and fundamental importance of a free press has been recognised domestically²¹⁵ and by Strasbourg,²¹⁶ and clearly featured in the court’s reasoning in *Radio France* when it was keen for its conclusions to correlate with Recommendation No. R (96) 10 of the Committee of Ministers of the Council of Europe to member States

²¹² *Ibid.*

²¹³ See e.g. *RENFE v Spain* (fn 170), where the railway provider was a governmental authority despite possessing a distinct legal personality and consequent administrative autonomy, and *Danderyds Kommun* (fn 170), where the local municipality was a governmental organisation despite being ‘an independent legal person, acting in its own capacity’.

²¹⁴ On this, see *Mykhaylenko v Ukraine* (App no 35091/02) (unreported) [44].

²¹⁵ *Derbyshire County Council v The Times Newspapers Ltd* [1993] AC 534, [1993] 2 WLR 449 (HL).

²¹⁶ *Observer and Guardian v United Kingdom* (App no 13585/88) (1992) 14 EHRR 153; *Jersild v Denmark* (App no 15890/89) (1995) 19 EHRR 1.

on the guarantee of the independence of public service broadcasting, ‘whose recitals reiterate that the independence of the media is essential for the functioning of a democratic society’.²¹⁷ Furthermore, characterising the *Radio France* decision as a public policy exception would represent a more nuanced analysis of Radio France’s status. The conclusion that Radio France’s independence rendered it a body whose purpose was to serve the private as opposed to public interest could prevent Strasbourg from declaring it a ‘core’ state body capable of engaging France’s state responsibility under the active liability principle²¹⁸ or, in the same vein, a ‘public authority’ capable of interfering with, for instance, the right to privacy under Art 8 ECHR.²¹⁹ Characterising *Radio France* as a public policy exception, however, would confine the conclusion – that a body which would ordinarily be a core state body can nevertheless be a non-governmental organisation – to those situations where ‘state’ media organisations seek to vindicate their own rights to freedom of expression.²²⁰

ECHR: Active Liability

Four cases arising for consideration here are *Van der Musselle*,²²¹ *Woś*,²²² *Sychev*²²³ and *Appleby*.²²⁴ They do not, I suggest, explicitly reveal a ‘public

²¹⁷ *Radio France* (fn 207) [26].

²¹⁸ It is recalled that a strong if not conclusive link exists in Strasbourg jurisprudence between core state bodies under the active liability principle and ‘governmental organisations’ under Art 34: *Danderyds Kommun v Sweden* (fn 170); *Hautanemi v Sweden* (fn 171); *Islamic Republic of Iran Shipping Lines v Turkey* (fn 171).

²¹⁹ The ‘public interest’ theme clearly underlies the approach to ‘public authority’ in Art 10, for instance: *Casado Coca v Spain* (App no 15450/89) (1994) 18 EHRR 1.

²²⁰ For a similar case in which a ‘public law’ broadcaster’s independence was emphasised in order to justify its classification as a non-governmental organisation for the purposes of filing an Art 10 complaint, see *Österreichischer Rundfunk v Austria* (App no 35841/02) (unreported).

²²¹ *Van der Musselle v Belgium* (App no 8919/80) (1984) 6 EHRR 163.

²²² *Woś v Poland* (App no 22860/02) (2007) 45 EHRR 28. The relevant decision is the Court’s admissibility decision of 1 March 2005.

interest' theme to Strasbourg's view of which bodies engage the state's responsibility under the active liability principle. Rather, the highly fact-specific outcomes in these cases can be comfortably and usefully rationalised by reference to the public interest theme.

In *Van der Mussele*, a pupil advocate alleged breaches of Arts 4(2), 1 of the First Protocol and 14 ECHR when compelled by the institutionally independent Belgian Order of Advocates to provide free legal services to indigent persons. Although finding no ultimate breach of the Convention, the European Court rejected the government's prior submission that Belgium could not be responsible for the actions of the Order of Advocates. According to the court, Belgium had chosen to ensure its compliance with the Art 6 ECHR obligation to provide such legal services by compelling the Order to compel advocates to undertake the work, which solution could not 'relieve the Belgian state of the responsibilities it would have incurred... had it chosen to operate the system itself.'²²⁵ It is clear that the Belgian state was under an obligation deriving from the Convention itself, but the court fails to clarify the particular relevance of Convention as opposed to, for instance, domestic law obligations on the state. Furthermore, the court fails to clarify why the fulfilment of an obligation as opposed to, for instance, the performance of any other function by an institutionally independent body on the state's behalf will engage the state's responsibility. In short, the limits to the 'delegation' principle are difficult to discern: nothing in the court's reasoning in *Van der Mussele* explains why the state's responsibility will not be engaged by the performance of *any* function

²²³ *Sychev v Ukraine* (App no 4773/02) (unreported).

²²⁴ *Appleby v United Kingdom* (App no 44306/98) (2003) 37 EHRR 38.

²²⁵ *Van der Mussele* (fn 221) [29].

(such as cleaning government offices) by *any* independent person on behalf of the state.

Van der Musselle can be sensibly rationalised and its ambit identified when analysed using the public interest theme. Despite the institutional independence of the Order of Advocates, its primary purpose was to serve the public interest by regulating the relevant arm of the Belgian legal profession; indeed, it was established by domestic law for this very reason.²²⁶ The court, evidently, did not see the Order of Advocates as an institutionally private person with the primary purpose of furthering its own interests. The Order was, the court noted, endowed with ‘legal personality in public law’ and ‘associated with the exercise of judicial power’.²²⁷ That the Order of Advocates was a body whose primary purpose was to further the public interest is, I suggest, the underlying reason why it was regarded as a core state body capable of engaging the state’s responsibility under the active liability principle.

In *Woś*, the applicant had been subjected to forced labour in Nazi-occupied Poland during the Second World War and applied for compensation to the Polish-German Reconciliation Foundation (PGRF), a body regulated by domestic private law and established after international treaty with Germany to distribute compensation scheme funds. The applicant claimed that the PGRF had incorrectly calculated his level of compensation and, after unsuccessful domestic action, alleged the breach of Art 6 ECHR. The European Court held that the PGRF’s actions were capable of engaging Poland’s state responsibility and, as in

²²⁶ *Ibid.*, [15].

²²⁷ *Ibid.*, [29].

Van der Musselle, based its conclusion upon the delegation of state powers to the PGRF.²²⁸ Again however, the court gave no indication as to what constituted ‘state powers’. Like Belgium’s delegation in *Van der Musselle* to the Order of Advocates of the performance of its international obligation to render free legal assistance under Art 6, the Polish state in *Woś* was also under an international treaty obligation – this time to administer the compensation funds. The effective *ratio decidendi* of these cases could therefore be that the performance by an institutionally independent person of a state’s international obligations engages the state’s responsibility. However, the court could have easily articulated such a principle if it wished. Additionally, it is unclear from the judgment why the performance of an *international* obligation – or any obligation for that matter – sets the parameters of active liability.

Again, I suggest, *Woś* can be made sense of when analysed using the public interest theme. The court noted in its judgment that the PGRF was a foundation which, under domestic law, was ‘established in order to carry out socially and economically beneficial goals which comply with the basic interests of the Republic of Poland.’²²⁹ It can therefore be said that the PGRF, established to administer the compensation schemes, had as its purpose the service of the public rather than its own interest. This is supported by the court’s further observations on the PGRF’s institutional character, namely that it was founded by a government minister who controlled the composition of the PGRF’s supervisory board and management board and that the Minister of the State Treasury could

²²⁸ *Woś v Poland* (fn 222) [72]-[73].

²²⁹ *Ibid.*, [22].

exercise ‘a certain degree of control and supervision over the Foundation’.²³⁰ Therefore, ‘the government had at its disposal substantial means of influencing the Foundation’s operations’.²³¹ That the Foundation’s primary purpose was to serve the public interest is, I suggest, why the PGRF was found to engage Poland’s responsibility under the active liability principle.

In *Sychev*, the European Court decided that the omissions of a judgment-executing Liquidation Commission engaged the state’s responsibility. *Sychev* is more difficult to analyse because, as will be seen in my analysis of Quane’s views in Chapter 5, the European Court relied to questionable effect on *Costello-Roberts v United Kingdom*²³² as authority for the proposition that a private person could engage the state’s responsibility when performing state powers. It is difficult to tell from the court’s account of the Liquidation Commission’s characteristics whether it was a body whose primary purpose was to serve the public interest or its own. The Commission comprised representatives of the main creditors of the Lenina coal mine, a bankrupt state-owned entity,²³³ which might suggest that those creditors and hence the Commission had as their primary purpose the service of the creditors’ own interests by seeking to recover the creditors’ debts. However, the main creditors included ‘several State owned companies’²³⁴ which, if they were bodies whose primary purposes were to serve the public interest, could indicate the contrary. It is therefore difficult to tell,

²³⁰ *Ibid.*, [68].

²³¹ *Ibid.*

²³² (App no 13134/87) (1995) 19 EHRR 112. *Costello-Roberts* is best seen as a ‘passive liability’ (positive obligation) case: see Chapter 5 and e.g. C. Ovey and R. White, *Jacobs & White: The European Convention on Human Rights* (4th edn OUP, Oxford 2006) 86.

²³³ *Sychev* (fn 223) [6].

²³⁴ *Ibid.*

despite what I regard as the court's erroneous reliance on *Costello-Roberts*, whether the court in *Sychev* reached the correct decision on the facts.

A case which falls clearly on the 'private' side of the line however is *Appleby*, in which the private owner of a shopping centre refusing the applicants the right to petition the public was held not to be able to engage the state's responsibility under the active liability principle when those applicants alleged the breaches of Arts 10 and 11 ECHR. It is evident that the owner of the centre (Postel Properties Ltd) was a body which had as its primary purpose the service of its own interests. Postel purchased the town centre in which the shopping centre was located from the Washington Development Corporation, a body established under statute to build the new town centre.²³⁵ Although the ability to enter into commercial transactions could not of itself render the body a private person since many core state bodies can also do so, it can indicate that body's ability to make profit and therefore serve its own interests. Since Postel Ltd was essentially 'run as a commercial business',²³⁶ it was an institutionally private person which had as its primary purpose the service of its own interests. As such, the court was right, I suggest, not to regard it as a body capable of engaging the state's responsibility.

Domestic Law

It is argued that a clear public interest theme to the courts' reasoning can be identified in each of the following two cases.

²³⁵ *Appleby* (fn 224) [11].

²³⁶ This would rightly appear to be a strong indicator of the private as opposed to 'state' nature of a body: *Islamic Republic of Iran Shipping Lines v Turkey* (fn 171) [81]; *Ukraine-Tyumen v Ukraine* (App no 22603/02) (unreported).

Aston Cantlow

Here, it is recalled, the principal question was whether the Parochial Church Council (PCC) was a public authority – core or hybrid – under s 6 HRA. The Court of Appeal held that the PCC was a core public authority.²³⁷ Sir Andrew Morritt V-C, giving the judgment of the court, emphasised the following:

‘[First, the PCC]... is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act. Thus, in particular, its notice to repair has statutory force. [Second] It is public in the sense that it is created and empowered by law; [third] that it forms part of the church by law established; and [fourth] that its functions include the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church.’²³⁸

As previously mentioned, the possession of special authority can be an indicator that a body is a core public authority whose primary purpose is to serve the public interest.²³⁹ The second factor – legal basis (here through delegated legislation)²⁴⁰ – also suggests an objective of serving the public interest because, as previously mentioned, Parliament is presumed only to legislate if it would be in the public interest to do so.²⁴¹ The third factor, although the House of Lords appeared to disagree on the basis of *Holy Monasteries*, would seem to imply that a PCC, representing an integral part in the workings of the Church of England, had as its primary purpose the service of the public interest because the Church of England itself was a core public authority with the same purpose. The fourth

²³⁷ [2001] EWCA Civ 713, [2002] Ch 51.

²³⁸ *Ibid.*, [35].

²³⁹ Oliver (fn 149) 481.

²⁴⁰ *Aston Cantlow* (fn 237) [32] (Sir Andrew Morritt V-C).

²⁴¹ Oliver (fn 149) 482.

factor (enforcing common law liability) seems to relate to the first factor by suggesting that the PCC's powers were coercive in the sense that they were deployable against subjects *against their will*, and not simply those who voluntarily assumed membership of the Church. Taken as a whole, these factors strongly suggest that the PCC was a core public authority because its primary purpose was to serve the public interest rather than its own.

The House of Lords, it is recalled, reached the unanimous conclusion that the PCC was not a core public authority after a closer and more reliable inspection of the PCC's characteristics.²⁴² Their Lordships' judgment is clearly underlain by the sentiment that the PCC's primary purpose was to serve its own rather than the public interest. Lord Hobhouse's view that the PCC 'acts in the sectional not the public interest' notwithstanding that there may have been ancillary public interest benefits to its activities, is a clear indicator of this.²⁴³ Lord Nicholls also believed the Church of England to be an essentially religious rather than governmental organisation²⁴⁴ and that, since the PCC's role was to promote and manage the Church's mission locally, it was engaged in mere self-governance and the 'promotion of its own affairs.'²⁴⁵ However, as seen above, it is difficult to make conclusive statements regarding the correlation (or lack thereof) between the religious and public interest without addressing the defensibility of the Church of England's religious views.²⁴⁶ Consequently, it is difficult to assess whether the particular views of Lords Hobhouse and Nicholls that the PCC's purpose of

²⁴² *Aston Cantlow* (fn 151).

²⁴³ *Ibid.*, [86].

²⁴⁴ *Ibid.*, [13]. See also [156] (Lord Rodger).

²⁴⁵ *Ibid.*, [14].

²⁴⁶ The courts may well be reluctant on public policy grounds to undertake such a task anyway: *R v Chief Rabbi of the United Hebrew Congregations, ex p Wachmann* [1992] 1 WLR 1036, [1993] 2 All ER 249 (QB) 1043 (Simon Brown J).

religious advancement fails to correlate with the public interest are correct on the facts.

Nevertheless, other factors enunciated by their Lordships indicate that the PCC's primary purpose was not to further the public interest. Consonantly with the factors mentioned by Oliver as evidence of a body's public interest objectives,²⁴⁷ Lord Hope observed that the PCC lacked public accountability or public funding, and the powers it possessed to enforce chancel liability could not be deployed against the general public or a class of it.²⁴⁸ Additionally, contrary to the Court of Appeal's analysis of the Church of England's status, it lacked legal personality.²⁴⁹ Again consonant with Oliver's view on the significance of a statutory basis, no Act of Parliament purported to establish the Church, and the relationship enjoyed by it with the state was one of recognition rather than devolution of power from state to Church.²⁵⁰ As Lord Rodger observed, PCC's 'were not constituted by statute but by the Church... to carry out functions determined by... the Church.'²⁵¹ Moreover, applying *Holy Monasteries* and *Hautanemi*,²⁵² the PCC would fail to engage the state's responsibility in Strasbourg.²⁵³ Lord Scott, it is recalled, agreed with both Lord Hope and Lord Rodger on the core public authority point.²⁵⁴ This reference to Strasbourg jurisprudence, because of its apparent public interest theme to the identification

²⁴⁷ Oliver (fn 149) 481-483.

²⁴⁸ *Aston Cantlow* (fn 151) [59].

²⁴⁹ *Ibid.*, [61].

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*, [152].

²⁵² *Hautanemi v Sweden* (fn 171). The Commission held, because the Church of Sweden was a non-governmental organisation under Art 34, that its actions could not engage the state's responsibility under the Convention.

²⁵³ *Aston Cantlow* (fn 151) [164]-[166]. See also [49] (Lord Hope) and [86] (Lord Hobhouse).

²⁵⁴ *Ibid.*, [129].

of bodies as ‘core’ state entities, is also a strong indicator of the public interest theme in domestic law.

Cameron v Network Rail Infrastructure Ltd

In *Cameron*,²⁵⁵ the defendant, Network Rail Infrastructure Ltd (formerly Railtrack plc), was a company created and vested with the railway infrastructure as part of the privatisation of the railway network. A number of people were killed in the Potters Bar rail crash of 2002, which occurred on a stretch of railway owned and controlled by the defendant. The claimants – the daughters and executor of one of the deceased – claimed *inter alia* that the defendant had breached the right to life under Art 2 ECHR. Sir Michael Turner held that Network Rail was not a public authority under s 6 HRA.

Regarding the core public authority point, Sir Michael listed various significant factors.²⁵⁶ First, the business of running a railway was not ‘intrinsically an activity of government’ since the ‘very purpose of privatisation’ was to ‘sever the railways from direct governmental control’. Second, there was a ‘clear commercial objective’ to Railtrack’s performance since it was ‘concerned to make profits for its shareholders’. Third, Railtrack was under no obligation ‘to conduct its operations in a manner subservient to the public interest’ and could behave, subject to its licence conditions, however it saw fit in order to achieve its objectives of profit. Fourth, it was not democratically accountable. Fifth, its board of directors was appointed by the company under no government influence

²⁵⁵ [2006] EWHC 1133 (QB), [2007] 1 WLR 163.

²⁵⁶ *Ibid.*, [29].

or control. Sixth, it possessed no special powers or immunities other than those possessed by private individuals. Seventh, it was not publicly funded.

Sir Michael's second, third and fifth factors clearly indicate that he saw the defendant as a person whose primary purpose was to serve its own interests rather than those of the public. This is supported in particular by Railtrack's lack of democratic accountability, special powers and public funding, any of which – if present – could have indicated in part its status as a 'public interest' body and hence a core public authority.²⁵⁷ Additionally, Railtrack's lack of 'special powers beyond those which... [pertain to] relations between individuals'²⁵⁸ should be a telling indicator of its status as a private person due to the potential difficulty were it to be classified as a core public authority of demonstrating specific legal authority for its actions under *Fewings*.

In sum therefore, a closer inspection of both Strasbourg and domestic law reveals the presence of the public interest theme to the courts' reasoning. Broadly speaking, bodies engaging the state's responsibility or qualifying as governmental organisations under Art 34 in Strasbourg are, like core public authorities under the HRA, distinguished from private persons by the central feature of having as their primary purpose the service of the public interest rather than their own. Upon closer analysis, *Radio France*, I suggest, evidences a public policy exception at the Strasbourg level which may allow media organisations which would ordinarily be regarded as core state bodies to be classed as 'non-governmental organisations' in order to enforce their Convention rights to free

²⁵⁷ Oliver (fn 149) 481-483.

²⁵⁸ *Cameron* (fn 255) [29] (Sir Michael Turner).

speech. When viewed as such in domestic law, this public policy doctrine represents a Strasbourg-recognised exception to the assumption in *Aston Cantlow* that core public authorities can *never* enforce their own Convention rights.²⁵⁹

D. REFINING THE PUBLIC INTEREST THEME

This basic theme, I suggest, needs refining in two respects. First, I argue that core public authorities are at times capable of furthering their own interests. Second, I argue that bodies which have voluntarily assumed their public interest objectives remain institutionally private persons unless they have undergone subsequent adoption by the state.

Furthering the Self-Interest

My use throughout this chapter of the words the ‘primary purpose’ in serving the public interest has been deliberate in order to reflect my view that core public authorities, at times, are capable of furthering their own interests. Oliver’s essential thesis, upon which this chapter has attempted to build, is that core public authorities are distinct from private persons because their purpose is to serve the public interest. In other words, self-service is the hallmark of typically private activity or private functions; selflessness the hallmark of public.²⁶⁰

²⁵⁹ See, on this assumption, *Aston Cantlow* (fn 151) [8] (Lord Nicholls).

²⁶⁰ Indeed, Oliver believes (fn 149) the performance of a public function under s 6(3)(b) to go hand in hand with a duty of altruism: 484. However, as Chapter 6 demonstrates, whilst this may be true of the exercise of coercive powers, it is not necessarily true of the second strand to ‘functions of a public nature’, namely the performance of a public function on a core public authority’s behalf.

Oliver's view is that a core public authority's purpose is to serve *only* the public interest.²⁶¹ But, as seen in Part A, she also believes that such bodies are capable (factually) of exercising private functions because they behave 'in ways that are on all fours with the ways in which private bodies act.'²⁶² In response however, it is difficult to see how core public authorities can ever act 'on all fours with' private persons if everything they do is for the fundamentally different purpose of furthering the public interest. In other words, given Oliver's views on the link between private interest and private functions, it is difficult – if Oliver's view that core public authorities *always* behave in the public interest is correct – to see how they could ever exercise factually private functions.

The more realistic view is that core public authorities will sometimes further their own interests. A local authority's employment of cleaning staff, for example, is a function which could loosely be said to benefit the public since it indirectly and tenuously facilitates the performance of that authority's statutory and common law duties. But the function of employing cleaning staff would undoubtedly be a factually private function when performed by a core public authority. This is not because it is a contractual transaction similarly capable of performance by a private person but, I suggest, because first and foremost the local authority is furthering its own interests. The prime, immediate beneficiary of the employment of these staff is the local authority and its employees. Given the tenuous and indirect benefit upon the public, the function cannot realistically

²⁶¹ Oliver (*ibid.*) 483-484.

²⁶² *Ibid.*, 478.

be said to be *in furtherance of* the public interest when the body feeling the immediate effects of the performance of that function is the performer itself.²⁶³

Oliver cites *R v Somerset County Council, ex p Fewings*²⁶⁴ to demonstrate that core public authorities behave in furtherance of the public interest in everything that they do. Laws J said:

‘A public body has no heritage of legal rights which it enjoys for its own sake; at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose... It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility: a responsibility which defines its purpose and justifies its existence.’²⁶⁵

These comments were made outwith the human rights context, instead concerned with the issue of a public body’s need to show specific legal authority for its actions. *Fewings* cannot be taken too literally in the HRA sphere. If a core public authority’s purpose is to further the public interest every time it performs a function, *Fewings* produces the conclusion when taken with Oliver’s views on the nature of functions that the body’s functions are all of a factually public nature. This in turn retreats to the ‘combined’ approach to core public authorities and should not, for the reasons given in Part A, be encouraged.

²⁶³ It may therefore be necessary to draw a distinction between staff with and without public-facing roles. Cf Oliver (*ibid.*), who appears to believe that employing *any* member of staff would be a private function. However, her assertion is based upon the law of judicial review which, as will be seen in Chapter 5, should not be regarded as coterminous with the meaning of s 6’s ‘public authority’ provisions.

²⁶⁴ *Fewings* (fn 180).

²⁶⁵ *Ibid.*, 524.

Alternatively, my interpretation of Oliver's views could be inaccurate and she may have an alternative method in mind of identifying a body's private functions. Perhaps a 'private' function is defined simply as a function which ordinary persons are capable of performing. This, after all, is what she could have meant when referring to core public authorities behaving in ways 'on all fours with' private persons. Typical examples of private functions include commercial transactions such as, she says, employing staff or letting and disposing of land.²⁶⁶

However, such an approach would be too crude, and risks generating the conclusion (reached by the majority in *YL*)²⁶⁷ that all functions performed pursuant to commercial transactions are private functions. This would in turn represent a suspiciously restricted view of the reach of s 6(3)(b) HRA which, by rendering as public authorities 'any person certain of whose functions are... of a public nature', was intended at least by the government to apply to those bodies performing functions in the commercial context of contracting out.²⁶⁸ The notion that the factual nature of a core public authority's functions is defined with reference to the public-private interest would therefore appear the more attractive one.

Laws J's *dicta* in *Fewings* are best seen as authority for the proposition that a core public authority cannot further its own, private, interests in the event of

²⁶⁶ Oliver (fn 149) 478.

²⁶⁷ *YL* (fn 163). For fuller discussion, see Chapter 5.

²⁶⁸ Hansard HC vol 314 col 409 (17 June 1998) (Mr Jack Straw MP). This restricted view – which is criticised in Chapter 6 – is indeed Oliver's precise thesis: D. Oliver, 'Functions of a public nature under the Human Rights Act' [2004] PL 329.

conflict with the public interest.²⁶⁹ After all, it is only really in such a case, to borrow his Lordship's phraseology, that the body is grinding its own axe *beyond* its public responsibility. But this would not prevent core public authorities validly serving their own interests where there is no clash with the public interest and, as a result, neatly reconciles *Fewings* with the need to draw a principled distinction between the 'public' and 'private' functions performed by bodies under the HRA.

Voluntary Assumption of Public Interest Objectives

The basic theme – that core public authorities are bodies whose primary purpose is to serve the public interest – would on its face include charities and sporting regulatory bodies, neither of which Oliver thought would be caught by the public interest theme.²⁷⁰

Charities

It is a straightforward proposition that charities are not usually core public authorities. However publicly beneficial their motives may be, they are for the most part legal persons or groups of individuals who have voluntarily assumed their 'public interest' objectives. Their precise status will depend on the facts of each case, however. For instance, in *Woś*,²⁷¹ the state responsibility-engaging Polish-German Reconciliation Foundation resembled a charitable organisation but, arguably, had not voluntarily assumed its 'public interest' objectives because

²⁶⁹ Along these lines, see Harris' 'third source' concept (fn 180) 232, under which public bodies can act without specific statutory or common law authority but cannot assert 'legal rights over the residuary freedoms of others' when doing so.

²⁷⁰ Oliver (fn 149) 484. The government shared the view that charities would not be classed as core public authorities: Hansard HC vol 314 col 407 (17 June 1998) (Mr Jack Straw MP).

²⁷¹ *Woś v Poland* (fn 222).

it was established by core state bodies as a device for the distribution of state compensation funds in the public interest. Put simply, it was conceived by and born to serve the state. The PGRF's position therefore differed from that of typical charitable organisations, which are established by private persons voluntarily assuming their 'public interest' objectives.²⁷²

Charitable organisations will thus remain for the most part private persons who can at best *imitate* the state's core by furthering the public interest. Therefore, such persons will need as a minimum to exercise 'functions of a public nature' under s 6(3)(b) in order to be categorised as public authorities under the HRA.

Sporting Regulators

It is less obvious why sporting regulators should not be classified as core public authorities, although there would appear to be two potential reasons. First, by analogy with the furtherance of the religious interest by the Church in *Holy Monasteries* and *Aston Cantlow*, it might be said that the furtherance of sporting objectives cannot empirically be said to correlate with the public interest and therefore that sporting regulators lack as their primary purpose the service of the *public* interest. However, it is clear for example that the National Greyhound Racing Club (NGRC) and the Jockey Club are regarded as acting for the public interest when regulating sporting industries.²⁷³

²⁷² As regards the *Fewings* 'paralysis' point (Part B) above, the European Court's merits judgment does seem to reveal that the PGRF possessed the special authority to perform its general day-to-day activities compatibly with its aims: (2007) 45 EHRR 28 [30].

²⁷³ *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302 (CA) 1308 (Lawton LJ) and 1311 (Slade LJ); *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909 (CA) 923 (Sir Thomas Bingham MR).

The second and more convincing reason, I suggest, as to why sporting regulators should not be regarded as core public authorities is because their ‘public interest’ objectives, like those of charities, tend to be voluntarily assumed. In *Law and Aga Khan* respectively, the NGRC and Jockey Club were established under the initiative of private individuals who had unilaterally assumed their regulatory roles and hence public interest objectives. The Jockey Club was incorporated two hundred years later by Royal Charter,²⁷⁴ but this merely amounted to a ‘mark of royal favour to racing’²⁷⁵ rather than a challenge to the notion that its creators had voluntarily assumed their purpose of furthering the public interest.

It is necessary however to address a further point. Although relating to the amenability of bodies to judicial review, *Datafin* illustrates the need to consider the position of voluntary ‘public interest’ bodies like the Panel of Take-overs and Mergers (PTM) who are subsequently incorporated into the governmental framework.²⁷⁶

The essential distinction here, I have sought to argue, is between those bodies forming the core of the state and those bodies who voluntarily assume their public interest objectives and, in doing so, merely emulate the state. However, it would be artificial to consider a body’s objectives and their voluntary/involuntary status only at the time of its inception. Regulatory bodies such as the Jockey Club, for example, can be hundreds of years old and their institutional links to the core of the state may change over time. For this reason,

²⁷⁴ *Aga Khan* (*ibid.*) 913.

²⁷⁵ *Ibid.*, 932 (Hoffmann LJ).

²⁷⁶ *R v Panel of Take-overs and Mergers, ex p Datafin Plc* [1987] 2 WLR 699, [1987] QB 815 (CA).

regulators with the primary purpose of serving the public interest, even if initially voluntarily assuming this purpose, should be recognised as core public authorities if subsequently ‘adopted’ by the state.

Adoption, I suggest, comprises two elements. The first is a clear indication by the executive or Parliament (through legislation) that the body is one which the executive or Parliament regards as a core state body or, put colloquially, ‘one of the family’. This is akin to the decision made by the Department of Trade and Industry that a central regulatory body should exist to cover the activities of the PTM, but that it was content to continue to allow the PTM to undertake them.²⁷⁷ However, especially given the consequences of s 6(1) applying to *all* of a core public authority’s activities, it would seem unnecessarily draconian if it stopped there. The second element, therefore, is a demonstration of assent by the body to the executive or Parliamentary indication. Assent may take many forms, but it is doubtful that continuing to operate as before should suffice. Otherwise, a unilateral executive or Parliamentary indication (the first element of adoption) that a voluntary regulator fills a void which would otherwise be filled by the state could amount to the damaging instruction to stop operating or risk being classed as a core public authority.²⁷⁸ On the other hand, it is unlikely given the consequences of being subject to the HRA in respect of *all* of one’s acts that

²⁷⁷ *Ibid.*, 838 (Sir John Donaldson MR). This indication is restated, it would seem, by Parliament’s designation of the PTM through the Companies Act 2006 as ‘the supervisory authority to carry out certain regulatory functions in relation to takeovers under the EC Directive on Takeover Bids (2004/25/EC)’: see The Takeover Panel, ‘The Panel on Takeovers and Mergers’ <<http://www.thetakeoverpanel.org.uk/new/>> accessed 1 August 2008.

²⁷⁸ Parliamentary sovereignty does however mean that a clear designation by Parliament that a body is a core public authority for the purposes of s 6 HRA would be law, whether or not the body’s assent existed.

assent would take such an explicit form as a public statement by the body alluding to its own core public authority status.

It is unclear from the judgment in *Datafin* whether assent to the executive's views that the PTM was 'one of the family' initially existed. Lloyd LJ alluded to the 'implied devolution of power' by state to PTM²⁷⁹ and Nicholls LJ to the presence on the PTM's membership board of persons appointed by the Governor of the Bank of England.²⁸⁰ But without knowing the circumstances in which the 'devolution' and membership came into being, it is difficult to know without a far more searching analysis of the PTM's history and institutional and relational links with the state whether this would have been enough.

However, another indicator of the PTM's assent may exist. Although it gives no indication as to which, the Companies Act 2006 (CA) clearly sees the PTM as either a core or hybrid public authority,²⁸¹ and further emphasises the PTM's service of the public interest by conferring on it the coercive power to give directions to restrain a person from acting in breach of regulatory rules devised by the PTM²⁸² and by enabling the Secretary of State to fund the PTM.²⁸³ Moreover, the CA imbues the PTM with special statutory authority for the performance of its day-to-day activities. Section 942(2) provides that 'The Panel may do anything that it considers necessary or expedient for the purposes of, or

²⁷⁹ *Datafin* (fn 276) 849.

²⁸⁰ *Ibid.*, 850. See also 825 (Sir John Donaldson MR).

²⁸¹ Section 961(1) CA exempts the PTM from liability in damages as a result of the performance of its functions, but this is expressly stated not to apply 'so as to prevent an award of damages... on the ground that... [an act or omission] was unlawful as a result of section 6(1) of the Human Rights Act 1998': s 961(3)(b).

²⁸² *Ibid.*, ss 943(2) and 946. The PTM can also impose sanctions on persons failing to comply with s 946 directions: s 952(1)(b).

²⁸³ *Ibid.*, s 958. Note that the CA's provisions could also represent a Parliamentary 'indicatory' statement that the PTM is 'one of the family'.

in connection with, its functions.’²⁸⁴ Not only does this make it easier to classify the PTM as a core public authority given the *Fewings* ‘paralysis’ observation above, but the PTM’s acquiescence in the conferral of such general powers and the strengthening of its institutional links with the state could amount to its implied assent to treatment as ‘one of the family’. If so, I would argue that the PTM – at least following the enactment of the CA – is a core public authority. If not, it would remain an institutionally private person which could only be subject to direct human rights challenges when exercising ‘functions of a public nature’ under s 6(3)(b) HRA.

E. CONCLUSIONS

Core public authorities are institutionally defined by *who they are* rather than by the factual nature of the functions which they perform. Consonantly with Strasbourg jurisprudence and the apparent wording of s 6(1) HRA, they are required to comply with the Convention when performing either public or private acts. Subject to rare instances of public policy as seen in *Radio France* (which seems at present only to apply to the exercise by state media organisations of the right to free speech), they are unable to rely on their own Convention rights.

Core public authorities (including adopted ‘public interest’ bodies) are bodies whose primary purpose is to serve the public interest as opposed to their own. This under-articulated but distinctly detectable ‘public interest’ theme can be

²⁸⁴ It is unclear from *Datafin* whether such authority existed at the time of the judgment itself. If not, this would expose a tension between *Datafin* and the *dictum* of Laws J in *Fewings* (fn 180) that the need to show positive legal authority for its actions applied to ‘every public body’: 534 (emphasis added).

identified in the jurisprudence of both the Strasbourg and domestic courts. In *Van der Musselle*, *Woś* and *Appleby*, where it appears more subtly, the public interest theme can be used as an analytical tool with which to rationalise the courts' reasoning. By highlighting the parity between the approaches of the Strasbourg and domestic courts, the public interest theme also explains the obvious focus of their Lordships in *Aston Cantlow* on only *core* public authorities when arguing for the applicability of Strasbourg jurisprudence to the 'public authority' provisions in s 6 HRA.²⁸⁵

Core public authorities *can* at times further their own interests. In order to do so validly, their own interests must not be shown to conflict with the public interest. If no conflict exists, their actions will be valid and the relevant function they perform factually *private* in nature. This, in turn, assists in understanding the meaning of 'public interest' here. Although 'almost as many theories of the public interest as there are writers on the subject' exist,²⁸⁶ a detailed analysis of these theories in an attempt to define the term positively would be unnecessary.²⁸⁷ The basic distinction in the present context between core public authorities and private persons is of selfishness and selflessness. Private persons are free to serve their own interests within the confines of the law. By contrast, core public authorities will be required to put the interests of those for whom

²⁸⁵ Considering this parity, Clapham's instant unease at *Aston Cantlow's* assimilation of core public authority with governmental organisations under Strasbourg law, I suggest, is unfounded: A. Clapham, *Human Rights Obligations of Non-State Actors* (Collected Courses of the Academy of European Law, OUP, Oxford 2006) 481.

²⁸⁶ A. McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 MLR 671, 674.

²⁸⁷ For a relatively recent exercise, see McHarg (*ibid.*) 674-678.

they are responsible before their own in the event of conflict between those interests. This is the sense in which ‘public interest’ is used.²⁸⁸

Oliver alludes to the merits of construing the core public authority category narrowly in order to avoid ‘rolling forward the frontiers of the state’ by widening the category of bodies unable to vindicate their own Convention rights against other core public authorities.²⁸⁹ My application of the public interest theme to Strasbourg jurisprudence may, therefore, be open to objection as being at odds with this principle since it would translate certain institutionally independent bodies such as the Order of Advocates in *Van der Musselle* and the Polish-German Reconciliation Foundation in *Woś* into *core* rather than *hybrid* public authorities under the HRA and, as such, favours a more expansive reading of the core public authority category than that of Quane, or of the Court of Appeal in *West* or House of Lords in *YL*. In response (first), despite the potential undesirability of stripping bodies of rights protection by expanding the core public authority category, the extent to which it is permissible to allow a preoccupation with the judicial protection of core public authorities from rights abuses to influence the interpretation of s 6(1) is questionable.²⁹⁰ Second, to the extent that this preoccupation *can* legitimately influence our interpretation of s 6(1), the incompatibility between the ‘narrowness’ argument and the public interest theme is unclear: Oliver, as the original advocate of the basic public interest theme, evidently believes that theme to be compatible with the need to construe the core public authority category narrowly. Third, *Radio France*

²⁸⁸ This would, however, be subject to rare instances such as that seen in relation to the religious interest in *Aston Cantlow* (fn 151) and *Holy Monasteries* (fn 197) where the relevant activities cannot be empirically equated with the public interest.

²⁸⁹ Oliver (fn 149) 492.

²⁹⁰ Clapham (fn 285) 485.

demonstrates how at Strasbourg level, media organisations which might otherwise be regarded as the core of the state can in exceptional situations and as a matter of public policy enforce their right to free speech by attracting classification as 'non-governmental organisations' under Art 34.

5.

Hybrid Public Authorities:

The Current Law

Section 6(3)(b) includes within the definition of a ‘public authority’ ‘any person certain of whose functions are functions of a public nature’. Section 6(5) provides, implying a burden of proof on the would-be public authority, that ‘In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.’ Persons who are public authorities by virtue of these provisions are commonly referred to as ‘hybrid’ or ‘functional’ public authorities.

This chapter analyses the courts’ treatment so far of these provisions. The first part illustrates the flaws present in their approach prior to the recent leading House of Lords ruling in *YL v Birmingham City Council*.²⁹¹ The second part examines *YL*’s impact, priming the canvas for the introduction in the next chapter of a more appropriate interpretation of the hybrid public authority provisions.

²⁹¹ [2007] UKHL 27, [2008] 1 AC 95.

A. THE EARLY LAW

Four main problems with the courts' initial approach can be identified. First, the interpretation of 'functions of a public nature' was based largely on the institutional status of the body in question rather than the functions it performed. Second, the courts equated s 6(3)(b) with the domestic law on the amenability of bodies to judicial review. Third, the courts seemed unconcerned with the distinction between 'functions' in s 6(3)(b) and 'acts' in s 6(5) and, as two cases demonstrate, even with the important difference between 'core' and 'hybrid' public authorities themselves. Fourth, for additional interpretative assistance, the courts began to look to Strasbourg jurisprudence; this involved juxtaposing the HRA's hybrid public authority concept against a scheme without a comparable doctrine.

Institutional Approach

In *Poplar Housing and Regeneration Community Association Ltd v Donoghue*,²⁹² the Court of Appeal found that Poplar Housing, a private company and registered social landlord created by a local authority (Tower Hamlets LBC) to inherit and manage its housing stock, was performing 'functions of a public nature' when providing the defendant, a periodic tenant whose accommodation had been transferred from Tower Hamlets to Poplar, with accommodation. Giving the judgment of the court, Lord Woolf CJ expressed a list of factors relevant to the decision. These included that a public function can be indicated by the extent to which the acts of a private body are 'enmeshed in the activities of a public body',

²⁹² [2001] EWCA Civ 595, [2002] QB 48.

the ‘closeness of the relationship which exists between Tower Hamlets and Poplar’ and the similar position in which the defendant stood *vis-à-vis* each of Poplar and Tower Hamlets since at the time of transfer of the housing stock ‘it was intended that she would be treated no better and no worse than if she remained a tenant of Tower Hamlets.’²⁹³

These factors drew heavily upon the presence or absence of institutional ties between the relevant private person and core public authority. The Court of Appeal adopted a similar approach in *R (Heather) v Leonard Cheshire Foundation*.²⁹⁴ Despite the later House of Lords ruling in *Aston Cantlow* hinting at an approach focussing more on the nature of the function performed by the body in question,²⁹⁵ some commentators remained unconvinced, due to *Aston Cantlow*’s failure to overrule or even mention *Donoghue* or *Leonard Cheshire*, that lower courts would be prepared to depart from the approach adopted in those cases.²⁹⁶ Indeed, the Court of Appeal seemed content to follow an institutional approach in *R (Beer) v Hampshire Farmer’s Markets Ltd*²⁹⁷ and *YL v Birmingham City Council*.²⁹⁸

²⁹³ *Ibid.*, 70.

²⁹⁴ [2002] EWCA Civ 366, [2002] HRLR 30 [20]-[21] (Lord Woolf CJ).

²⁹⁵ *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [41] (Lord Hope).

²⁹⁶ See the Joint Committee on Human Rights’ Seventh Report of Session 2003-04, ‘The Meaning of Public Authority under the Human Rights Act’ HL (2003-04) 39, HC (2003-04) 382 [39] and R. Costigan, ‘Determining “Functions of a Public Nature” under the Human Rights Act 1998: A New Approach’ (2006) 12 EPL 577, 580-581.

²⁹⁷ [2003] EWCA Civ 1056, [2004] 1 WLR 233 [36], [38] and [40] (Dyson LJ).

²⁹⁸ [2007] EWCA Civ 26, [2008] QB 1 [46]. Here, Buxton LJ sought unconvincingly to defend Lord Woolf’s focus on institutional factors in *Donoghue* and *Leonard Cheshire*.

An institutional approach is misguided due to s 6(3)(b)'s textual focus on *functions*.²⁹⁹ The courts' apparent treatment in the above cases of institutional status and links with core public authorities as highly persuasive, if not decisive, is unlikely to have reflected Parliament's true intention.³⁰⁰

Amenability to Judicial Review

In *Donoghue*, Lord Woolf CJ stated that the public authority provisions in s 6 are 'clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review.'³⁰¹ Stanley Burnton J regarded it at first instance in *Leonard Cheshire* as 'clearly right' that the test for amenability to judicial review under CPR Part 54.1, using 'identical wording' and entering into force on the same day and 'in the same context of public law', has the 'same meaning' as 'functions of a public nature' under s 6(3)(b) HRA.³⁰² At the risk of splitting hairs, the wording in each set of provisions is not 'identical'. Whereas s 6(3)(b) refers to 'functions of a public nature', Part 54.1 refers to a judicial review claim 'in relation to the exercise of a *public function*.'³⁰³ Parliament's omission to use identical wording for such apparently similar provisions could equally have signified its intention that the two formulations should cover different ground.³⁰⁴ Similar equation of 'functions of a public nature' under s 6(3)(b) with the law on the amenability of bodies to

²⁹⁹ P. Craig, 'Contracting out, the Human Rights Act and the scope of judicial review' (2002) 118 LQR 551, 559.

³⁰⁰ See further M. McDermont, 'The Elusive Nature of the "Public Function": *Poplar Housing and Regeneration Community Association Ltd v Donoghue*' (2003) 66 MLR 113, 122; D. Oliver, 'Functions of a public nature under the Human Rights Act' [2004] PL 329, 331; Costigan (fn 296) 582.

³⁰¹ *Donoghue* (fn 292) 69.

³⁰² [2001] EWHC 429 (Admin) [65].

³⁰³ Emphasis added.

³⁰⁴ See J. Wadham, H. Mountfield, A. Edmundson and C. Gallagher, *Blackstone's Guide to the Human Rights Act 1998* (4th edn OUP, Oxford 2007) [4.61].



judicial review can be found in the Court of Appeal's judgment in *Leonard Cheshire*³⁰⁵ and at first instance in *R (A) v Partnerships in Care Ltd.*³⁰⁶ Although both Court of Appeal and House of Lords rulings in *Aston Cantlow* demonstrated a greater judicial appreciation that the law on amenability to judicial review would not be determinative of the nature of a function under s 6(3)(b),³⁰⁷ the courts' judgments in *R (Beer) v Hampshire Farmer's Markets Ltd*,³⁰⁸ *R (West) v Lloyd's of London*³⁰⁹ and *R (Mullins) v The Appeal Board of the Jockey Club*³¹⁰ all equated the s 6(3)(b) and amenability tests more closely.

The meaning of 'functions of a public nature' under s 6(3)(b) and the test for the amenability of bodies to review should not be regarded as identical. As Oliver explains:

'[The phrase "public function" in CPR Part 54] is shorthand for a sophisticated set of principles that were in the course of development well before the CPR came into effect. The CPR cannot change the substantive law... ["Public function" under CPR Part 54] has no one fixed meaning and allows for different tests to be applied to public and private bodies.'³¹¹

³⁰⁵ Lord Woolf CJ (fn 294) seemed formally to recognise that the scope of the two tests could differ: [36]. However, this was tempered by his Lordship's adherence to 'statutory powers' and 'public flavour' – factors which closely resemble those used in *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815, [1987] 2 WLR 699 (CA) – as indicators of the public nature of a function under s 6(3)(b): [35].

³⁰⁶ [2002] EWHC 529 (Admin), [2002] 1 WLR 2610 [9] (Keith J).

³⁰⁷ [2001] EWCA Civ 713, [2002] Ch 51 [34] (Sir Andrew Morritt V-C); (fn 295) [38] and [52] (Lord Hope) and [87] (Lord Hobhouse).

³⁰⁸ [2002] EWHC 2559 (Admin) [33] (Field J); (fn 297) [29] (Dyson LJ), cited with approval in *YL* (fn 298) [51] (Buxton LJ).

³⁰⁹ [2004] EWCA 506 (Civ) [34]-[35] (Brooke LJ).

³¹⁰ [2005] EWHC 2197 (Admin) [42] (Stanley Burnton J).

³¹¹ Oliver (fn 300) 346-347. See further P. Cane, 'Church, state and human rights: are parish councils public authorities?' (2004) 120 LQR 41, 45-46 and S. Palmer, 'Public, private and the Human Rights Act 1998: an ideological divide' [2007] CLJ 559, 568.

Conceptual Confusion

As seen in Chapter 4, the Court of Appeal in *Aston Cantlow* found that the Parochial Church Council (PCC) was a core public authority.³¹² In the alternative however, Sir Andrew Morritt V-C, giving the judgment of the court, held that ‘If this were to be incorrect, the PCC would nevertheless, and *for the same reasons*, be [exercising functions of a public nature under s 6(3)(b)].’³¹³ Similarly, at first instance in *Beer*, Field J held simply that the body in question ‘was acting as a public authority within section 6 of the 1998 Act’ without exploring the distinction between core and hybrid public authorities.³¹⁴ The Court of Appeal’s failure to distinguish core from hybrid public authority in *Aston Cantlow* was rightly criticised in the House of Lords.³¹⁵ Aside from the importance of the distinction due to the practical significance of core public authorities being subject to the HRA in respect of *all* of their acts, the core/hybrid distinction – as Chapter 4 demonstrates – is also underlain by a fundamental institutional distinction between bodies whose primary purpose is to serve the public interest and those, by contrast, whose primary purpose is to serve their own.

Early cases also failed to distinguish ‘functions’ under s 6(3)(b) from ‘acts’ under s 6(5) HRA. For instance, in *Donoghue*, Lord Woolf CJ listed factors which the court found relevant to its decision that Poplar was a hybrid public authority without explaining whether those factors were relevant to the nature of Poplar’s

³¹² *Aston Cantlow* (fn 307).

³¹³ *Ibid.*, [35] (emphasis added).

³¹⁴ *Beer* (fn 308) [35]. See also *Pine v The Law Society (No. 1)* [2001] EWCA Civ 1574, [2002] UKHRR 81 [8] (Sir Andrew Morritt V-C) and *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 2 AC 42 [71] (Lord Hoffmann).

³¹⁵ *Aston Cantlow* (fn 295) [43] (Lord Hope).

‘functions’ under s 6(3)(b), its ‘acts’ under s 6(5), or both.³¹⁶ Lord Hobhouse was keen to untangle ‘functions’ from ‘acts’ in *Aston Cantlow*,³¹⁷ but Lords Nicholls and Hope did not.³¹⁸ Lord Nicholls’ view in particular seemed to be that a ‘function of a public nature’ under s 6(3)(b) is dichotomous to an act of a private nature under s 6(5).³¹⁹ However, this skews the language of s 6(5), which merely deems a body performing a private act not to be a hybrid public authority: it does not state that a body performing a private act under s 6(5) *ceases* to perform functions of a public nature under s 6(3)(b). Additionally, it is unclear why any dichotomy should necessarily arise when the words ‘function’ and ‘act’ used in the same section of the HRA are different. Moreover, if ‘private act’ in s 6(5) did mean ‘private function’ as the antonym of ‘function of a public nature’ under 6(3)(b), s 6(5) would be redundant anyway.³²⁰ unless Lord Nicholls had an unarticulated and intermediate category of ‘semi-public functions’ in mind, any function which was not public in nature must, by implication from s 6(3)(b) alone, be private in nature. It would not have been necessary for Parliament to express such an obvious conclusion in a separate provision through s 6(5). Potential distinctions between ‘functions’ and ‘acts’ are explored more fully in Chapter 6.

³¹⁶ *Donoghue* (fn 292) 69.

³¹⁷ *Aston Cantlow* (fn 295) [88].

³¹⁸ *Cane* (fn 311) 43. For similar ‘act’/‘function’ confusion, see *Beer* (fn 297) [15] (Dyson LJ) and *YL* (fn 298) [39] (Buxton LJ).

³¹⁹ ‘What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function’: *Aston Cantlow* (fn 295) [16].

³²⁰ As will be seen in Chapter 6, Landau argues that s 6(3)(b), referring simply to *certain* of a body’s functions, can be satisfied if *any* function – not just the function performed in relation to the victim – is public: J. Landau, ‘Functional public authorities after *YL*’ [2007] PL 630. It might be thought that ‘private act’ under s 6(5), if it *did* mean ‘private function’ as the antonym of ‘function of a public nature’ under s 6(3)(b), had as its purpose the dismissal of Landau’s approach by referring to *the particular* private act and consequently emphasising the need for *the function in question* to be public for s 6(3)(b) to be met. However, as Chapter 6 demonstrates, Landau’s approach is untenable for other reasons such that s 6(5) would not be required in order to dismiss it. Hence, I reiterate, s 6(5) *would* be redundant if the words ‘private act’ under s 6(5) did mean ‘private function’.

Strasbourg Jurisprudence

In *Aston Cantlow*, the House of Lords advocated the use of Strasbourg jurisprudence as an aid to interpreting the ‘public authority’ provisions. As seen in Chapter 4, two areas of Strasbourg jurisprudence are said to be relevant to s 6 HRA: the jurisprudence on which bodies constitute ‘state’ organs capable of engaging the state’s international responsibility in Strasbourg,³²¹ and the jurisprudence on which bodies constitute ‘governmental’ organisations incapable of enforcing their Convention rights under Art 34 ECHR.³²² Although Strasbourg jurisprudence was said cautiously by Dyson LJ in *Beer* to be ‘less helpful’ to the interpretation of ‘functions of a public nature’ under s 6(3)(b) than to the scope of core public authority under s 6(1),³²³ the Court of Appeal nevertheless sought to apply it when interpreting ‘functions of a public nature’ in *West*.³²⁴ This problem was perpetuated rather than remedied by the House of Lords in *YL*; the arguments against applying Strasbourg jurisprudence to s 6(3)(b) will therefore be addressed in the penultimate part of this chapter rather than here.

B. *YL* AND BEYOND: CHARTING A WISER COURSE?

In *YL*, the House of Lords held by a bare majority (Lord Bingham and Baroness Hale dissenting) that the private provider of care and accommodation to an elderly Alzheimer’s patient pursuant to contract with her local authority was not

³²¹ *Aston Cantlow* (fn 295) [6] (Lord Nicholls).

³²² *Ibid.*, [47] (Lord Hope). Art 34: ‘The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation... [of] the Convention.’

³²³ *Beer* (fn 297) [28].

³²⁴ *West* (fn 309) [36]-[39] (Brooke LJ). Stanley Burnton J also appeared to endorse the applicability of Strasbourg jurisprudence to s 6(3)(b) in *Mullins* (fn 310) [40], as did Forbes J at first instance in *Johnson v Havering London Borough Council* [2006] EWHC 1714 (Admin) [39].

exercising ‘functions of a public nature’ and not, therefore, bound to respect Art 8 ECHR when serving notice to evict. *YL*’s result, it will be seen in Chapter 6, is open to criticism on the ground that it failed to accord sufficient width to the term ‘functions of a public nature’. This part of the chapter, however, concentrates on their Lordships’ reasoning by assessing whether the problems with the courts’ earlier approaches have been addressed. *YL*, it would seem, represents no more than an improvement in form to the approach taken in the early law.

Institutional Approach

Although not expressly overruling *Donoghue*’s predominantly institutional approach to s 6(3)(b), members of both majority and minority disapproved of it in *YL*.³²⁵ However, the institutional approach remains in substance if not in form. Central to the reasoning of the majority’s decision that the private provider was not a hybrid public authority under s 6(3)(b) HRA was the character of the body as a self-serving commercial entity motivated by a desire to profit from performing the services. As Lord Mance explained, ‘The private and commercial motivation behind Southern Cross’s operations... [points] against treating Southern Cross as a person with a function of a public nature.’³²⁶

As seen in Chapter 4, the institutionally private persons who become hybrid public authorities by virtue of s 6(3)(b) differ fundamentally in character from core public authorities precisely because of the ability to further their own interests – even at the expense of others – within the confines of the law. Hence,

³²⁵ *YL* (fn 291) [105] (Lord Mance) and [61] (Baroness Hale) (dissenting).

³²⁶ *Ibid.*, [116]. Lord Neuberger agreed with Lord Mance: [126]. See further [26] (Lord Scott).

self-interested commercial motivation institutionally *characterises* rather than excludes the persons who fall within s 6(3)(b) when performing public functions.³²⁷

Amenability to Judicial Review

Members of both majority and minority cautioned against relying too heavily on the law on amenability to review when interpreting ‘functions of a public nature’ under s 6(3)(b).³²⁸ However, a real risk that lower courts will elide these two legal schemes still seems to exist. In *R (Weaver) v London & Quadrant Housing Trust*,³²⁹ the Divisional Court affirmed the decision in *Donoghue* that registered social landlords exercise ‘functions of a public nature’. Richards LJ (with whom Swift J agreed) highlighted the differing rationales of the law on amenability to review and ‘functions of a public nature’ under s 6(3)(b),³³⁰ but then appeared to suggest that the tests covered identical ground by concluding that the issues of hybrid public authority and amenability to review stood or fell together.³³¹

The courts’ apparent homeward trend towards the law on amenability to review can perhaps be explained by the difficulty inherent in identifying the correct relationship between amenability to review and ‘functions of a public nature’ under s 6(3)(b) without first identifying a principled and defensible approach to the hybrid public authority concept itself. Introducing a more appropriate ‘two-

³²⁷ See also Landau (fn 320) 636; M. Elliott, ““Public” and “private”: defining the scope of the Human Rights Act’ [2007] CLJ 485, 486; S. Palmer, ‘Public, private and the Human Rights Act 1998: an ideological divide’ [2007] CLJ 559, 564-565 and 569.

³²⁸ *YL* (fn 291) [12] (Lord Bingham) (dissenting) and [86]-[87] (Lord Mance).

³²⁹ [2008] EWHC 1377 (Admin).

³³⁰ *Ibid.*, [60].

³³¹ *Ibid.*, [64]-[65].

strand' approach to s 6(3)(b), Chapter 6 briefly explores how the law on amenability to review might be of use.

Conceptual Confusion

None of their Lordships in *YL* appeared unaware of the distinction between core and hybrid public authorities. Regarding the distinction between 'functions' under s 6(3)(b) and 'acts' under s 6(5), Lords Scott and Neuberger were particularly keen to highlight the differences between the two.³³² As Lord Neuberger explained, 'acts' under s 6(5) are more specific than 'functions'; a 'number of different acts can be involved in the performance of a single function.'³³³ Despite the evidently increasing judicial tendency to untangle 'functions' from 'acts', it is disappointing that only Lord Scott analysed in any depth the nature of the 'act' of serving notice upon Mrs YL.³³⁴ This, said his Lordship, was private in nature since it took place 'in purported reliance on a contractual provision in a private law agreement.'³³⁵ Even so, Lord Scott stopped short of attempting to define a 'private' act, an unfortunate omission given that the meaning of s 6(5) is highly germane to determining the scope of the hybrid

³³² *YL* (fn 291) [23] (Lord Scott) and [130] (Lord Neuberger). Baroness Hale also highlighted this distinction, but used it to confusing effect: '[T]he company... was performing a function of a public nature... Furthermore, *an act in relation to* the person for whom the public function is being put forward cannot be a "private" act for the purpose of section 6(5)': [73] (emphasis added). It is difficult to see without explanation why an act 'in relation to' the person for whom the public function is put forward cannot be private in nature: this, surely, is precisely what s 6(5) envisages.

³³³ *Ibid.*, [130].

³³⁴ The tendency to distinguish the two concepts is also reflected in *Weaver* (fn 329): [26]. However, Richards LJ's treatment of the 'function'/'act' distinction was cryptic. Having expressly acknowledged that the registered social landlord in that case was 'relying on private law rights' when terminating the tenancy (which, following Lord Scott's judgment in *YL*, would point conclusively to the *private* nature of the act) his Lordship reasoned from the presumption that, since 'granting' a tenancy would be a public act, so must 'terminating' a tenancy since 'the allocation and management of the housing stock are to be regarded as part and parcel of a single function or as closely related functions.': [61]-[62]. At no point did his Lordship attempt to explain what constitutes a 'public' as distinct from a 'private' act.

³³⁵ *YL* (fn 291) [34].

public authority provisions.³³⁶ Chapter 6 attempts to define the meaning of a ‘private act’ under s 6(5).

C. CHASING THE STRASBOURG RAINBOW

I have attempted to show from the foregoing analysis that even after *YL*, the law still displays a predominantly institutional approach to s 6(3)(b) with the propensity for over-reliance on the law on the amenability of bodies to judicial review, and lacks a full understanding of the meaning of s 6(5) HRA. The final criticism of the current state of the law involves lengthy but necessary analysis and thus deserves a separate mention. I argue in this part of the chapter that Strasbourg jurisprudence, at least in its current form, bears no relation to the hybrid public authority concept under s 6(3)(b) and is only relevant to the identification of core public authorities under s 6(1). Judicial and academic views to the contrary, I shall argue, are misguided.

Domestic Application of Strasbourg Law

This chapter has already mentioned the Court of Appeal’s reliance upon Strasbourg jurisprudence as an aid to the identification of ‘functions of a public nature’ in *West*.³³⁷ When reaching the decision in *YL* that Southern Cross (the care home provider) was not exercising functions of a public nature under s 6(3)(b), two of their Lordships in the majority drew inspiration from Strasbourg jurisprudence when reaching their decisions. Having drawn extensively from the

³³⁶ Palmer (fn 311) 570.

³³⁷ *West* (fn 309) [36]-[39] (Brooke LJ).

judgments of their Lordships in the earlier case of *Aston Cantlow*,³³⁸ which explained the intention on the part of s 6(1) HRA and ‘public authority’ to cover those bodies engaging the state’s responsibility in Strasbourg, Lord Mance proclaimed that as ‘section 6(3)(b) merely elucidates section 6(1)..., the rationale applies as much to the identification of a person exercising a function of a public nature under section 6(3)(b) as it does to the identification of a core public authority.’³³⁹ Lord Neuberger, in seeming agreement with Lord Mance, believed it significant when reaching his decision that Strasbourg would classify Southern Cross as a ‘non-governmental organisation’ under Art 34 and a body which could not engage the UK’s international responsibility under the ECHR.³⁴⁰

Aston Cantlow, I suggest, has been chronically misinterpreted in order to stand for the proposition that Strasbourg jurisprudence is relevant to identifying ‘functions of a public nature’ under s 6(3)(b) HRA. As seen in Chapter 4, their Lordships in *Aston Cantlow* seemed to have only core public authorities in mind when arguing for the utility of Strasbourg jurisprudence to the ‘public authority’ concept. Moreover, the additional arguments in favour of applying Strasbourg jurisprudence to s 6(3)(b) can in my opinion be met.

Should Strasbourg Jurisprudence Nevertheless Apply?

Quane argues for the relevance to s 6(3)(b) of both the Strasbourg jurisprudence on the active liability principle and on ‘governmental organisations’ under Art 34

³³⁸ *Aston Cantlow* (fn 295).

³³⁹ *YL* (fn 291) [88].

³⁴⁰ *Ibid.*, [161].

ECHR.³⁴¹ Her thesis, in its simplest form, is that in each of these areas of law, Strasbourg recognises that ‘the state’ can include private bodies exercising delegated or ‘governmental’ functions. This, she reasons, can inform which private persons exercise ‘functions of a public nature’ under s 6(3)(b). Quane’s views, I argue below, are unpersuasive.

Active Liability

Regarding active liability, Quane relies on *Costello-Roberts v United Kingdom*³⁴² and *Appleby v United Kingdom*.³⁴³ The applicant in the first case received corporal punishment from the headmaster of an independent school and claimed breaches of Arts 3, 8 and 13 ECHR. Despite finding no ultimate breach of the Convention, the European Court of Human Rights did find that the private school’s actions were technically capable of engaging the UK’s responsibility.³⁴⁴ first, the state is obliged by Art 2 of the First Protocol to secure the rights of children to education. Functions such as discipline are not ‘merely ancillary to the educational process.’ Second, this right pertains to every child, and therefore as much to those in independent as in state schools. Third, ‘the state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.’ Lord Mance in *YL* described *Costello-Roberts* as ‘not an easy case to analyse’³⁴⁵ before noting that the European Court of Human Rights in *Storck v Germany*³⁴⁶ saw it as a judgment based on the principle of passive liability (positive obligations) rather than active liability as Quane suggests.

³⁴¹ H. Quane, ‘The Strasbourg jurisprudence and the meaning of “public authority” under the Human Rights Act’ [2006] PL 106.

³⁴² (App no 13134/87) (1995) 19 EHRR 112.

³⁴³ (App no 44306/98) (2003) 37 EHRR 38.

³⁴⁴ *Costello-Roberts* (fn 342) [27]-[28].

³⁴⁵ *YL* (fn 291) [95].

³⁴⁶ (App no 61603/00) (2006) 43 EHRR 6. See also *Costigan* (fn 296) 583.

Since passive liability should be regarded as irrelevant to the ‘public authority’ provisions, this ought to indicate *Costello-Roberts*’ irrelevance to s 6(3)(b) in my opinion. I would respectfully agree with his Lordship’s ‘passive liability’ interpretation, which certainly reflects the tenor of the *Costello-Roberts* judgment because the European Court began the relevant analysis by emphasising that states can be under positive obligations to regulate private activity.³⁴⁷ The European Court mentioned its ‘delegated functions’ point last, and cited *Van der Musselle v Belgium*³⁴⁸ as authority for the proposition that the state’s responsibility will be engaged if it delegates its obligations to private individuals.

In *Van der Musselle*, the European Court held that the institutionally independent Order of Advocates could engage the state’s responsibility.³⁴⁹ In Strasbourg’s view, Belgium had chosen to fulfil its obligation deriving from Arts 6(3)(c) and 6(1) ECHR to provide free legal assistance by placing a domestic obligation on the Order of Advocates to compel members of the Bar to undertake the work. This solution, said the court, ‘cannot relieve the Belgian state of the responsibilities it would have incurred... had it chosen to operate the system itself.’³⁵⁰ This is not, I suggest, persuasive authority for the principle that an institutionally private person such as the independent school in *Costello-Roberts* can engage the state’s responsibility in Strasbourg when performing delegated state obligations. First, despite the obvious chain of delegation from ‘state’ to Order of Advocates and the latter’s institutional independence, it is not clear that the court regarded the Order of Advocates as a typically ‘private’ body to which

³⁴⁷ *Costello-Roberts* (fn 342) [26].

³⁴⁸ (App no 8919/80) (1984) 6 EHRR 163.

³⁴⁹ The facts are stated in Chapter 4.

³⁵⁰ *Van der Musselle* (fn 348) [29].

the independent school in *Costello-Roberts* would be suitably analogous. Indeed, in the same paragraph, the court noted that the Order of Advocates was endowed with ‘legal personality in public law’ and ‘associated with the exercise of judicial power’.³⁵¹ Second, the court in *Van der Mussele* seemed at any rate not to decide the point on delegation alone, since it also alluded to the direct imposition by the legislature through domestic law of the obligation to provide free legal services.³⁵² Hence, the court would seem to be emphasising Convention interference by the legislature rather than the institutionally independent delegate.

In short, *Van der Mussele* is by no means clear authority for the proposition that the delegation of ‘state’ obligations to private individuals will engage the state’s responsibility. Even if the European Court of Human Rights in *Costello-Roberts* did wish to base its reasoning wholly or even principally on this point as Quane suggests and as I seek to refute, the court’s reasoning is greatly weakened by relying on *Van der Mussele* to support that point. As seen in Chapter 4, the Order of Advocates’ ‘public interest’ motives imply that *Van der Mussele* is best seen as deciding that the body was a core state body capable of engaging the state’s responsibility under the active liability principle.

*Appleby v United Kingdom*³⁵³ is the second case on which Quane relies to demonstrate that, for the purposes of active liability, Strasbourg envisages that private persons exercising governmental functions can engage the state’s

³⁵¹ *Ibid.*

³⁵² *Ibid.*

³⁵³ *Appleby* (fn 343).

responsibility.³⁵⁴ In *Appleby*,³⁵⁵ refusal by the private shopping centre owner to allow the applicants to petition the public did not engage the UK's responsibility:

'In this case, the applicants were stopped from... [petitioning by a] private company. The Court does not find that the Government bear [*sic.*] any direct responsibility... It is not persuaded that any element of State responsibility can be derived from the fact that a public development corporation transferred the property to... [the company] or that this was done with ministerial permission.'³⁵⁶

The European Court then considered the passive liability question of whether the state had failed in any positive obligation to protect the claimants' right to freedom of expression, concluding that it had not.³⁵⁷ Whereas Quane interprets the above *dicta* as implicitly accepting that a private body's actions can sometimes engage the state's responsibility under the active liability principle, a more natural reading of them is that a private body's actions cannot do so. After all, this was what the court decided on the facts: having observed that the alleged interference with the applicants' rights was by an institutionally private actor, the court was unmoved by further argument as to why that actor should nevertheless be regarded as 'the state'. Additionally, if the court did believe that a private body's actions could theoretically engage the state's responsibility other than through passive liability, it gave no indication as to when this might occur.

³⁵⁴ Quane (fn 341) 112-114.

³⁵⁵ The facts are stated in Chapter 4.

³⁵⁶ *Appleby* (fn 343) [41].

³⁵⁷ *Ibid.*, [49]-[50].

Finally, two authorities unmentioned by Quane deserve analysis. In *Woś v Poland*,³⁵⁸ the European Court held that the PGRF's actions were capable of engaging Poland's state responsibility. Having examined the institutional nature and activities of the PGRF,³⁵⁹ the court stated:

'[T]he exercise of State powers which affects Convention rights and freedoms raises an issue of State responsibility regardless of the form in which these powers happen to be exercised, be it for instance by a body whose activities are regulated by private law.'³⁶⁰

Citing *Van der Mussele*, the court continued:

'[T]he respondent State has decided to delegate its obligations arising out of international agreements [i.e. the treaty with Germany] to a body operating under private law. In the Court's view, such an arrangement cannot relieve the Polish State of the responsibilities it would have incurred had it chosen to discharge these obligations itself, as it could well have done...'³⁶¹

Therefore, a private law body exercising delegated state obligations may engage the state's responsibility. This *appears* to support Quane's view that a private person exercising state functions can engage the state's responsibility. However, *Woś* should not be so interpreted. The PGRF may have been regulated by private law, but it does not follow that it was a 'private' person. It should be recalled here from the previous chapter that 'private' persons contrast with core state bodies due to their inherently self-serving institutional nature. As in *Van der Mussele*, the body in *Woś* was created for a 'public interest' purpose (to fulfil the

³⁵⁸ (App no 22860/02) (2007) 45 EHRR 28. The relevant decision is the Court's admissibility decision of 1 March 2005. The facts are stated in Chapter 4.

³⁵⁹ *Ibid.*, [68]-[71].

³⁶⁰ *Ibid.*, [72].

³⁶¹ *Woś (ibid.)* [73].

function of distributing compensation). Its primary duty was to further the public interest rather than its own and in that sense it differed fundamentally in character from typically private persons. To perceive the PGRF as a private person because of its regulation by private law would be unnecessarily formalistic, especially since paradigmatically ‘state’ bodies such as government departments or the armed forces are also subject to private law regulation when, for instance, entering into commercial contracts. As seen in Chapter 4, *Woś* is better regarded as an example of a ‘public interest’ core state entity engaging the state’s responsibility under the active liability principle.

In *Sychev v Ukraine*,³⁶² the European Court decided that the omissions of a judgment-executing Liquidation Commission engaged the state’s responsibility. The court started by citing *Costello-Roberts* as authority for the proposition that private individuals can engage the state’s responsibility when performing state functions. With that, it baldly proclaimed:

‘The Court does not find it necessary to embark on a discussion of whether the liquidation commission was or was not itself a State authority for the purposes of Article 34 § 1 of the Convention. It suffices to note that the body in question exercised certain state powers at least in the execution of court judgments.’³⁶³

By drawing a distinction between ‘State authority’ and other bodies capable of engaging the state’s responsibility, *Sychev* would seem the strongest authority yet in favour of Quane’s thesis. However, the court’s reasoning in *Sychev* is flawed, principally because the court read and sought to apply *Costello-Roberts* as

³⁶² (App no 4773/02) (unreported).

³⁶³ *Ibid.*, [54].

authority for the proposition that a private person can engage the state's responsibility when performing state functions. This, I have argued, is an inaccurate interpretation which is not supported by other courts.³⁶⁴ Additionally, the court's reasoning itself is confused and appears slow to distinguish between active and passive liability: after alluding to the Commission's exercise of 'certain state powers',³⁶⁵ the court emphasised the *positive obligations* incumbent upon states under Art 6(1) 'to organise their legal systems in such a way that their authorities can meet its requirements.'³⁶⁶ This illustrates, first, that the 'delegated functions' point was only a part of the court's overall conclusion on state responsibility. Second, even if *Sychev* did support Quane's thesis, because the law on positive obligations is irrelevant to the interpretation of 'functions of a public nature' under s 6(3)(b), a judgment like *Sychev* which relied partly on passive liability could not be comfortably lifted into domestic law. To do so would risk infecting s 6(3)(b) with pronouncements on points of law not germane to the hybrid public authority concept.

Article 34 and Governmental Organisations

In *Holy Monasteries v Greece*,³⁶⁷ the European Court rejected the government's preliminary objection that the applicants were governmental organisations incapable of making an Art 34 application: the monasteries did not exercise governmental powers, were independent of the state and possessed ecclesiastical and spiritual rather than public administration objectives.³⁶⁸

³⁶⁴ See *Storck v Germany* (fn 346) and *YL* (fn 291) [95] (Lord Mance).

³⁶⁵ *Sychev* (fn 362) [54].

³⁶⁶ *Ibid.*, [56].

³⁶⁷ (App nos 13092/87 and 13984/88) (1995) 20 EHRR 1. The facts are stated in Chapter 4.

³⁶⁸ *Ibid.*, [49].

According to Quane, Art 34 jurisprudence was used to interpret ‘functions of a public nature’ in *Aston Cantlow*.³⁶⁹ Therefore, she reasons, *Holy Monasteries* ‘suggests several factors which should be taken into account’ when determining the status of a private person under s 6(3)(b).³⁷⁰ As I have argued, Quane’s analysis of *Aston Cantlow* is misguided because a closer analysis reveals that the House of Lords saw the relevance of Strasbourg jurisprudence only to the concept of ‘core’ public authorities. Indeed, this was certainly true of passages which Quane cited to support her point.³⁷¹ Consequently, *Holy Monasteries* is of no relevance to the identification of ‘functions of a public nature’, and nor does it support Quane’s general thesis that Strasbourg recognises that a private person exercising governmental functions can be regarded as ‘the state.’

Quane believes *Radio France v France*³⁷² to be arguably the ‘most significant case to date’ in this area.³⁷³ In that case, applying *Holy Monasteries* and drawing largely on Radio France’s institutional autonomy and editorial independence, the European Court held that Radio France was a non-governmental organisation capable of filing an Art 34 application.³⁷⁴ The court stated in its analysis that the phrase ‘governmental organisation’ applies not only to central state organs, but also to decentralised authorities, such as local authorities, which exercise public functions.³⁷⁵ The court then stated that this was also true of ‘public-law entities other than territorial authorities’.³⁷⁶ To support this point, the court drew from

³⁶⁹ Quane (fn 341) 115.

³⁷⁰ *Ibid.*

³⁷¹ See *Aston Cantlow* (fn 295) [49]-[50] (Lord Hope).

³⁷² (App no 53984/00) (2005) 40 EHRR 29. The ruling relevant for present purposes is the admissibility decision of 23 September 2003. The facts are stated in Chapter 4.

³⁷³ Quane (fn 341) 117.

³⁷⁴ *Radio France* (fn 372) [26].

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*

two Commission cases: *Consejo General de Colegios Oficiales de Economistas de España v Spain*³⁷⁷ and *RENFE v Spain*.³⁷⁸ In *Consejo General*, the General Council of Spanish Economists, a professional regulatory body created by statute, alleged breaches of Arts 6, 1, 13 and 8 ECHR in relation to domestic challenges made to legislation concerning tax and national insurance issues. The Commission emphasised that professional regulatory bodies such as the General Council are ‘public law entities exercising official functions conferred on them by the Constitution and by law’³⁷⁹ and that, because ‘governmental organisations’ can include, in systems of decentralised power, ‘any national authority exercising public functions’,³⁸⁰ the General Council was a governmental organisation incapable of filing an application under Art 34. Similarly, in *RENFE*, the Commission held the Spanish National Railway provider to be a governmental organisation due to its status as a public law organisation created by law, its accountability to government, the legal control on its internal structure and activities and its position as the sole railway provider.³⁸¹

Quane believes the use of the term ‘territorial authority’ in *Radio France* to reveal a distinction at Strasbourg level between those bodies which the HRA would recognise as ‘core’ from those which it would recognise as ‘hybrid’ public authorities.³⁸² This is ambitious, since the court in *Radio France* gave no useful indication as to what it meant when using the term. Additionally, according to

³⁷⁷ (App nos 26114/95 and 26455/95) (1995) DR 82-B.

³⁷⁸ *RENFE v Spain* (App no 35216/97) (1997) DR 90-B.

³⁷⁹ *Consejo General* (fn 377). This is my translation from the French text of the opinion.

³⁸⁰ *Ibid.*

³⁸¹ *RENFE* (fn 378).

³⁸² Quane (fn 341) 117.

Quane, the cases of *Radio France*, *Consejo General* and *RENFE* 'suggest that a body may be regarded as a governmental organisation when it has special powers conferred on it by the state such as an operating monopoly, when legislation confers official duties on it, or when it is subject to a high degree of control by the state.'³⁸³

The use of the term 'public functions' by the Commission in *Consejo General* does at first sight imply a striking similarity between the Strasbourg and domestic schemes. But, it is recalled, Quane's essential thesis is that Strasbourg jurisprudence is relevant to 'functions of a public nature' under s 6(3)(b) because such jurisprudence analogously demonstrates how private persons can be regarded as 'the state' when performing public functions. It cannot be said, however, that any of the bodies in these Strasbourg cases were private persons. Radio France may have operated in a competitive market and the Spanish National Railway provider may have enjoyed administrative autonomy, but considering their characteristics as a whole implies that these bodies all had as their purpose the service of the public interest and, as such, were not institutionally private persons at all. Although Strasbourg may not have regarded them as the 'typical' or 'self-evident' core of the state, these cases, I suggest, did no more than hold that upon closer inspection, these bodies' characteristics and activities confirmed or denied their status as core state entities.³⁸⁴ This analysis is supported in particular by the careful use of the terms 'decentralised power' and 'national authority' used by the court in *Radio France*: it is clear that Strasbourg

³⁸³ *Ibid.*, 118.

³⁸⁴ *Radio France*, as contended in Chapter 4, was based on a public policy exception.

had more in mind than simply ‘private’ persons when considering which bodies can constitute governmental organisations under Art 34.

Furthermore, as Quane notes,³⁸⁵ the Commission in *RENFÉ* stated that the railway provider, being a governmental organisation, could not at any time make an Art 34 application. The implication of this, according to her, is that either the provider in *RENFÉ* was what the HRA would regard as a core public authority, or it was what the HRA would regard as a hybrid public authority but was prevented from ever invoking its own ECHR rights because it sometimes exercised ‘functions of a public nature.’ Quane believes the former conclusion to be incongruent with passages in *Aston Cantlow* urging a narrower interpretation of the core public authority category as compared to the hybrid category³⁸⁶ and consequently settles on the latter conclusion that the railway provider was a hybrid authority. She notes however that the Commission’s view that the provider could never invoke its own ECHR rights sits uncomfortably with s 6(5) HRA and encourages Strasbourg to reconsider the decision.³⁸⁷

Especially given my arguments in this chapter, the obvious and compelling answer to this conundrum is domestically to regard the railway provider – and indeed any other bodies previously labelled ‘governmental organisations’ by Strasbourg – as *core* public authorities. It is important to remember that cases other than *RENFÉ* have taken the view that governmental organisations can

³⁸⁵ Quane (fn 341) 117.

³⁸⁶ My views on the ‘necessary’ narrowness of the core public authority category were given in Chapter 4.

³⁸⁷ Quane (fn 341) 117.

never invoke their own ECHR rights.³⁸⁸ Far from suggesting the reconsideration of *dicta* in a single decision therefore, Quane would appear to be urging Strasbourg to rethink its interpretational attitudes to Art 34 on a more general level. Strasbourg jurisprudence should not be shoehorned into s 6(3)(b) HRA in this way.

Summary: Chasing the Strasbourg Rainbow

I have attempted to show in the foregoing analysis that *Aston Cantlow* has been misapplied by the Court of Appeal in *R (West) v Lloyd's of London* and by the House of Lords in *YL v Birmingham City Council* in order to be regarded as authority for the proposition that Strasbourg jurisprudence on active liability and 'governmental organisations' under Art 34 is relevant to determining the meaning of 'functions of a public nature' under s 6(3)(b) HRA.³⁸⁹ Quane's views that Strasbourg jurisprudence should apply to s 6(3)(b) are tainted by a similar misunderstanding of *Aston Cantlow* and an overly ambitious perception of the ability of Strasbourg jurisprudence to articulate a doctrine whereby private persons exercising public or governmental functions are considered 'the state'. This is not to say that such a doctrine will not develop over time. However, as it currently stands, Strasbourg jurisprudence is unsuitable for use as an interpretative aid to 'functions of a public nature.' Its only proper relevance, it is contended, is to the identification of core public authorities under s 6(1) HRA.

³⁸⁸ See e.g. *Ayuntamiento de Mula v Spain* (App no 55346/00) (unreported); *Danderyds Kommun v Sweden* (App no 52559/99) (unreported).

³⁸⁹ *Weaver* (fn 329) would appear to continue the 'Strasbourg' trend: see [32] (Richards LJ).

D. CONCLUSIONS

In substance if not in form, the law after the House of Lords' ruling in *YL* perpetuates the institutional approach to 'functions of a public nature' under s 6(3)(b) HRA. Although *YL* represents a pleasing departure from the early law by demonstrating an increasing judicial tendency to untangle 'functions' under s 6(3)(b) from 'acts' under s 6(5), judges still seem unwilling to attempt to demarcate private and public acts in a principled manner.

YL's principal error is to rely on Strasbourg jurisprudence as an interpretative aid to 'functions of a public nature' under s 6(3)(b). A detailed examination of the Strasbourg cases commonly said to be relevant to s 6(3)(b) reveals extreme difficulty – if not impossibility – in classifying the relevant bodies as institutionally private persons to whom s 6(3)(b) would apply domestically. Hence the term 'chasing the Strasbourg rainbow', a phrase seemingly apt to describe the efforts of those who believe in Strasbourg's recognition of an intermediate 'hybrid' public authority doctrine similar to that found in s 6(3)(b) HRA.

A better view, I have sought to argue, is domestically to classify bodies regarded by Strasbourg as 'state' bodies as *core* rather than hybrid public authorities.³⁹⁰ Understanding the proper relevance of Strasbourg jurisprudence to the 'public authority' provisions under s 6 is crucial to attributing a wider reading to 'functions of a public nature'. *YL*'s essential equation of core 'state' bodies under

³⁹⁰ This would in turn vindicate the instinctive concerns of certain commentators that Strasbourg jurisprudence sits uncomfortably with the hybrid public authority concept in domestic law: see Cane (fn 311) 46 and, *mutatis mutandis*, Palmer (fn 311) 562.

Strasbourg jurisprudence with 'hybrid' public authorities under s 6(3)(b) will continue if applied by domestic courts to result in a necessarily restrictive reading of that subsection by excluding from the domestic reach of the Convention institutionally private persons whose primary motives are to themselves.

6.

Hybrid Public Authorities:

The ‘Two-Strand’ Approach

With the observations from the previous chapters in mind, it is now possible to attempt to formulate a more appropriate ‘two-strand’ approach to s 6(3)(b) HRA. For ease of understanding and since the two-strand approach is referred to at various points throughout the chapter, a brief outline is helpful: ‘functions of a public nature’ under s 6(3)(b) are comprised of two distinct ‘strands’ of function. The first strand comprises those functions which, when performed, must be performed primarily in the interests of a person other than the performer. The second strand comprises functions which are performed by a private person on behalf of a core public authority and which would be of a public nature when performed by that core public authority.

This chapter consists of five parts. In the first, I make the basic case for extending the meaning of ‘functions of a public nature’ to include private persons who perform public functions on behalf of core public authorities. In the second part, I explain more comprehensively the two-strand approach to ‘functions of a public nature’. The third part briefly compares and contrasts the existing proposed solutions to lending a wider reading to s 6(3)(b). I examine the limits to

the two-strand approach in the fourth part. The fifth part then applies the two-strand approach to the relevant bodies in the decided cases, as well as to other significant bodies such as the BBC.

A. THE CASE FOR A WIDER READING OF ‘FUNCTIONS OF A PUBLIC NATURE’

Although s 145 of the Health and Social Care Act 2008 has sought to remedy the immediate problem in relation to care homes, *YL v Birmingham City Council*³⁹¹ renders it highly doubtful that private persons performing functions on behalf of core public authorities will be adjudged to perform ‘functions of a public nature’ under s 6(3)(b) if acting for commercial gain.³⁹² This observation is especially pertinent following the first instance ruling in *R (Weaver) v London & Quadrant Housing Trust*, where Richards LJ (with whom Swift J agreed) drew attention to the registered social landlord’s status as a ‘non-profit-making charity’ to support his conclusion that it *was* exercising a public function when providing accommodation.³⁹³ The effect of ruling out bodies acting for commercial gain is to exclude virtually all contracted out services from the scope of s 6(3)(b). I argue in this part of the chapter that compelling reasons exist for holding that private persons who perform a public function on behalf of a core public authority exercise a ‘function of a public nature’ under s 6(3)(b).

A preliminary point must be made. As Freedland notes, on the general question in English public law of how properly to demarcate ‘public’ from ‘private’, ‘Few

³⁹¹ *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95.

³⁹² *Ibid.*, [116] (Lord Mance).

³⁹³ [2008] EWHC 1377 (Admin) [54].

if any distinctions... are more charged with ideology'.³⁹⁴ The public/private divide is a 'manifestation... of whatever is the prevailing political philosophy concerning the proper role of government.'³⁹⁵ I do not attempt, given this thesis' doctrinal focus, to examine the meaning of the hybrid public authority concept on an ideological plane.³⁹⁶ An ideological analysis would be of little or no practical use unless Parliament, when enacting the HRA, could be shown to have had a particular ideology in mind. This may never be known. This part of the chapter does not attempt, either, slavishly to analyse the well-rehearsed doctrinal arguments for and against interpreting s 6(3)(b) so as to include persons performing public functions on behalf of core public authorities.³⁹⁷ In the interests of space and in an attempt to argue its point from an original perspective, the chapter instead uses some of these arguments to raise the clear possibility that Parliament *could* have intended such an interpretation. This then justifies a more searching exploration, which will be undertaken in Part D, of the limits to such an approach and to s 6(3)(b) generally. The results of this exercise, I argue, will help to counter the oft-held judicial views that subjecting contracted out bodies to the HRA would represent an unworkable interpretation of s 6(3)(b).

³⁹⁴ M. Freedland, 'The Evolving Approach to the Public/Private Distinction in English Law' in M. Freedland and J. Auby (eds), *The Public Law/Private Law Divide* (Studies of the Oxford Institute of European and Comparative Law, Hart Publishing, Oxford 2006) 93, 94.

³⁹⁵ M. Elliott, "'Public" and "private": defining the scope of the Human Rights Act' [2007] CLJ 485, 487.

³⁹⁶ For an interesting normative argument as to why and how English public law in general should respond to the increasing governmental trend towards contracting out, see M. Hunt, 'Constitutionalism and the Contractualisation of Government' in M. Taggart (ed), *The Province of Administrative Law* (Hart Publishing, Oxford 1997) 21.

³⁹⁷ For an overview, see P. Craig, 'Contracting out, the Human Rights Act and the scope of judicial review' (2002) 118 LQR 551 (favouring such an interpretation) and D. Oliver, 'Functions of a public nature under the Human Rights Act' [2004] PL 329 (against it).

Arguments Favouring Expansion

At the outset it is worth discounting one argument in favour of interpreting s 6(3)(b) so as to include contracted out bodies. The Joint Committee on Human Rights (JC) believes the courts' current restrictive approach to s 6(3)(b) to hinder the UK's ability to 'bring rights home' by providing domestic remedies for Convention breaches actionable in Strasbourg.³⁹⁸ As seen in Chapters 4 and 5, s 6(3)(b) is designed to expand on the range of bodies regarded by Strasbourg as 'state' bodies and, consequently, would not seem to be concerned with 'bringing rights home' at all. Nevertheless, two remaining key arguments in favour of interpreting s 6(3)(b) so as to include persons performing public functions on behalf of core public authorities exist.

Method of Service Delivery

Core public authorities such as local authorities are bound by the HRA to respect the Convention in respect of all their acts, public or private. A service user whose rights are interfered with by a local authority service provider can therefore enforce those rights directly against the local authority. As Craig explains, an approach to s 6(3)(b) largely excluding private contractors from the scope of the HRA arbitrarily renders a victim's ability to enforce their rights directly against the body interfering with them wholly dependent upon the method by which the local authority chooses for the services to be delivered.³⁹⁹ Oliver disagrees with Craig's argument that such a result is incompatible with constitutional principle, on the ground that constitutional principle axiomatically requires higher

³⁹⁸ The Joint Committee on Human Rights' Seventh Report of Session 2003-04, 'The Meaning of Public Authority under the Human Rights Act' HL (2003-04) 39, HC (2003-04) 382 [41].

³⁹⁹ P. Craig, 'Contracting out, the Human Rights Act and the scope of judicial review' (2002) 118 LQR 551, 554.

standards of ‘consideration for others, selflessness and public service’ of core public authorities than of private persons.⁴⁰⁰ For Oliver, ‘it is no part of *constitutional principle* that private bodies... subordinate their own interests to those of others.’⁴⁰¹ Two points can be made in response. First, whether or not *constitutional principle* demands the ‘subordination’ of private persons’ interests to those of others is irrelevant given that Parliament and the common law, at times, do. As will be seen in greater detail in Part B of this chapter, the duty to perform a function in the interests of another over one’s own can be found, for instance, in the exercise of coercive powers, and represents the first of the two ‘strands’ of ‘functions of a public nature’ under s 6(3)(b). Oliver’s attempt to rebut Craig’s point thus loses its force by collapsing into a mere formalistic attack on his use of the term ‘constitutional principle’. Second, Oliver’s remark in any event seems somehow to presuppose a duty to subordinate one’s own interests to those of another as a prerequisite to the performance of a public function under s 6(3)(b). As will be seen, whilst this is true of the first strand (performance of ‘public interest’ functions) to the two-strand approach, it is not true of the second (performance of a public function on a core public authority’s behalf). The two strands need not share a common conceptual basis. Oliver’s apparent assertion that ‘functions of a public nature’ must all be referable to the single concept of altruism is not obviously correct, especially given the observations above that the public/private divide is a particularly ideological, political and philosophical issue. Unless Parliament has attempted to spell out an ideology,⁴⁰² any presumption that a coherent ideology must underlie the meaning

⁴⁰⁰ D. Oliver, ‘Functions of a public nature under the Human Rights Act’ [2004] PL 329, 340.

⁴⁰¹ *Ibid.* (emphasis original).

⁴⁰² Hansard, at least, reveals nothing to indicate that any members of Parliament had a clear ideology in mind.

of ‘functions of a public nature’ is necessarily questionable. For these reasons, even though a unified conceptual basis between the first and second strands may be intellectually preferable, its absence is not, I suggest, fatal to the credibility of the two-strand approach.

Residual Remedies Inadequate

The second argument in favour of interpreting s 6(3)(b) so as to include contracted out public functions is that the residual remedies otherwise open to service providers, particularly in the much-litigated care home context, are insufficient to protect that service user’s rights to the same level as a direct action through s 6(3)(b).

The possibility of a service user invoking the horizontal effect of the Convention has already been discounted in Chapter 3. Lord Woolf CJ suggested in *Leonard Cheshire* that a resident could ‘require’ the local authority to contract with the provider so as to protect the provider’s Convention rights.⁴⁰³ However, the source of an *obligation* to compel the service provider to respect rights is conceptually unclear given *Leonard Cheshire*’s thrust that, at times, there will be no Convention obligation upon the provider.⁴⁰⁴ This approach also contains practical flaws, such as potential inconsistency between levels of rights protection depending on when or in which area the contracts are concluded.⁴⁰⁵

⁴⁰³ *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] HRLR 30 [33].

⁴⁰⁴ Craig (fn 399) 560. See also the JC’s Seventh Report (fn 398) [118].

⁴⁰⁵ The JC’s Seventh Report (*ibid.*) [115]-[122]; M. Elliott, *Beatson, Matthews and Elliott’s Administrative Law Text and Materials* (3rd edn OUP, Oxford 2005) 151. See, more generally, C. Donnelly, ‘*Leonard Cheshire* again and beyond: private contractors, contract and s.6(3)(b) of the Human Rights Act’ [2005] PL 785, 791-799.

Residents may have their own contracts with providers which stipulate for the protection of their Convention rights.⁴⁰⁶ However, this may not always be the case, for instance if the resident makes no ‘top-up’ payments of their own to the provider. Additionally, even those with contracts may be disadvantaged at the remedial stage of proceedings by contract law’s particular preference for damages remedies to more specific remedies such as injunctions.⁴⁰⁷ What the service users in *Leonard Cheshire* and *YL* essentially sought was the right to remain in their respective homes.

As their Lordships explained in *YL*, contracting out does not divest core public authorities of their own Convention obligations.⁴⁰⁸ This raises the possibility of an action by a service user against the local authority in the event of a Convention breach by the provider, but this is not an obviously useful remedy given that the local authority would not in many cases be able to provide effective redress by, for instance, keeping a care home open.⁴⁰⁹

Arguments Against Expansion

Having briefly outlined the arguments in favour of interpreting s 6(3)(b) HRA so as to include private persons performing public functions on behalf of core public authorities, it is necessary to address those arguments deployed against adopting such an interpretation. The key arguments are twofold. They relate, first, to the textual inapplicability of certain Convention rights to private persons and, secondly, to the disparity in rights protection which would result between private

⁴⁰⁶ Such was the case, as Lord Scott observed, in *YL*: (fn 391) [32].

⁴⁰⁷ Donnelly (fn 405) 799.

⁴⁰⁸ *YL* (fn 391) [118] (Lord Mance) and [149] (Lord Neuberger).

⁴⁰⁹ The JC’s Seventh Report (fn 398) [84]; S. Palmer, ‘Public, private and the Human Rights Act 1998: an ideological divide’ [2007] CLJ 559, 569.

and local authority funded residents in the same care homes. Two further arguments, relating to the denial of Convention protection to hybrid public authorities and to the difficulty of ascertaining the outer boundaries to an interpretation which caught contracted out services, more appropriately concern the limits to the two-strand approach and will therefore be addressed in Part D.

Textual Inapplicability of Qualified Rights

At first instance in *Leonard Cheshire*, Stanley Burnton J believed that s 6(3)(b) could not have intended to subject private persons such as the service provider in that case to the Convention because ‘the justifications referred to in Article 8.2 [of the Convention⁴¹⁰] are all matters relevant to government, and not of any non-public body.’⁴¹¹ Even if his Lordship accurately stated Parliament’s intention in respect of the qualified rights, this reasoning would fail to explain why a private person should not be regarded as exercising ‘functions of a public nature’ under s 6(3)(b) in respect of an unqualified right such as Art 3 ECHR.⁴¹²

However, his Lordship, I would argue, did not in any event accurately state Parliament’s intention regarding the qualified rights. Were s 6(3)(b) to have applied to the private service provider in *Leonard Cheshire*, it would have provided a cause of action directly against that private person to allow the victim of the rights infringement to bring their dispute to court. However, once in court,

⁴¹⁰ Art 8(2): ‘There shall be no interference by a public authority... except such as... is necessary... in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

⁴¹¹ *R (Heather) v Leonard Cheshire Foundation* [2001] EWHC 429 (Admin) [71]. See also *Oliver* (fn 400) 343-344.

⁴¹² Art 3: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

that dispute would still involve – at least in Strasbourg’s eyes, due to its failure to recognise a doctrine akin to hybridity under s 6(3)(b) – a domestic court adjudicating a dispute between two institutionally private individuals. The court’s relationship *vis-a-vis* each of these private individuals would remain exactly the same as in a common law horizontal effect dispute such as *Douglas v Hello!*, where private individuals can avail themselves *indirectly* of the qualifications to the Convention rights due to the duty upon the court under ss 6(1) and 6(3)(a) as a public authority to act compatibly with the Convention.⁴¹³ Therefore, for example, although the service provider may not – as Stanley Burton J contends – be able *directly* to claim that *it* was acting in the ‘economic well-being of the country’ when evicting a resident, it might be able to persuade a judge that the *court* would be so acting when giving judgment in the service provider’s favour.⁴¹⁴ Nothing in s 6(3)(b) appears to relieve the court of its duties towards individuals during a private dispute simply because Parliament has furnished the victim with a cause of action by designating another private individual as a ‘public authority’ in a particular situation.

Disparity

A second argument deployed against interpreting s 6(3)(b) so as to include private providers of public functions on behalf of core public authorities is that, where a private provider accommodates both privately and local authority funded residents, privately funded residents whose services are not provided on the local

⁴¹³ For an explanation of the mechanics of ‘indirect horizontal effect’, see *Douglas v Hello! Ltd* [2001] QB 967, [2001] 2 WLR 992 (CA) 1005 (Sedley LJ) and 984 (Brooke LJ).

⁴¹⁴ It is unclear, largely due to Lord Woolf CJ’s omission clearly to identify the particular head of Art 8(2) which justified Poplar Housing’s actions when evicting the tenant, whether the Court of Appeal believed Art 8(2) to apply *directly* to the public authority in *Donoghue*, or *indirectly* through the court: *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, 70-71.

authority's behalf would lack a direct action under s 6(3)(b). 'To distinguish between different residents in the same care home... appears undesirable.'⁴¹⁵

Whether or not such contracted out services are caught by s 6(3)(b) however, some disparity will result.⁴¹⁶ As seen above, an alternative disparity exists in rights protection, if s 6(3)(b) is *not* interpreted as applying to the contractor's activities, between those receiving services from local authorities on the one hand and from private providers pursuant to contracting out on the other. Against the opponents' disparity argument and from a common sense perspective, it is difficult to see when faced with two alternative forms of disparity why judges should prefer the approach like that in *YL* which *denies* rather than protects rights. Reluctance to expand on the level of protection offered in Strasbourg jurisprudence was one explanation proffered,⁴¹⁷ but as seen from Chapters 4 and 5, s 6(3)(b)'s purpose would seem to be to expand on those bodies regarded by Strasbourg as 'state' bodies.

In *YL*, Lord Mance believed there to be nothing inherently public in the provision of care and accommodation.⁴¹⁸ From my analysis of the nature of core public authorities in Chapter 4, I would respectfully disagree that the function is private. It is performed by the local authority in the interests of the elderly and vulnerable rather than its own, and as a result is factually public in nature. Lord Mance disliked the disparity in rights protection which would result from labelling Southern Cross a hybrid public authority when the same services, his Lordship

⁴¹⁵ *Ibid.*, [117] (Lord Mance). See also [29] (Lord Scott) and [151] (Lord Neuberger).

⁴¹⁶ P. Craig, *Administrative Law* (6th edn Thomson Sweet & Maxwell, London 2008) 578.

⁴¹⁷ *YL* (fn 391) [161] (Lord Neuberger).

⁴¹⁸ *Ibid.*, [118].

observed, are provided to both privately and local authority funded residents.⁴¹⁹ However, this presumes an exact and highly questionable synonymy between ‘services’ and ‘functions’ under s 6(3)(b). Stanley Burnton J stated at first instance in *Leonard Cheshire* that ‘the public authority criterion [under s 6(3)(b)] cannot be *purely* functional.’⁴²⁰ This, I respectfully suggest, is an astute and significant remark. In isolation from its context, ‘there is nothing in the nature of *any...* [activity] that renders it clearly [public or private].’⁴²¹ More background information is therefore needed, despite the fact that the *services* in each case are the same, in order to assess the nature of the *function* under s 6(3)(b). This would seem to justify the reference in the second strand of the two-strand approach to the arrangements between the private provider and the core public authority and to the examination of whether the private provider performs the relevant function on the core public authority’s behalf.⁴²² Hence, the disparity which is said to exist between privately and local authority funded residents would represent, crucially, an inevitable and permissible side-effect of the two-strand approach.

The arguments in this part of the chapter have focussed on the care home context, which has generated much litigation and which s 145 of the Health and Social Care Act 2008 has aimed to rectify by designating the provision of care and accommodation pursuant to arrangements made under s 21 NAA a function of a public nature under s 6(3)(b) HRA. Nevertheless, the arguments favouring the expansion of s 6(3)(b) and my responses to the arguments against expansion

⁴¹⁹ *Ibid.*, [119].

⁴²⁰ *Leonard Cheshire* (fn 411) [68] (emphasis added). This is an analysis which Lord Mance himself, ironically, appeared to support in *YL (ibid.)* [102].

⁴²¹ Donnelly (fn 405) 804 (emphasis added).

⁴²² It is crucial, however, to re-emphasise the arguments from Chapter 5 that a *lack* of institutional proximity between core public authority and service provider should not militate conclusively *against* the relevant function being classified as public.

apply to contracting out in general, which the HSCA did not seek to address. In sum, I reiterate, I do not claim to have demonstrated in the foregoing analysis that Parliament *conclusively* intended that s 6(3)(b) should apply to persons performing public functions on behalf of core public authorities. Instead, I have sought to show that this would be a *plausible* reading of Parliament's intention, so as to justify a closer examination of the effects of such an approach. This examination occurs in Part D, and is used to bolster the credibility of the two-strand approach as a whole. First however, the approach requires greater explanation.

B. THE TWO-STRAND APPROACH EXPLAINED

This chapter argues that two strands of public function exist under s 6(3)(b). The first strand involves functions which the performer is obliged to perform in the interests of another over himself. The second strand involves functions which are performed by a private person on behalf of a core public authority and which would represent factually public functions when performed by that core public authority.⁴²³ As seen in Part A of this chapter, the lack of a common conceptual basis to these two strands need not strip the two-strand approach of credibility given the ideological and philosophical nature of the debate on the public/private

⁴²³ It is recalled from Chapter 4 that all functions and acts of a core public authority are *legally* public. Lord Neuberger stated in *YL* (fn 391) that '[the concept of 'function of a public nature'] has relevance only to hybrid public authorities': [141]. Even though core public authorities are defined institutionally by *who they are* rather than the nature of the functions they perform (see Chapter 4), it is unclear why – and his Lordship omitted to argue the point – the HRA prevents the nature of a core public authority's functions from 'being used as an interpretative aid to s.6(3)(b)': A. Williams, '*YL v Birmingham City Council: Contracting out and "functions of a public nature"*' [2008] EHRLR 524, 529.

divide and the apparent lack on Parliament's part to resolve the issue on that level. This part of the chapter explains each strand in greater detail.

First Strand: 'Public Interest' Functions

As seen in Chapter 4, a proper appreciation of the nature and functions of core public authorities represents a significant indicator of public as opposed to private activity which may aid in the interpretation of 'functions of a public nature' under s 6(3)(b).

Chapter 4 concluded that core public authorities, when properly understood, are bodies with the primary purpose of serving the public interest over their own. Circumstances exist in which those bodies can further their own interests. But in the event of a clash between their interests and those of the public (i.e. the persons for whom the core public authority is responsible when performing a given function), the core public authority must prefer the interests of the public when performing its functions. Not to do so may render *ultra vires* any activity undertaken by that core public authority. Therefore, the duty to perform a function in the interests of another over one's own is the hallmark of 'publicness'. Applying this finding to s 6(3)(b) produces the conclusion that a function is of a public nature if the private person is required to perform it, over his own interests, in the interests of a person or persons for whom the performer is responsible when performing that function. This is the first 'strand' of 'functions of a public nature' under s 6(3)(b), which functions will be referred to as 'public interest' functions.

Two clarifying points must be made. First, the ‘duty’ in question – to perform the function in the furtherance of the interests of another – is not a duty to *perform* the function but a duty of *selflessness during its performance*. Core public authorities will be subject to varied and extensive statutory duties to *perform* certain functions, such as making arrangements to provide care and accommodation for the elderly and infirm. This might be thought to raise the possibility that a typically public function is one which, in the public interest, the person is *obliged* to perform. But private persons may still be subject to duties to undertake activities which may well be in the public interest, for instance to pay income tax or ensure that their children attend school. The ‘duty’ in the first strand cannot attach to the duty to *undertake* an activity which is in the public interest, since taxpayers and parents sending their children to school would then perform public functions under s 6(3)(b) when fulfilling those statutory duties. This cannot be right. The ‘duty’ which characterises a function as public is, in the alternative, the duty to perform a function *selflessly* (rather than self-interestedly) by preferring the interests of another person over one’s own. Second, and as a result, a distinction must be drawn between a duty to perform a function in the interests of another over one’s own, and a restriction on the *extent* to which a person can behave self-interestedly. The latter occurs in spheres involving typically private activity, such as competition⁴²⁴ or employment.⁴²⁵ As Sir Michael Turner remarked in *Cameron v Network Rail Infrastructure Ltd* in relation to Network Rail’s functions under s 6(3)(b), ‘It was said that the

⁴²⁴ The purpose of competition law can be summarised (crudely) as the restriction of monopolistic, self-interested behaviour (for instance to maximise profits) in order to further the policy goal of delivering better economic outcomes and benefits for consumers: see R. Whish, *Competition Law* (5th edn LexisNexis Butterworths, London 2003) 2-17.

⁴²⁵ Section 2(1) of the Health and Safety at Work Act 1974, for example, places upon every employer the duty ‘to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.’

defendant has a central role in regard to safety, but so, too, does every other employer owe duties [under statute].⁴²⁶ Borderline situations may exist where the extent to which a person can act self-interestedly when performing a function is so heavily restricted that it amounts, in substance, to a duty to perform that function in the interests of another rather than one's own. That must depend on the specific provision at hand. But only those functions implying duties to serve another's interests over one's own should properly be regarded as public functions under the first strand to s 6(3)(b).

Doctrinal Evidence

Perhaps due to the judicial omission as yet to address in any detail the nature of core public authorities,⁴²⁷ the 'public interest' functions doctrine has not so far received explicit judicial or academic attention. Nevertheless, implicit doctrinal evidence exists to suggest that public interest functions constitute 'functions of a public nature' under s 6(3)(b).

A significant case is *R (A) v Partnerships in Care Ltd*,⁴²⁸ where the claimant, a mental inpatient detained in a private hospital pursuant to s 3(1) of the Mental Health Act 1983 (MHA), sought judicial review of the hospital's decision to alter the focus of treatment on her ward. The patient claimed, *inter alia*, that to do so would deny her appropriate care and infringe Arts 3 and 8 ECHR. Keith J held that the compulsory care and treatment of the claimant by the hospital amounted

⁴²⁶ [2006] EWHC 1133 (QB), [2007] 1 WLR 163 [35].

⁴²⁷ Even during *YL* (fn 391) and beyond, divided assertions on how to identify core public authorities seemed to reign. Contrast, for instance, the 'institutional' assertion of Lord Neuberger, at [141], with the 'functional' assertion of J. Landau, 'Functional public authorities after *YL*' [2007] PL 630, 630-631.

⁴²⁸ [2002] EWHC 529 (Admin), [2002] 1 WLR 2610.

to the performance of a public function under s 6(3)(b) HRA.⁴²⁹ The ‘critical’ factor, according to his Lordship, was that ‘those of the hospital’s patients who are admitted... [under s 3(1) MHA] are admitted by compulsion and not by choice’.⁴³⁰ *Partnerships in Care* therefore demonstrates that the exercise of coercive powers amounts to the exercise of a public function under s 6(3)(b).⁴³¹

Oliver, who regards the exercise of physically and legally coercive powers as ‘the only workable test’ for public functions under s 6(3)(b), supports this conclusion.⁴³² Oliver’s confinement of s 6(3)(b) to coercive powers is open to objection following Part A of this chapter due to her exclusion of contracted out public functions, but her equation of coercive powers with public functions, I suggest, is accurate. Donnelly fails to see why the exercise of coercive powers amounts to the performance of a public function,⁴³³ but I would argue that the answer lies in the existence of the duty when performing these functions to do so in the furtherance of the interests of another rather than the performer.⁴³⁴ As a matter of principle alone, it would be highly surprising if not deeply chilling for Parliament or the common law to provide a private person with the power to coerce another either physically (by detention) or legally (by, for instance, disciplining them) for *the performer’s* ends. Indeed, the MHA seemingly reflects

⁴²⁹ Despite the confusion between ‘functions’ and ‘acts’ (*ibid.*) [24], this appears to have been his Lordship’s decision: [25].

⁴³⁰ *Ibid.*, [25].

⁴³¹ Further tacit support can be found in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 [90] (Lord Hobhouse) and *Cameron* (fn 426) [35] (Sir Michael Turner).

⁴³² Oliver (fn 400) 337.

⁴³³ Donnelly (fn 405) 804.

⁴³⁴ Oliver appears implicitly to recognise this when stating: ‘One would expect those exercising public functions to be under general duties of altruism’: D. Oliver, ‘The frontiers of the State: public authorities and public functions under the Human Rights Act’ [2000] PL 476, 489. In *Aston Cantlow* (fn 431) [64], Lord Hope believed that the performance of a public function under s 6(3)(b) could involve a responsibility towards others, which would also lend implicit support to the idea that ‘public interest’ functions constitute public functions under s 6(3)(b).

this proposition by authorising applications for the admission of patients for compulsory treatment only if ‘necessary for the health and safety of the patient or for the protection of other persons’.⁴³⁵ It is clear that a private hospital may well be motivated by profit when compulsorily detaining and treating patients whom it *is* necessary on these grounds to detain and treat. But if it were *not* necessary, i.e. if a conflict existed between the profit-making interests of the hospital on the one hand, and of the patient or public on the other, the hospital would be unable to further its own interests by detaining and treating the patient regardless. The MHA does not, therefore, appear to permit the use of its coercive powers other than in the interests of the patient or the public: the private hospital must use its coercive powers in the interests of others or not at all.

This raises the related question of whether the exercise of coercion *other* than through the exercise of statutory or common law powers, such as the coercion exercised by the Jockey Club as the *de facto* regulator of the horseracing industry, should be treated as the performance of a public function under s 6(3)(b). There would be a strong normative argument for doing so, namely that it makes no difference to the coerced whether the coercion has a specific legal basis or whether it results, for instance, from sheer market dominance. However, it has been seen that the focus of the first strand is the duty to perform a function in the overriding interests of another rather than one’s own. Without a *legal* basis for the function, it is difficult to see how a performer could be under such a duty when performing it: if the ability to coerce has been acquired by the lawful exercise of individual liberty, one would expect if anything that it *is* being used

⁴³⁵ MHA 1983, s 3(2)(c). See further, to that effect, ss 2(2)(b), 4(2) and 5(4)(a).

for the prime benefit of the performer over anyone else. Self-pursuit and individual liberty, *Fewings* makes clear, go hand in hand.⁴³⁶ As seen in Chapter 4 however, *Fewings* does identify the link between the principles of judicial review and the duty to perform a function in the interests of another over one's own. Although a greater analysis of the ambit and rationale of the principles of judicial review would exceed the scope of this thesis,⁴³⁷ it is tentatively contended that a function may be a 'public interest' function under strand one if the performer is amenable to judicial review in respect of it. To this end, the two-strand approach would aid in finding a suitable home within the hybrid public authority concept for the law on amenability to review.

The need for a *duty* to perform a function in the interests of others also prevents the functions of voluntarily 'public interest' bodies such as charities from falling automatically into the first strand to s 6(3)(b). As seen in Chapter 4, a fundamental conceptual difference exists between *bona fide* public activity on the one hand, and merely *imitated* public activity on the other.

Briefly to summarise, the first strand of 'functions of a public nature' under s 6(3)(b) comprises functions which, when performed, the performer is required to perform in the interests of another over his own.

⁴³⁶ *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513 (QB) 524 (Laws J).

⁴³⁷ The landscape of administrative law, Craig cautions, is profoundly affected by political philosophy: (fn 416) 4. For a thorough analysis of the constitutional basis for judicial review, see M. Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, Oxford 2001).

Second Strand: 'Inherited' Public Functions

The above analysis has sought to demonstrate that public interest functions constitute the first strand to 'functions of a public nature' under s 6(3)(b). The second strand comprises those functions which are performed by a private person on behalf of a core public authority and which would be of a factually public nature when performed by that core public authority. These functions will be referred to as 'inherited' functions. Inherited functions will usually be found in the context of contracting out, where private persons perform public functions on behalf of core public authorities for financial reward.⁴³⁸ Part A has already attempted to make the basic case for including inherited functions within s 6(3)(b), and Part D will assess the limits to an approach which does so.

Function 'inheritance' may at first sight be thought to include functions performed in privatised industries by private persons in whom Parliament vests an enterprise after removing from the relevant core public authority the power to perform those functions.⁴³⁹ Although the government intended privatised providers at times to be caught by s 6(3)(b),⁴⁴⁰ it would not seem sensible to regard s 6(3)(b) as applying during the delivery of privatised services *per se*.⁴⁴¹ First, it is artificial to try to evaluate, for instance, the nature of the function of providing railway services when performed by the state-owned British Railways

⁴³⁸ The arguments in Part A in favour of interpreting s 6(3)(b) so as to cover inherited functions would, however, apply equally to cases where private persons such as charities perform these services *voluntarily* on a core public authority's behalf.

⁴³⁹ 'Privatisation' is used in the narrow sense to denote the vesting of an enterprise in a private company (see V. Ramanadham, 'The Concept and Rationale of Privatisation' in V. Ramanadham (ed), *Privatisation in the UK* (Routledge, London 1988) 3, 4-6), rather than in the wider sense which includes contracting out (see K. Hartley and M. Huby, 'Contracting-Out Policy: Theory and Evidence' in J. Kay, C. Mayer and D. Thompson (eds), *Privatisation and Regulation: The UK Experience* (OUP, Oxford 1986) 284, 284).

⁴⁴⁰ Home Office, 'Rights Brought Home: The Human Rights Bill' (Cm 3782, 1997) [2.2].

⁴⁴¹ For the same conclusion, see *James v London Electricity Plc* [2004] EWHC 3226 (QB).

Board if as a result of privatisation that core public authority can no longer perform the function at all. Second, the 'most obvious' form of privatisation involves the 'denationalisation of a public enterprise'.⁴⁴² In these cases, where an *entire* enterprise is performed by private persons in a competitive market, there would be no arbitrariness in the level of rights protection resulting from the method of service delivery as there would for example in the care home context discussed above. Third, including the delivery of privatised services in the category of 'inherited public functions' would appear to render those functions enduringly public under s 6(3)(b). Absent Parliamentary intervention to designate the function as private, it is difficult to see how the provision of railway services, if classified as a public function when performed by Railtrack (now Network Rail Infrastructure Ltd) as a privatised operator, could be classed as anything other than public for as long as the company continued to provide them. At least in the contracting out context, a private service provider seeking to limit its human rights liability would have the freedom to negotiate the length of its contract and hence the length of time during which it performed public functions under the HRA or, alternatively, cease to deal with the relevant core public authority and thereby cease to perform public functions on its behalf. Not so for a privatised operator like Railtrack, who would be regarded from its inception as performing a public function when providing railway services and whose only apparent option to avoid such a consequence would be to cease trading as a railways operator altogether.

⁴⁴² Ramanadham (fn 439) 6.

This is not to say that the exclusion of the delivery of privatised services from the second strand of ‘functions of a public nature’ means that privatised operators’ activities will *never* fall within s 6(3)(b). As *Cameron* demonstrates, companies in whom privatised enterprises are vested will usually be given temporary regulatory control over their industry in the form of statutory coercive powers.⁴⁴³ The exercise of these powers, as seen above, would constitute the performance of public functions under the first strand to s 6(3)(b).

Again by way of brief summary, the second strand to ‘functions of a public nature’ under s 6(3)(b) comprises ‘inherited’ functions, i.e. functions performed on behalf of a core public authority and which would be of a public nature when performed by that core public authority. This does not, it is contended, include the performance of privatised services *per se*.

C. SECTION 6(3)(b): EXISTING POTENTIAL SOLUTIONS

A number of potential solutions have been proffered for interpreting s 6(3)(b) more widely in an effort to include contracted out service providers. Landau advocates what in shorthand may be named the ‘abstract function’ approach. This exploits the wording ‘*certain* of whose functions are... public’⁴⁴⁴ in s 6(3)(b) in order to expand the scope of rights protection such that s 6(3)(b) is met in a given situation if *any* of a body’s functions – not simply the one(s) performed in relation to the victim in the case – are public in nature.⁴⁴⁵ Landau argues that s 6(3)(b) would therefore be met in *all* cases if a care home providing

⁴⁴³ *Cameron* (fn 426) [35].

⁴⁴⁴ Emphasis added.

⁴⁴⁵ Landau (fn 427) 632.

care and accommodation also possessed coercive powers of restraint.⁴⁴⁶ In response, it would be arbitrary if the provider's s 6 status changed in *YL* simply by virtue of its possession of coercive powers which it might never have contemplated using against Mrs YL. Additionally, Lord Neuberger's comment that hybrid public authorities are only liable for public acts undertaken 'pursuant to or in connection with' a public function implicitly rejects the abstract function approach (since the approach would only be of use when public acts were performed pursuant to *private* functions),⁴⁴⁷ as does Lord Nicholls' remark in *Aston Cantlow* that 'it is not necessary to analyse each of the functions... and see if any of them is a public function.'⁴⁴⁸

In the Court of Appeal in *YL*, Buxton LJ proffered his own interpretation of s 6(3)(b). For his Lordship, 'publicness' under s 6(3)(b) depends upon the degree of integration between the private body and relevant core public authority,⁴⁴⁹ and the extent to which the body stands in the local authority's shoes when providing a service.⁴⁵⁰ However, because of the alleged textual inapplicability to private persons of the qualifications contained in the qualified rights and those persons' consequent inability directly to avail themselves of those qualifications,⁴⁵¹ the ultimate question is whether it is 'necessary and justified' to treat the body in question as a public authority.⁴⁵² The House of Lords was right not to endorse (indeed, their Lordships did not even discuss) these *obiter* remarks. The overall criterion of 'necessity and justification' is hopelessly vague. I have sought to

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *YL* (fn 391) [131].

⁴⁴⁸ *Aston Cantlow* (fn 431) [16].

⁴⁴⁹ *YL v Birmingham City Council* [2007] EWCA Civ 26, [2008] QB 1 [71].

⁴⁵⁰ *Ibid.*, [72].

⁴⁵¹ *Ibid.*, [73]-[74].

⁴⁵² *Ibid.*, [76].

address the ‘textual inapplicability’ argument in Part A. Although Buxton LJ’s second criterion (‘standing in the shoes’) appears to support the view that inherited public functions should be caught by s 6(3)(b), his first criterion (‘integration’) – unless it merely emphasises the need for a person to perform a public function *on behalf of* the core public authority – would risk imbuing s 6(3)(b) with an institutional focus.

‘Assumption of Responsibility’

Some interpretations proffered rely upon ‘assumption of responsibility’. For the JC, s 6(3)(b) extends beyond the exercise of coercive powers by private persons⁴⁵³ to cover those functions performed by private persons ‘for which the government has taken responsibility in the public interest’.⁴⁵⁴ An example would include caring for the sick or disabled, but only when ‘assisting in performing what the State itself has identified as... [its] responsibilities’ by ‘doing work as part of a government programme’ in discharging the duties necessary for the provision of it.⁴⁵⁵ Although the JC’s focus on ‘public interest’ includes coercive powers as well as inherited public functions and therefore indicates the JC’s recognition of the two distinct ‘strands’ of public function under s 6(3)(b), the focus on state ‘duties’ and ‘responsibilities’ tends to imply that private persons’ functions which would have been performed by core public authorities pursuant to *powers* are not public under s 6(3)(b). It is difficult to see why not, when the arguments in Part A relating in particular to the method of service delivery apply no less in the context of a *power* than a duty.⁴⁵⁶ The JC’s interpretation also

⁴⁵³ The JC’s Seventh Report (fn 398) [144].

⁴⁵⁴ *Ibid.*, [140].

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Craig shares this view: (fn 416) 577.

allows for the argument employed by their Lordships in *YL*, namely that a private provider in the care home context is not discharging a local authority's *duty* at all, since the only *duty* upon the local authority under s 21 of the National Assistance Act 1948 (NAA) is to *arrange for* rather than *provide* accommodation.⁴⁵⁷

In *YL*, Baroness Hale (dissenting) proffered a similar interpretation to that of the JC.⁴⁵⁸ Although her Ladyship's interpretation sought expressly to unify *all* public functions under s 6(3)(b) by reference to the 'assumption of responsibility' by the state for the function⁴⁵⁹ and in that sense represents an intellectually attractive interpretation of s 6(3)(b), the general focus on the state's 'responsibilities' and 'duties' in the first place, as I have argued, is inappropriate.

Markus' variant on the 'assumption of responsibility' theme proposes that a public function is indicated under s 6(3)(b) (first) by 'whether the state discharges its responsibilities *or*... recognises [the function] as being in the public interest,'⁴⁶⁰ and (second) whether the body 'is in a position to evaluate the fair balance that must be struck by the state when interfering with Convention rights.'⁴⁶¹ Although the first criterion would seem sensibly to obviate the need to demonstrate a *duty* on the state's part to perform the function in question, it is

⁴⁵⁷ *YL* (fn 391) [112] (Lord Mance) and [147] (Lord Neuberger). Their Lordships' argument is open to objection however, since it places the focus of the statutory purpose on *arrangement* of provision, rather than on Parliament's real purpose 'which, surely, is to ensure that vulnerable members of society are cared for': Williams (fn 423) 529. See further Craig (*ibid.*) 578; *YL* (fn 391) [16] (Lord Bingham) and [66] (Baroness Hale).

⁴⁵⁸ *YL* (*ibid.*) [65]. See also [8]-[9] (Lord Bingham).

⁴⁵⁹ *Ibid.*, [69].

⁴⁶⁰ K. Markus, 'Leonard Cheshire Foundation: what is a public function?' [2003] EHRLR 92, 99 (emphasis added).

⁴⁶¹ *Ibid.*

difficult to see the relevance of the second. *Any* private company, properly legally advised, would surely be ‘in a position to evaluate’ the balance to strike.

Bills Before Parliament

Following a reassessment of the meaning of ‘public authority’ under s 6 HRA, the JC’s Ninth Report of Session 2006-07 called for a ‘separate, supplementary and interpretative statute’ to s 6(3)(b).⁴⁶² The Human Rights Act 1998 (Meaning of Public Authority) Bill was introduced into the Commons by Andrew Dismore MP (the JC’s Chairman) in January 2007, prior to *YL* reaching the House of Lords.⁴⁶³ This has now been superseded by the Human Rights Act (Meaning of Public Function) Bill, which would classify as public a function ‘which is required or enabled to be performed wholly or partially at public expense.’⁴⁶⁴ Whilst Mr Dismore envisages that the latter would extend the HRA to contracted out care for the elderly,⁴⁶⁵ the Bill in its current form fails to mention s 6(5) and address Lord Scott’s argument in *YL*⁴⁶⁶ that the provider’s purported reliance upon its contractual rights when seeking to evict Mrs *YL* was a private act.⁴⁶⁷ Also, the extensive list of factors in cl 1 to which the court must have regard when determining the nature of a function, such as ‘public interest’ and ‘extent to which the state makes payment’, reveals no coherent approach to s 6(3)(b) and indicates no relative weight for the court to attach to each factor. Furthermore, ‘wholly or partially at public expense’ would seem capable, absent a *de minimis*

⁴⁶² The Joint Committee on Human Rights’ Ninth Report of Session 2006-07, ‘The Meaning of Public Authority under the Human Rights Act’ HL (2006-07) 77, HC (2006-07) 410 [150].

⁴⁶³ Human Rights Act 1998 (Meaning of Public Authority) HC Bill (2006-2007) [43], cl 1. For brief commentary, see Williams (fn 423) 529.

⁴⁶⁴ Human Rights Act 1998 (Meaning of Public Function) HC Bill (2007-2008) [45], cl 2. This Bill is due at the time of writing for Second Reading in the Commons on 17 October 2008.

⁴⁶⁵ Hansard HC vol 469 col 739 (18 December 2007).

⁴⁶⁶ *YL* (fn 391) [34].

⁴⁶⁷ Williams (fn 423) 530. This is also an unfortunate omission in s 145 of the Health and Social Care Act 2008.

principle, of expanding on the two-strand approach by including the activity of charities for which they had received government support, regardless of whether that activity was performed on a core public authority's *behalf* as such. If, for instance, the Secretary of State provides development assistance to a UK charity with a view to furthering sustainable development abroad,⁴⁶⁸ arguably *all* of the charity's functions (other than those perhaps with no connection to sustainable development), including the employment of staff, are undertaken *partially* at public expense and are caught by s 6(3)(b). It is doubtful that the HRA was intended by Mr Dismore to extend this far.⁴⁶⁹

In sum, none of the above approaches to s 6(3)(b) are as appropriate, I would suggest, as the two-strand approach. I therefore examine the limits to and safeguards against the use of this approach.

D. LIMITS TO THE TWO-STRAND APPROACH

There are three main points of limitation to the two-strand approach. First, as specifically concerns the second strand (inherited functions), only inherited factually *public* functions are caught by s 6(3)(b). Second and more generally, a proper understanding of the difference between 'functions' under s 6(3)(b) and 'acts' under s 6(5) aids in the reduction of s 6(3)(b)'s scope in appropriate circumstances. Third, on a proper understanding of the HRA's provisions, hybrid public authorities should be regarded as capable of relying on their own Convention rights *at all times* as any other private persons could.

⁴⁶⁸ International Development Act 2002, ss 1(1) and 1(2).

⁴⁶⁹ See Hansard HC vol 472 col 59 (18 February 2008) (Mr Ben Bradshaw MP) for similar concerns regarding an identically worded Dismore amendment to the HSCA.

Only Contracted out Public Functions Satisfy Strand Two

In response to the argument that contracted out services should be caught by s 6(3)(b) in *YL*, Lord Scott rhetorically asked where it would end if ‘every contracting out by a local authority of a function... [turned] the contractor into a hybrid public authority’.⁴⁷⁰ Against this, it is not the contention of Professor Craig, whose work was cited to their Lordships in *YL*, that every contracted out function should be public under s 6(3)(b).⁴⁷¹ Nor is it mine. As seen in Chapter 4, only functions performed by a core public authority primarily for the benefit of someone other than the core public authority are factually ‘public’ functions to which s 6(3)(b) would apply upon inheritance; indeed, it is difficult to see how a factually private function could ever become public in nature upon contracting out. Section 6(3)(b) would therefore include, for example, the provision of care and accommodation under s 21 NAA as in *Leonard Cheshire* and *YL*, but not the cleaning of local authority offices. Section 6(3)(b) would therefore include certain functions regarded as instinctively private by judges and commentators such as road building and repairs,⁴⁷² providing cleaning or cooking services for a local authority owned care home,⁴⁷³ cleaning council tenants’ windows⁴⁷⁴ and gardening in public parks.⁴⁷⁵ However, even if these functions should properly be

⁴⁷⁰ *YL* (fn 391) [30] (emphasis added).

⁴⁷¹ Although Craig (fn 399) did not explicitly make the point, it is clear that he had only inherited public functions in mind by his assessment of the nature of the local authority’s function of providing care and accommodation in *Leonard Cheshire* as ‘public in the classic, social welfare sense’: 557. Oliver overlooked this (fn 400) when stating: ‘Craig considers that if a private body does the self-same thing as a public body... it would be performing a “public function”... This does not seem to me to be the case... *Not everything that [core] public authorities do is a function of a public nature*’: 340 (emphasis added). Lord Mance, having cited Oliver’s work with seeming approval, made the same mistake in *YL* (*ibid.*) [110].

⁴⁷² *Leonard Cheshire* (fn 411) [49] (Stanley Burnton J).

⁴⁷³ *YL* (fn 391) [27] (Lord Scott).

⁴⁷⁴ *Ibid.*, [82] (Lord Mance).

⁴⁷⁵ Oliver (fn 400) 338.

regarded as falling outwith s 6(3)(b), this chapter demonstrates that there are other limitations upon the ‘damage’ caused by including them.

Lord Scott also asked in *YL* whether, if the provider were a hybrid public authority, the same would be true of each manager and nurse employed there.⁴⁷⁶

In response, it is unrealistic to regard the manager of a care home as ‘providing care and accommodation’ on the local authority’s behalf when his responsibilities are better described as *ensuring the performance* of the function by the staff. Nurses may be said to ‘provide’ care and accommodation, but would represent a poor choice of defendant due to their inability to prevent a care home’s closure or (through their relative impecuniosity) to pay damages for the breach of a resident’s Convention rights.

‘Functions’ and ‘Acts’

Due no doubt in large part to the confusion between ‘functions’ under s 6(3)(b) and ‘acts’ under s 6(5) in the earlier case law,⁴⁷⁷ the distinction has not yet been subjected to thorough exegesis. Some commentators, however, have made a number of brief observations. Lord Neuberger explained in *YL* that the term ‘function’ has ‘a more conceptual, and perhaps less specific, meaning’ than ‘act’ under s 6(5), and that ‘A number of different acts can be involved in the performance of a single function.’⁴⁷⁸ Functions ‘can be performed as part of a duty or under a power’.⁴⁷⁹

⁴⁷⁶ *YL* (fn 391) [30].

⁴⁷⁷ See Chapter 5.

⁴⁷⁸ *YL* (fn 391) [130].

⁴⁷⁹ Oliver (fn 400) 335.

General

From the above, a pyramid appears to emerge. At the apex are duties or powers, i.e. *requirements* or *abilities* to undertake a given activity (X) in order to achieve an outcome (Y). Section 21 NAA, for example, confers a *duty* upon a local authority to make arrangements (X) and a *power* to provide care and accommodation (X) in order to aid the elderly and vulnerable (Y). At a lower level are functions, which are undertaken with a view to achieving Y. At the foot of the pyramid are 'acts', i.e. those activities undertaken pursuant to functions. Since s 6(1) focuses on the lawfulness of the 'act', the 'act' is the element of conduct capable of triggering the victim's cause of action. An act, it seems, will be transient and of short duration compared to a 'function' such as 'providing care and accommodation'. The latter is an ongoing activity which does not of itself trigger the cause of action, but instead generates and explains the relational proximity between victim and performer.

'Public' and 'Private' Acts

The first strand to the two-strand approach measures the 'publicness' of a function under s 6(3)(b) by reference to whether or not the performer is under a duty to perform that function in the interests of another over himself. However, it would seem, such a duty cannot represent the touchstone for the 'publicness' of an *act* under s 6(5). It puts the cart before the horse to ask whether there exists a duty to perform an *act* in the interests of another over one's own, since this must logically presuppose the actor's ability lawfully to undertake that act in the first place. Indeed, it is difficult to see why the law would ever impose a duty to perform an *act in the interests of another* when the actor had no legal right to

perform the act at all. The actor's ability lawfully to undertake the act is the very issue in question here. Section 6(1), it is recalled, provides that 'It is unlawful for a public authority to *act* in a way which is incompatible with a Convention right.'⁴⁸⁰

A more appropriate approach when defining a private act under s 6(5), I suggest, is to ask whether the victim, in Phillipson's words, has 'freely accepted' the behaviour complained of.⁴⁸¹ Although his thesis concerns the different context of common law horizontal effect, the key rationale for employing 'autonomy' as a limiting factor to the applicability of rights in the private sphere – that 'citizens ought to be free to have their rights restricted'⁴⁸² – applies equally to s 6(5). Three instances must be distinguished:⁴⁸³ first, the victim who has genuinely agreed to the behaviour complained of; second, the victim who has merely *formally* agreed (i.e. the victim has agreed 'in the face of a monopoly or other kind of power which precludes a genuine choice'⁴⁸⁴) and, third, the victim who has not agreed. The first should be regarded as involving a 'private' act under s 6(5), and the third a 'public act'. The second situation, Phillipson's views suggest, should also be regarded as involving a public act. First, it is arbitrary to deny a direct rights action by labelling the act as 'private' if the behaviour is only *formally* agreed to. Second, an approach which concerned itself with only formal agreement would risk collapsing the public/private divide within s 6 HRA into a

⁴⁸⁰ Emphasis added.

⁴⁸¹ G. Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?' (1999) 62 MLR 824, 846.

⁴⁸² *Ibid.* Indeed, as Hunt explains, for advocates of more 'vertical' approaches to the protection of fundamental rights, 'Maximisation of the private space in which individuals are free to pursue their own conceptions of the good is seen as the ultimate goal of a society's legal and political arrangements': M. Hunt, 'The "horizontal effect" of the Human Rights Act' [1998] PL 423.

⁴⁸³ Phillipson (*ibid.*) 846.

⁴⁸⁴ *Ibid.*

test which rendered determinative the existence of a contract between ‘public’ body and complainant. The presence of a contract may at times evidence behaviour freely agreed to, since no private person can *legally* compel another to conclude a contract.⁴⁸⁵ But an approach which focussed on the presence of merely formal consensual instruments such as contract would starkly resemble the courts’ approach to the law on amenability of bodies to judicial review⁴⁸⁶ which, it has been seen in Chapter 5, is not coterminous with the ‘public authority’ test under s 6(3)(b).

Rights-Stripping?

Oliver cautions against a wider reading of s 6(3)(b) than that which includes only the exercise of coercive powers because hybrid public authorities would be incapable of enforcing their Convention rights against core public authorities and, consequently, this would ‘roll forward the frontiers of the state’ by legitimating state interference with those persons’ rights.⁴⁸⁷ The issue of whether hybrid public authorities can rely on their own Convention rights has never been comprehensively judicially or academically addressed.⁴⁸⁸ A closer examination of the issue, I argue, reveals that hybrid public authorities should be permitted at all times to rely on their own Convention rights as any private persons could. Due to the ‘victim’ test under Art 34 ECHR⁴⁸⁹ which Davis believes to posit a

⁴⁸⁵ *Felthouse v Bindley* (1862) 11 CBNS 869.

⁴⁸⁶ See *R v Panel on Take-overs and Mergers, ex p Datafin Plc* [1987] QB 815, [1987] 2 WLR 699 (CA) 847 (Lloyd LJ).

⁴⁸⁷ Oliver (fn 434) 492.

⁴⁸⁸ Despite Lord Nicholls’s remark in *Aston Cantlow* (fn 431) [11] that hybrid public authorities could rely on their own rights ‘when necessary’, Baroness Hale expressly left the question whether Southern Cross Healthcare could have relied on Art 1 of the First Protocol when evicting Mrs YL ‘for another day’: *YL* (fn 391) [74].

⁴⁸⁹ Art 34: ‘The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation...’ This test is replicated by s 7(7) HRA.

binary relationship between ‘state’ and ‘citizen’, he infers that hybrid public authorities remain ‘victims’ capable in Strasbourg’s eyes of asserting their own rights against the state.⁴⁹⁰ From my analysis in Chapter 5 of the Strasbourg jurisprudence and my response to Quane’s thesis,⁴⁹¹ I would agree.

Domestically, hybrid public authorities might seek to rely on their own Convention rights in proceedings against core public authorities or, alternatively, in private proceedings to try to justify the *prima facie* breach of a qualified right under the ‘rights of others’ head. Buxton LJ believed instinctively in *YL* that ‘when discharging its public functions... [a hybrid public authority] has no such rights’.⁴⁹² But nothing in s 6(3)(b) compels that conclusion such as to displace the express provision through ss 7(1) and 7(7) HRA when read together that an institutionally private person meeting the ‘victim’ test under Art 34 can bring proceedings against a public authority or rely on their Convention right(s) in *any* legal proceedings. Even if s 6(3)(b) *did* intend to qualify the victim test and prevent these bodies from relying on their own rights in legal proceedings, the possibility would arise of s 6(3)(b)’s *prima facie* incompatibility with Art 14 ECHR. This is because the ability of private persons to vindicate their Convention rights in domestic law would depend – and somewhat arbitrarily since hybrid public authorities would not necessarily *win* against the other party by deploying Convention claims⁴⁹³ – upon whether or not they were classified as hybrid public authorities. Section 6(3)(b) would then be open to interpretation

⁴⁹⁰ H. Davis, ‘Public Authorities as “Victims” under the Human Rights Act’ [2005] CLJ 315, 321.

⁴⁹¹ H. Quane, ‘The Strasbourg jurisprudence and the meaning of a “public authority” under the Human Rights Act’ [2006] PL 106.

⁴⁹² *Ibid.*

⁴⁹³ *Douglas v Hello!* (fn 413) is a perfect example of how one private party’s rights can be upheld despite reliance by another on theirs.

under s 3(1) as far as possible to the Convention-friendly interpretation that it does *not* preclude hybrid public authorities relying on their own rights.⁴⁹⁴

E. THE TWO-STRAND APPROACH APPLIED

The application of the two-strand approach in this analysis divides into three parts: registered social landlords, care homes and other bodies.

Registered Social Landlords

Applying the two-strand approach to *Donoghue*,⁴⁹⁵ Poplar Housing would be a hybrid public authority. Although created by the local authority, having local authority members on its board and dealing exclusively with Tower Hamlets LBC's ex-public housing stock,⁴⁹⁶ it would not be a core public authority despite appearing institutionally to have as its primary purpose the service of the public interest: it appears to lack specific legal authority for its day-to-day activities and, as such, would otherwise be subject to paralysis by *Fewings*.⁴⁹⁷ The function of providing accommodation was originally performed for the benefit of residents by Tower Hamlets LBC and would therefore have been factually public in nature. Poplar Housing, performing this function on the local authority's behalf, therefore performs a public function under the second strand to s 6(3)(b) HRA. The act of serving notice to terminate was an act which the tenant had not

⁴⁹⁴ As to the scope of the 'rights of others', Strasbourg has previously held that the Convention qualifications are to be narrowly construed and admit of no implied qualifications: *Klass v Germany* (App no 5029/71) (1979-80) 2 EHRR 214 [42]; *Golder v United Kingdom* (App no 4451/70) (1979-80) 1 EHRR 524 [44]. Cf *YL* (fn 391) [116] (Lord Mance); *Jacobowski v Germany* (App no 15088/89) (1995) 19 EHRR 64 [25].

⁴⁹⁵ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48.

⁴⁹⁶ Poplar Housing, 'About Us' <<http://www.poplarharca.co.uk/Aboutus>> accessed 6 August 2008.

⁴⁹⁷ *Fewings* (fn 436). See Chapter 4 on the 'paralysis' point.

freely accepted. Periodic tenancies of the kind in *Donoghue*⁴⁹⁸ are ‘founded on the continuing will of both landlord and tenant that the tenancy shall persist’.⁴⁹⁹

One-sided termination therefore indicates service of notice against the will of the other party, rendering Poplar Housing’s service a public act under s 6(5).

The London & Quadrant Housing Trust in *Weaver*,⁵⁰⁰ similarly, would not be a core public authority for the additional reason that it lacks the institutional links possessed by Poplar. Unlike Poplar Housing, only a fraction of its housing stock is ex-public,⁵⁰¹ none of its board members are local authority representatives⁵⁰² and private as opposed to local authority finance is the dominant component of its capital funding.⁵⁰³ The provision of accommodation on behalf of a local authority would, however, amount to a public function under strand two of s 6(3)(b). The nature of the act of seeking a possessory order for rent arrears would depend upon whether the tenant had genuinely or merely *formally* agreed to pay the level of rent in question; this would in turn depend upon the presence or absence of a monopoly or other power which, in Phillipson’s words, ‘precludes a genuine choice’.⁵⁰⁴ Relevant factors might therefore include the extent to which the tenant was free to negotiate the level of rent for the property, or the extent to which the tenant’s circumstances left them free to target properties with that particular level of rent.

⁴⁹⁸ *Donoghue* (fn 495) 56 (Lord Woolf CJ).

⁴⁹⁹ K. Gray and S. Gray, *Land Law* (5th edn OUP, Oxford 2007) 177-178, citing *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478, [1990] 3 WLR 1144 (HL) 492 (Lord Browne-Wilkinson).

⁵⁰⁰ *R (Weaver) v London & Quadrant Housing Trust* [2008] EWHC 1377 (Admin).

⁵⁰¹ *Ibid.*, [21] (Richards LJ).

⁵⁰² *Ibid.*, [18] (Richards LJ).

⁵⁰³ *Ibid.*, [20] (Richards LJ).

⁵⁰⁴ Phillipson (fn 481) 846.

Care Homes

In *Leonard Cheshire*,⁵⁰⁵ the charity service provider was a voluntary ‘public interest’ body and not, therefore, a core public authority. Southern Cross Healthcare in *YL*,⁵⁰⁶ as a profit-earning company, had as its primary purpose the service of its own interests and would therefore be an institutionally private person. Neither care home in *YL* and *Leonard Cheshire* possessed coercive powers, and care home providers acting in the same statutory context have previously been found *not* to be amenable to review in respect of the provision of care and accommodation.⁵⁰⁷ Consequently, these providers were not performing a public function under the first strand to s 6(3)(b). Both providers, however, performed the public function of providing care and accommodation on behalf of the local authorities and, consequently, would perform public functions under strand two.⁵⁰⁸ As previously observed, this result is now brought about in s 145 of the Health and Social Care Act 2008. In *Leonard Cheshire*, the act complained of was the decision to close the claimants’ home (‘Le Court’) and relocate them into various smaller homes.⁵⁰⁹ The decision was taken against earlier promises that the claimants could remain in Le Court for as long as they wished⁵¹⁰ and, consequently, was a public act to which the claimants had not freely agreed under s 6(5). In *YL* however, the act complained of was the service of notice to evict after alleged disruptive behaviour from the resident’s family during visits.

⁵⁰⁵ *Leonard Cheshire* (fn 403).

⁵⁰⁶ *YL* (fn 391).

⁵⁰⁷ *R v Servite Houses, ex p Goldsmith* (2001) 33 HLR 35, (2000) 2 LGLR 997 (QB).

⁵⁰⁸ It could be said against this that the providers did not perform any function *on behalf of* the local authorities at all, since the local authorities were merely discharging their statutory duties under s 21 NAA of *arranging* accommodation with those providers: *YL* (fn 391) [112] (Lord Mance) and [147] (Lord Neuberger). However, as previously mentioned (see fn 457), diverting the focus of the local authorities’ activities onto *arranging* accommodation would overlook the NAA’s real purpose and represent an artificial interpretation of what the NAA actually required.

⁵⁰⁹ *Leonard Cheshire* (fn 403) [5].

⁵¹⁰ *Ibid.*, [6] and [23].

Southern Cross was seeking to rely on its contractual right to terminate the agreement 'for a good reason', a clause to which YL (acting through her daughter), on the face of the judgment, appeared to have freely agreed. Consequently, I would argue, Lord Scott was correct to regard the 'act' in YL as private in nature.⁵¹¹ His Lordship's use of the term 'purported reliance' by Southern Cross upon the contractual term,⁵¹² it is contended, is important to keep in mind with s 6(5). The question of whether consent to the act existed should not be equated directly with the question of whether, in contract law, the defendant was correctly relying on the contractual term in question. The latter would involve a more searching analysis of the terms of the contract which, arguably, is unsuitable at the more preliminary 'public authority' stage of inquiry. Along the lines of Lord Scott's *dictum*, I suggest, the court should regard the act as private if the defendant is seeking with a reasonable chance of success to rely on the exercise of a contractual power to which the victim has freely agreed. Whilst in some cases this could make it tempting for defendants to try to evade the HRA by loosely justifying their acts with reference to pre-existing contractual terms, the reasonableness requirement would prevent this where the acts were only tenuously linked to the relevant contractual power. Additionally, a judicial finding that the act is reasonably connected to a contractual power to which the claimant has freely agreed – and therefore private under s 6(5) – does not necessarily mean that the victim lacks a remedy altogether; it merely means that the victim must pursue their contention that the defendant is acting unlawfully through existing private law means. It will still be open for the victim to argue,

⁵¹¹ See YL (fn 391) [34].

⁵¹² *Ibid.*

on a closer inspection of the contract, that the defendant lacked the contractual capacity to commit the act complained of.⁵¹³

Other Bodies

The bodies in the decided cases, and further bodies such as the BBC are considered in turn.

Decided Cases

The private hospital in *Partnerships in Care*,⁵¹⁴ as seen above, performed a public function under the first strand to s 6(3)(b) when it compulsorily detained and treated patients.⁵¹⁵ The ‘act’ in question (the decision to alter the focus of the treatment on the ward) was not one to which the patient had freely agreed and, consequently, was public under s 6(5). The hospital, I suggest, was rightly regarded by Keith J as a hybrid public authority.

In *Beer*,⁵¹⁶ a local authority established and ran a series of farmer’s markets pursuant to its powers under s 33 of the Local Government and Housing Act 1989 to take appropriate steps for promoting local economic development. The council then helped the stallholders to establish HFML Ltd, a private company, to manage the markets. HFML rejected the claimant’s application to participate in the markets and the claimant sought judicial review, alleging *inter alia* a

⁵¹³ Part A demonstrates that contractual remedies cannot be regarded as obvious substitutes for human rights remedies. It is important to stress that the above point does not intend to renounce Part A’s findings. I do not advocate *replacing* human rights remedies with contractual remedies; merely, in relatively rare borderline cases where the defendant (despite having convinced the court at the ‘public authority’ stage that it is seeking with a reasonable chance of success to rely on a contractual power) *does* upon closer inspection lack the contractual capacity to act as it has done, the claimant is resigned in the interests of case management to a contractual remedy.

⁵¹⁴ *Partnerships in Care* (fn 428).

⁵¹⁵ The hospital would also be amenable to judicial review: *ibid.*, [26] (Keith J).

⁵¹⁶ *R (Beer) v Hampshire Farmer’s Markets Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233.

breach of Art 1 of the First Protocol and Art 6 ECHR.⁵¹⁷ The Court of Appeal affirmed the decision of Field J⁵¹⁸ by ruling that HFML was a hybrid public authority, essentially because it would be amenable to judicial review⁵¹⁹ and had stepped into the shoes of its local authority creator.⁵²⁰ The court's apparent equation of the law on amenability to review with the meaning of 'functions of a public nature' under s 6(3)(b) was criticised in Chapter 5. Nevertheless, as seen in Part B, HFML's potential amenability to review could indicate its performance of a strand one 'public interest' function. Alternatively, the function of running the markets was undertaken by the council to promote local economic development⁵²¹ and was therefore performed by the council in the public interest rather than its own. Consequently, it was factually public in nature. HFML Ltd, performing that function on the council's behalf,⁵²² was thus performing a public function under strand two of s 6(3)(b). The 'act' in question (the decision to reject the claimant's application) was not an act to which the claimant had freely agreed and, consequently, was public under s 6(5). Therefore, HFML would be a hybrid public authority under the two-strand approach. The Court of Appeal was right, I suggest, so to regard HFML.

The Parochial Church Council (PCC) in *Aston Cantlow*,⁵²³ as seen in Chapter 4, was not a core public authority. Nor did it exercise coercive powers⁵²⁴ or, it

⁵¹⁷ The particular Convention breaches alleged are only evident from the face of the first instance ruling, however: [2002] EWHC 2559 (Admin).

⁵¹⁸ *Ibid.*

⁵¹⁹ *Beer* (fn 516) [31] (Dyson LJ, with whom Longmore LJ and Sir Martin Nourse agreed).

⁵²⁰ *Ibid.*, [37]-[40] (Dyson LJ).

⁵²¹ *Ibid.*, [2] (Dyson LJ).

⁵²² The institutional links between council and HFML emphasise that HFML performed the function on the council's behalf: HFML's registered offices were at the council's offices and HFML's company secretary was a council employee and director of HFML: *ibid.*, [5] (Dyson LJ).

⁵²³ *Aston Cantlow* (fn 431).

seems, any functions on behalf of a core public authority.⁵²⁵ Even if it did exercise any public functions under s 6(3)(b), the act of enforcing chancel repair liability would be private under s 6(5) as an act to which the landowners had freely agreed by acquiring their property subject to the obligation to undertake chancel repair. The PCC, therefore, would not be a hybrid public authority. Lord Scott, differing from the rest of the House on the hybrid public authority point, believed the enforcement of chancel repair liability to be public in nature, essentially due to the general public interest in the PCC's activities.⁵²⁶ Two points can be made in response. First, his Lordship presumptively took the enforcement of repair liability as the *function* in question when, alternatively,⁵²⁷ it would seem more appropriate to describe it as the *act* giving rise to the dispute. Second, general public interest is not the touchstone under either strand to s 6(3)(b) under the two-strand approach. Consequently, I suggest, the majority of the House of Lords were correct not to regard the PCC as a hybrid public authority.

Lloyd's of London, run as a commercial business, is a private person rather than a core public authority.⁵²⁸ The presence of the Financial Services Authority as

⁵²⁴ Chapter 4. Sir Andrew Morritt V-C tentatively suggested in the Court of Appeal that the PCC might be amenable to review (presumably, at least, in respect of the protection of its property): [2001] EWCA Civ 713, [2002] Ch 51 [34], a conclusion with which Lord Scott (fn 431), dissenting on the hybrid public authority point, seemed without analysis to agree: [130]. It is not clear that this would be the case, since the function and context of protecting property, for the purposes of judicial review at least, could be regarded like employment as a typically 'private' matter: see e.g. *R v BBC, ex p Lavelle* [1983] 1 WLR 23, [1983] ICR 99 (QB).

⁵²⁵ The Church of England, as their Lordships observed, was a religious rather than *governmental* organisation: *Aston Cantlow* (fn 431) [13] (Lord Nicholls) and [156] (Lord Rodger).

⁵²⁶ *Aston Cantlow* (*ibid.*) [130].

⁵²⁷ *Ibid.*

⁵²⁸ *R (West) v Lloyd's of London* [2004] EWCA Civ 506, [2004] HRLR 27 [5] (Brooke LJ); *Islamic Republic of Iran Shipping Lines v Turkey* (App no 40998/98) (2008) 47 EHRR 24 [81].

the ‘regulatory authority... in the area of Lloyd’s business’⁵²⁹ indicates, I suggest, that the state has made no attempt to adopt Lloyd’s as one of the family. Lloyd’s did not appear to perform any functions on behalf of a core public authority. Additionally, any coercion which it may have exercised against the claimant originated not from statute or common law but from contract.⁵³⁰ Lloyd’s did not therefore perform ‘public interest’ functions under s 6(3)(b) and would not be a hybrid public authority under the two-strand approach. I would therefore agree with the Court of Appeal’s conclusion in *West* that Lloyd’s did not fall within s 6(3)(b).

The Jockey Club voluntarily assumed its public interest motives and is therefore a private person rather than a core public authority.⁵³¹ It is not thought that the Club has been adopted by the state: as mentioned in Chapter 4, the grant of a Royal Charter two hundred years after the Club’s inception was merely a ‘mark of royal favour to racing’.⁵³² The Club did not appear to perform any functions on behalf of a core public authority and its coercive ability, like that of Lloyd’s of London, originated from contract rather than statute or common law.⁵³³ The Jockey Club is not amenable to judicial review in respect of its regulatory functions.⁵³⁴ Stanley Burnton J, I suggest, was right in *Mullins* not to regard the Club as a hybrid public authority under s 6(3)(b).

⁵²⁹ *West (ibid.)* [26] (Brooke LJ).

⁵³⁰ *Ibid.*, [8]. Relevant to strand one under s 6(3)(b), Lloyd’s was also held not to be amenable to judicial review: [40] (Brooke LJ).

⁵³¹ See Chapter 4.

⁵³² *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 1 WLR 909 (CA) 932 (Hoffmann LJ).

⁵³³ *Mullins v The Appeal Board of The Jockey Club* [2005] EWHC 2917 (Admin) [28].

⁵³⁴ *Aga Khan* (fn 532), applied by Stanley Burnton J in *Mullins (ibid.)* [45]-[46].

Network Rail Infrastructure Ltd is not a core public authority.⁵³⁵ Additionally, as demonstrated by *Cameron*, it had been stripped of its regulatory coercive powers by the time of the act complained of.⁵³⁶ As seen in Part B of this chapter, the performance of privatised services *per se* should not be regarded as amounting to the exercise of a public function under the ‘inherited function’ strand to s 6(3)(b). Consequently, I suggest, Sir Michael Turner was correct not to regard Network Rail as a hybrid public authority.

Further Bodies

The National Greyhound Racing Club, for the same reasons as the Jockey Club, would not be a hybrid public authority under the two-strand approach to s 6(3)(b).⁵³⁷ The Panel of Take-overs and Mergers (PTM), I argued in Chapter 4, could be regarded as a core public authority due to its possible consensual adoption by the state. Were it not to have been adopted, it would be a hybrid public authority when performing the legally coercive function of regulation⁵³⁸ to the extent that it performs public acts such as making directions of restraint⁵³⁹ or

⁵³⁵ See the discussion in Chapter 4.

⁵³⁶ *Cameron* (fn 426) [35]. Lacking a regulatory role, Network Rail could hardly be regarded as amenable to judicial review along *Datafin* lines as a *de facto* public body.

⁵³⁷ The NGRC’s core public authority status, it is recalled, was discussed and discounted in Chapter 4. Additionally, as relevant to strand one of s 6(3)(b), the Court of Appeal has previously held that the Club is not amenable to judicial review when regulating greyhound racing: *Law v National Greyhound Racing Club* [1983] 1 WLR 1302 (CA).

⁵³⁸ Section 943(2) of the Companies Act 2006 allows the PTM to make rules ‘(a) for or in connection with the regulation of- (i) takeover bids, (ii) merger transactions, and (iii) transactions... that have or may have... an effect on the ownership or control of companies’. Hence, the function of regulation is coercive – like compulsory psychiatric treatment in *Partnerships in Care* – in the sense that it occurs under Parliamentary warrant and not necessarily with the consent of the subject. The conclusion that the function of regulation was public under s 6(3)(b) could also follow, as seen in Part B, from the PTM’s amenability to review in respect of that function: see *Datafin* (fn 486).

⁵³⁹ *Ibid.*, s 946: ‘Rules [made by the Panel: s 943(2)] may contain provisions conferring power on the Panel to give any direction that appears to the Panel to be necessary in order... (a) to restrain a person from acting... in breach of the rules.’

orders of disclosure,⁵⁴⁰ imposing sanctions⁵⁴¹ or ordering the payment of compensation for a breach of its rules.⁵⁴²

The HRA status of the BBC, whilst never having fallen for judicial consideration, is an ‘interesting question’.⁵⁴³ Fenwick and Phillipson discount the possibility of the BBC’s status as a core public authority since core public authorities lack the ability to enforce their own Convention rights and ‘it would seem absurd to disallow it from claiming that its freedom of expression had been interfered with.’⁵⁴⁴ The authors then deduce from *ProLife*,⁵⁴⁵ which concerned an application for judicial review of the BBC’s decision to refuse to screen an election broadcast showing aborted foetuses, that the BBC ‘is acting as a public authority when it acts, effectively, as a regulator.’⁵⁴⁶ Since a decision to broadcast precedes *any* broadcast, they then reason that the BBC could be seen as performing a public function under s 6(3)(b) when broadcasting generally,⁵⁴⁷ but observe in particular against this that the BBC could not assert its rights against the government when performing this public function.⁵⁴⁸ The authors thus conclude that ‘no satisfactory answer [exists] to this conundrum’.⁵⁴⁹

⁵⁴⁰ *Ibid.*, s 947(1): ‘The Panel may by notice in writing require a person... (a) to produce any documents...’

⁵⁴¹ *Ibid.*, s 952(1): ‘Rules [made by the Panel: s 943(2)] may contain provision conferring power on the Panel to impose sanctions on a person who has... (a) acted in breach of the rules...’

⁵⁴² *Ibid.*, s 954.

⁵⁴³ H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (OUP, Oxford 2006) 114. As the authors note (115), the Commission has previously left open the Art 34 status of the BBC when filing claims in Strasbourg: *BBC Scotland, McDonald, Rodgers and Donald v United Kingdom* (App no 34324/96) (1998) 25 EHRR CD179; *BBC v United Kingdom* (App no 25798/94) (1996) 21 EHRR CD93.

⁵⁴⁴ *Ibid.*, 115.

⁵⁴⁵ *R (ProLife Alliance) v BBC* [2004] 1 AC 185, [2003] 2 WLR 1403 (HL).

⁵⁴⁶ Fenwick and Phillipson (fn 543) 120 (emphasis original).

⁵⁴⁷ *Ibid.*, 121.

⁵⁴⁸ *Ibid.*, 122.

⁵⁴⁹ *Ibid.* (emphasis original).

Applying the preceding chapters' analysis, the BBC (and possibly Channel 4 given its institutional 'public interest' characteristics),⁵⁵⁰ I would argue, is a core public authority. The public policy exception in *Radio France*,⁵⁵¹ seen in Chapter 4, would allow the BBC to rely on its right to free expression by classification as a 'non-governmental' organisation in Strasbourg anyway, thus alleviating the authors' key concern of the effect on the BBC's media freedom. Despite coming into being as a company named the British Broadcasting Company in 1922, the BBC was incorporated by Royal Charter shortly thereafter (in 1927).⁵⁵² The grant of this Charter – which seeks extensively to prescribe the BBC's rights and obligations – is more, to quote Hoffmann LJ in *Aga Khan*, than a 'mark of royal favour' to the BBC's activities.⁵⁵³ The Charter, which is renewed every ten years and by its own admission provides the 'suitable legal framework' for the BBC's operations,⁵⁵⁴ furnishes the BBC with the 'capacity of a natural person',⁵⁵⁵ and imbues it with the specific legal power (relevant to the *Fewings* 'paralysis' point above) to undertake general functions 'which directly or indirectly promote the Public Purposes'.⁵⁵⁶ Although historical evidence exists to suggest that the executive of 1926 had previously sought to promote the public interest and

⁵⁵⁰ The Channel Four Corporation was created by the Broadcasting Act 1990, s 23. It consists of members the majority of whom are chosen with the Secretary of State's approval by the communications regulator, OFCOM: ss 23(3)-(4). OFCOM also determines their remuneration: Sch 3, para 4(1). The Corporation is imbued with the specific legal authority to undertake its day-to-day activities (Sch 3, para 1(3)). Moreover, Channel 4 (unlike Channels 3 and 5) is subject to *particular* public interest obligations regarding its broadcasting, such as ensuring a 'significant contribution' to 'programmes of educative value': Communications Act 2003, s 265(3).

⁵⁵¹ *Radio France v France* (App no 53984/00) (2005) 40 EHRR 29. The relevant decision is the admissibility decision of 23 September 2003.

⁵⁵² The BBC, 'A Brief History Of The BBC' <<http://www.bbc.co.uk/dna/h2g2/A30044459>> accessed 7 August 2008.

⁵⁵³ *Aga Khan* (fn 546) 932.

⁵⁵⁴ This is stated in the current Charter's preamble: HM Privy Council, 'Charter of Incorporation of the British Broadcasting Corporation 2006'. The Charter is available online at <http://www.bbc.co.uk/bbctrust/assets/files/pdf/regulatory_framework/charter_agreement/royalchartersealed_sept06.pdf> accessed 7 August 2008.

⁵⁵⁵ *Ibid.*, Art 47(3).

⁵⁵⁶ *Ibid.*, Art 5(2). The 'public purposes' include 'sustaining citizenship and civil society' and 'promoting education and learning': Art 4.

preserve the BBC's independence by declining Winston Churchill's suggestion of expropriating the BBC so as to control its output,⁵⁵⁷ there is still scope, I would suggest, to argue that the BBC had been adopted by the state. A body's *independence*, it is recalled, does not necessarily preclude that body's status as a core state body.⁵⁵⁸ The executive, it would seem, had regarded the BBC as 'one of the family' from its inception, when it was born out of a radio broadcasting pilot by the Post Office 'at the Government's behest'.⁵⁵⁹ As for assent to the executive's view, the BBC responded flirtatiously to the grant of the Charter by changing its name to the British Broadcasting Corporation⁵⁶⁰ and willingly subjecting itself to the extensive and onerous public interest obligations contained therein.⁵⁶¹

For the sake of completeness, the BBC is undoubtedly a body whose primary purpose is to serve the public interest rather than its own. Aside from receiving funding from licence money,⁵⁶² 'The BBC *exists* to serve the public interest'.⁵⁶³ The BBC is driven by the 'sovereign' BBC Trust,⁵⁶⁴ which sets 'the overall strategic direction of the BBC' and 'will perform these roles in the public interest'.⁵⁶⁵ The Secretary of State determines the level of remuneration which

⁵⁵⁷ The BBC (fn 552).

⁵⁵⁸ See Chapter 4.

⁵⁵⁹ The BBC (fn 552).

⁵⁶⁰ *Ibid.*

⁵⁶¹ These include acting in the public interest 'in all its functions': Royal Charter (fn 554) Art 23.

⁵⁶² Department for Culture, Media and Sport, 'An Agreement Between Her Majesty's Secretary of State for Culture, Media and Sport and the British Broadcasting Corporation' (Cm 6872, 2006) Part 75(1).

⁵⁶³ Royal Charter (fn 554) Art 3(1) (emphasis added).

⁵⁶⁴ *Ibid.*, Art 9(2).

⁵⁶⁵ *Ibid.*, Art 7(1).

the BBC is to grant the Trust,⁵⁶⁶ and can even influence how the BBC is wound up and its assets dissolved.⁵⁶⁷

Should the above analysis be incorrect and the BBC better regarded as an institutionally private person, its amenability to judicial review under *ProLife*, as seen from Part B, could indicate its performance of a ‘public interest’ function under strand one of s 6(3)(b) ‘when it acts, effectively as a regulator.’⁵⁶⁸ Part D of this chapter has sought to explain why classifying the BBC as a hybrid public authority would not prevent it from relying on its own right to freedom of expression against other core public authorities as any other private person could, thus alleviating Fenwick and Phillipson’s concerns.

F. CONCLUSIONS

There are two distinct strands of public function under s 6(3)(b): ‘public interest’ functions which connote a duty to perform a function in the interests of another over one’s own, and ‘inherited’ factually public functions performed on behalf of core public authorities. The lack of a unified conceptual basis to these strands is not fatal to the credibility of the approach. Additionally, the two-strand approach supports Craig’s recent observation that the public function issue arises in two different contexts:

‘[I]t is important at the outset to remember that s.6(3)(b) may be applicable either in cases where there is no contracting out... or in cases where this does feature on the facts

⁵⁶⁶ *Ibid.*, Art 17.

⁵⁶⁷ *Ibid.*, Art 53.

⁵⁶⁸ Fenwick and Phillipson (fn 543) 120.

of the case, such as *YL*. This has implications for the test to determine “public function” [*sic.*] for the purposes of s.6(3)(b).⁵⁶⁹

Strand two has been consistently denied by the courts. Weighty evidence exists, however, to imply at the very least that Parliament *could* have intended to include the second strand. This observation is bolstered by the weaknesses which I have sought to expose in the ‘rights stripping’ and ‘endlessness’ arguments deployed against extending the current judicial interpretation of s 6(3)(b) so as to include strand two. Moreover, the potential for s 6(5) to reduce the scope of s 6(3)(b) where necessary – in relation to a particular act to which the victim has freely agreed – represents a more nuanced, context-specific and altogether sophisticated outer boundary to the hybrid public authority concept than the outright denial of the existence of a second strand to ‘functions of a public nature’.

⁵⁶⁹ Craig (fn 416) 577. See further *YL* (fn 449) [40] (Buxton LJ).

7.

The Meaning of 'Public Authority':

Conclusions

The meaning of 'public authority' can now be concluded by reference to the three species contained within s 6. I shall offer a summary of the previous chapters' findings before assessing their implications.

As seen from Chapter 4, a core public authority is a body whose primary purpose is to serve the public interest over its own. In the event of conflict between its interests and those of the public, i.e. the person or persons for whom the authority is responsible, the public interest must prevail. A core public authority, to borrow the language of Laws J, has 'no axe to grind beyond its public responsibility'.⁵⁷⁰ Core public authorities contrast institutionally with private persons, whose primary purposes will usually be to further their own interests. Private persons or bodies such as charities may voluntarily further the public interest, but will not become core public authorities when doing so unless consensually adopted by the state as 'one of the family'. Whilst consensual adoption may take many forms, it is difficult to see how a private person could properly be regarded as a core public authority unless imbued with specific legal

⁵⁷⁰ *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513 (QB) 524.

authority for its day-to-day activities. This results from the *Fewings* principle in administrative law that public bodies must demonstrate specific legal authority for their actions. Since it is unlikely that a core public authority would be regarded as a person not amenable to judicial review, one would expect core public authorities to be subject to *Fewings* in administrative law and, in turn, core public authorities without specific legal authority for their day-to-day activities would be paralysed by the *Fewings* principle.

Private persons or bodies can become hybrid public authorities in a given situation by performing a 'function of a public nature' unless performing a particular, private, act.⁵⁷¹ A private act is one to which the victim of the rights infringement has freely agreed. 'Agreement' should be regarded as agreement *in substance*, rather than simply in form.

Under the 'two-strand' approach expounded in Chapter 6, a private person will perform a 'function of a public nature' in two circumstances. First, a function will be public if common law or statute requires its performance in the interests of a person other than the performer, although the performer need not be under a duty to *perform* the function at all. This is the 'public interest functions' strand. Second, a function will be public if performed on behalf of a core public authority *and* if that function would be of a factually public nature when performed by that core public authority. In the care home context, consonantly with s 145 of the Health and Social Care Act 2008 (HSCA), this would include the provision of care and accommodation pursuant to arrangements made

⁵⁷¹ HRA, ss 6(3)(b) and 6(5).

between a private provider and local authority under ss 21 and 26 of the National Assistance Act 1948. This second strand is the ‘inherited functions’ strand. Since both strands look to the nature and functions of core public authorities as indicators of true public activity, a proper appreciation of the core public authority concept is crucial to a proper understanding of s 6(3)(b) HRA. The two-strand approach, by designating functions as strand one ‘public interest’ functions if the performer is amenable to review in respect of them, may go some way to identifying the correct relationship between s 6(3)(b) HRA and the law on amenability to judicial review.

A potentially controversial aspect of the two-strand approach is that strand one appears to include the functions of fiduciaries such as trustees, solicitors and agents. ‘Put crudely, the central idea [of fiduciary duties] is service of another’s interests.’⁵⁷² The fiduciary ‘will not be allowed to say that he has preferred his own interest to that of his principal.’⁵⁷³ Two points can be made. First, it is unclear to what extent it is unacceptable for fiduciary functions to fall within s 6(3)(b) HRA.⁵⁷⁴ The ambit and rationale of the fiduciary principle remain uncertain,⁵⁷⁵ with one commentator stating that it ‘is informed in some measure by considerations of public policy aimed at preserving the integrity and utility of

⁵⁷² P. Finn, ‘Fiduciary Law and the Modern Commercial World’, in E. McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (OUP, Oxford 1992) 7, 9.

⁵⁷³ P. Millett, ‘Bribes and Secret Commissions’ [1993] RLR 7, 20, cited with approval in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324, [1993] 3 WLR 1143 (PC) 337 (Lord Templeman).

⁵⁷⁴ This is especially pertinent following Conaglen’s recent analysis of the similarities between fiduciary duties and the public law principle of bias: M. Conaglen, ‘Public-private intersection: comparing fiduciary conflict doctrine and bias’ [2008] PL 58. As seen in Chapter 6, *Fewings* links public law principles with a duty to act in the public interest and therefore to strand one. For a more general exposition of the similarities between public and private law, see D. Oliver, *Common Values and the Public-Private Divide* (Butterworths, London 1999).

⁵⁷⁵ E. Burn and G. Virgo, *Maudsley & Burn’s Trusts & Trustees Cases & Materials* (7th edn OUP, Oxford 2008) 781-785.

these relationships... given the purposes they serve in society'.⁵⁷⁶ Hence, it is not self-evidently improper to impose upon fiduciaries an additional obligation to act compatibly with the Convention. Second, if it is, whilst strand one appears to include fiduciaries' functions, the logic of strand two specifically excludes them. When a fiduciary such as an express trustee manages property, he does so to promote the objectives (i.e. on behalf) of a private person (the settlor).⁵⁷⁷ The same function of managing property, when performed by the settlor, would be private in nature.⁵⁷⁸ In this sense, the fiduciary has inherited only a *private* function from the settlor. As seen in Chapter 5, there is logical force in the argument that inherited functions should remain the same in nature regardless of who performs them. Whilst this logic has hitherto been deployed to advocate expanding s 6(3)(b) so as to include contracted out service providers performing public functions on behalf of core public authorities, it would seem equally capable of explaining why fiduciaries' functions might be better regarded as private in nature.

Section 6(3)(b) aside, domestic redress may also be had against private rights violators through the 'horizontal effect' of the Convention. This may take place through the courts' duties under ss 6(1) and 6(3)(a) as public authorities to act compatibly with the Convention when developing the common law, or through the interpretative obligation under s 3(1) HRA, which requires statutes to be read Convention-compatibly regardless of whether the dispute involves only private

⁵⁷⁶ Finn (fn 572) 10.

⁵⁷⁷ In an agency context, for example, the person on whose behalf the fiduciary acts would also be the principal to whom the fiduciary obligations are owed.

⁵⁷⁸ This does not apply to trusts imposed by law, which lack a settlor. However, 'there is a great deal of uncertainty whether resulting and constructive trustees' are fiduciaries anyway, because the trustee 'has not knowingly subjected him or herself to fiduciary obligations': Burn and Virgo (fn 575) 779.

individuals. The true extent of common law horizontal effect, as Chapter 3 argued, requires courts not to *apply* Convention rights, but to develop the common law consonantly with the *values* underlying them. This ‘weak’ form of indirect horizontal effect generates a balancing exercise between Convention values and non-Convention factors and allows the courts to decline to engage in judicial ‘legislation’ by effecting comprehensive reform of the common law, even if the consequence is a failure by the state to fulfil its positive obligations towards the victim. Weak indirect horizontal effect therefore seeks to preserve the boundaries between judicial and Parliamentary legislation, as well as avoiding the somewhat drastic potential consequence – of *applying* a Convention right to the extent contended for by a claimant in *all* novel factual disputes – which could follow under stronger approaches from the uncertainty surrounding the Strasbourg jurisprudence on positive obligations.

Returning to the issue of hybrid public authorities, Chapter 5 sought to show that Strasbourg evinces no doctrine of hybridity in its jurisprudence on which bodies constitute core state bodies under the active liability principle, or on which bodies constitute ‘governmental’ organisations incapable of vindicating their own rights under Art 34 ECHR. Contrary to previous academic and judicial commentary, in no decided cases has Strasbourg made it clear that an institutionally private person will become a ‘state’ body or governmental organisation when it performs ‘state’ functions. Hence, two concepts do *not* directly affect the width of s 6(3)(b). The first, given the irrelevancy of Strasbourg jurisprudence to the hybrid public authority concept, is the apparent lack of a general warrant under s 2 HRA to expand on the level of rights

protection which Strasbourg would provide. Strasbourg jurisprudence *is*, however, relevant to the core public authority concept due to the common basic ‘public interest’ theme to the core of the state in domestic law and under the Convention. The courts’ current approach to s 2 – by which they follow Strasbourg jurisprudence save for good reason – will, however, influence to some extent their interpretation of the core public authority category.

The second concept which does not *directly* affect the width of s 6(3)(b) is the interpretative obligation under s 3, which instructs courts to interpret *prima facie* Convention-incompatible legislation in a Convention-friendly fashion. The purpose of ss 6(3)(b) and 6(5), by subjecting institutionally private persons to the Convention when performing public acts pursuant to public functions, would seem to be to *expand* on rights protection by widening that category of bodies regarded as capable themselves of infringing a victim’s rights. However, as Chapter 6 observed, s 3 *could* apply to s 6(3)(b) so as to meet contentions that the hybrid public authority provisions strip hybrid public authorities – institutionally private ‘victims’ in Strasbourg’s eyes – of the ability to assert their Convention rights either directly against public authorities or against private persons *via* the court. In this sense, s 3 would lend indirect support to the widening of ‘functions of a public nature’ by weakening the arguments in favour of interpreting the term narrowly.

So, what is the significance of these findings? When viewed against the backdrop of Strasbourg jurisprudence, hybrid public authorities remain institutionally private victims who are equally as capable as any other private persons in

Strasbourg's eyes of asserting their own Convention rights. Nothing in the text of the hybrid public authority provisions seems to compel the alternative conclusion, countenancing what Morgan would regard as the 'deliciously ironical prospect' of Convention-incompatibility within the HRA itself,⁵⁷⁹ that hybrid public authorities are somehow stripped of the Convention rights which as private persons they would otherwise enjoy.

Thus, when taken with Strasbourg's binary perception of the division between 'citizen' and 'state', all ss 6(3)(b) and (5) appear to do is to confer upon a claimant a statutory cause of action allowing him to initiate a complaint against a private defendant who exercises 'functions of a public nature' and performs a particular public act. When in court however, the claim no longer involves a *direct* allegation by the claimant that the defendant has interfered with his rights. Instead, the claimant and defendant, as private persons, make any rights claims against each other indirectly *via* the court as a public authority. This switch is necessary in order to preserve the hybrid public authority's ability, as an institutionally private person satisfying the 'victim' test,⁵⁸⁰ *indirectly* to avail itself against the court both of the qualifications contained in the qualified rights, and of its own Convention rights. An apt name for this would be 'chameleonic' horizontal effect, due to the changing nature of the allegation made by the claimant: he alleges *directly* through s 6(3)(b) that a defendant hybrid public authority has interfered with his rights in order to bring that defendant to court, but *indirectly* when in court that the court would fail in *its* duty as a public

⁵⁷⁹ J. Morgan, 'Questioning the "true effect" of the Human Rights Act' (2002) 22 LS 259, 273.

⁵⁸⁰ See Art 34 ECHR and s 7 HRA.

authority to protect the claimant's rights by giving judgment in the defendant's favour.

For two reasons, the chameleonic model would differ from the 'weak' indirect horizontal effect model which Chapter 3 argued befits the common law. First, since passive liability (i.e. the law on positive obligations) does not apply to the hybrid public authority concept, the claimant would not be required to show when mounting a s 6(3)(b) action – unlike in a case of common law horizontal effect – that a positive obligation existed upon the state to regulate the private activity complained of.⁵⁸¹ The second difference is that whilst under the weak indirect approach the court would only be required to weigh the *values* underlying the Convention rights against non-Convention factors, s 6(3)(b) would require the application of the rights themselves, because a court allowing any non-Convention factors to trump the right would have allowed the hybrid public authority, against the text of s 6(3)(b), to act incompatibly with the *Convention*.⁵⁸²

The hybrid public authority concept, upon closer inspection, is somewhat of a sheep in wolf's clothing. Against the backdrop of the Strasbourg scheme, it must continue to treat hybrid public authorities as the institutionally private 'victims' which Strasbourg and s 7 HRA would regard them as. It cannot, without generating the UK's liability under the ECHR, deny those hybrid public

⁵⁸¹ As Chapter 3 sought to argue however, such a task would not be difficult in most areas of passive liability due to the uncertainty surrounding the Strasbourg jurisprudence and the concomitant need in domestic disputes with novel facts for domestic courts to presume the state to be internationally responsible.

⁵⁸² See G. Phillipson, 'Clarity postponed: horizontal effect after *Campbell*' in H. Fenwick, G. Phillipson and R. Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP, Cambridge 2007) 143, 153.

authorities the rights protection which Strasbourg would afford them. With this in mind, it is practically impossible to see why the judiciary should be so unwilling to embrace the hybrid public authority concept more fully in future. Especially given the recent enactment of s 145 of the Health and Social Care Act 2008, it is crucial to understand in-depth the true effect of the concept. The public authority status of private care home providers will no doubt arise again for judicial consideration shortly after s 145 does enter into force. It would be disappointing – despite Parliament’s best and obvious efforts to extend the rights protection of the elderly and vulnerable – if judges afraid of the wolf and oblivious to the sheep were to seize on the HSCA’s omission to mention s 6(5) HRA in order to continue their seemingly determined trend of excluding private providers from the Convention’s domestic reach.

This thesis’ findings on the limits to the public authority provisions do expose the clumsiness of Strasbourg jurisprudence and its inability to respond flexibly to the modern political climate, which surrounded the HRA’s enactment, of ‘a shrinking public sector and an increase in the role of the private, voluntary and charitable sectors in the provision of public services.’⁵⁸³ Whilst the designation of private persons as public authorities required to act compatibly with the Convention may generate the instinctive impression that such public authorities are subject to the same conditions of rights-restriction as core public authorities, Strasbourg’s crude institutional distinction between ‘state’ and ‘citizen’ hinders the domestic implementation of such a principle in the absence of clear Parliamentary language seeking to prescribe it.

⁵⁸³ S. Palmer, ‘Public, private and the Human Rights Act 1998: an ideological divide’ [2007] CLJ 559, 561.

Strasbourg *should* recognise a doctrine of hybridity. Strasbourg's recognition of such a principle could prove a useful interpretative guide to s 6(3)(b). Since both strands to the term 'functions of a public nature' are informed by a proper appreciation of the nature and functions of core public authorities, whose characteristics closely resemble those of core state bodies and governmental organisations in Strasbourg, there seems little reason why Strasbourg could not also reason from the inside out to develop a similar doctrine. After all, Strasbourg has previously declared that the 'Convention must be interpreted in the light of present-day conditions'⁵⁸⁴ and, as Chapter 5 observed, *Sychev v Ukraine*⁵⁸⁵ may represent an early indication that Strasbourg will be prepared to take the bait. In *Sychev*, the European Court of Human Rights distinguished between 'state authority' under Art 34 and bodies exercising 'certain state powers' when ruling that a judgment-executing Liquidation Commission could engage the state's responsibility under the active liability principle.⁵⁸⁶ However, as Chapter 5 argued, *Sychev* does not on its own *clearly* reveal a doctrine of hybridity due to the court's questionable reliance upon earlier authority as purported evidence of the existence of that doctrine, and to the difficulty of inferring from the facts of the judgment whether or not the Liquidation Commission was a self-serving institutionally private person at all.

Should Strasbourg attempt to develop a hybridity doctrine in future however, it will encounter the obvious obstacle of the difficulty of identifying a theoretical foundation for the applicability of rights in the private sphere. This, as Chapter 6

⁵⁸⁴ *Tyrer v United Kingdom* (App no 5856/72) (1978) 2 EHRR 1 [31], cited with approval in *Marckx v Belgium* (App no 6873/74) (1979-80) 2 EHRR 330 [41].

⁵⁸⁵ (App no 4773/02) (unreported).

⁵⁸⁶ *Ibid.*, [54].

observed, is an inherently political and philosophical issue. Given Strasbourg's express refusal to develop a general theory of the applicability of rights to private activity in the field of positive obligations and passive liability,⁵⁸⁷ there seems little reason at present to presume that Strasbourg would be any more willing to do so for hybridity.

Therefore, should Parliament have intended the hybrid public authority concept to eschew Strasbourg's binary distinction between 'state' and 'citizen' and strip hybrid public authorities of their Convention rights, it would seem more sensible for Parliament to make this clear by expressly providing for 'rights-stripping' in an amending statute rather than waiting for Strasbourg to develop a doctrine of hybridity which did so itself. Given the failure of the current Human Rights Act 1998 (Meaning of Public Function) Bill⁵⁸⁸ even to reveal a coherent theme to the term 'functions of a public nature' however, this development would seem unlikely to occur for some time. Even if Parliament did wish to take this step, it could involve the startling prospect of the UK attracting international liability for removing the rights of hybrid public authorities in an effort to adopt a *more* contemporary view of the state than Strasbourg. Whilst the meaning of 'public authority' as currently enacted may be capable of reasonably precise definition therefore, the background presence of a relatively rudimentary Strasbourg scheme could prove prohibitively problematic for successor Parliaments attempting to devise a more sophisticated formulation in future.

⁵⁸⁷ *VgT Verein gegen Tierfabriken v Switzerland* (App no 24699/94) (2002) 34 EHRR 4 [46]. See also Chapter 3.

⁵⁸⁸ Human Rights Act 1998 (Meaning of Public Function) HC Bill (2007-2008) [45].

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