

5. Public Authorities: What is a hybrid public authority under the HRA?

Alexander Williams

An analysis of *when* the HRA subjects private bodies to the Convention is highly germane to any discourse concerning the impact of the HRA on private law. The common law horizontal effect mechanism is one route through which to hold private bodies, albeit indirectly, to Convention standards.¹ Another route is through the hybrid public authority scheme – if a private body performs ‘functions of a public nature’ under s 6(3)(b), it is regarded during its public activity as a public authority and must respect the Convention.²

This chapter builds on earlier work which attempts to coax the judges into adopting a wider interpretation of s 6(3)(b).³ Its central message is that there is no need for the courts to construe that provision as restrictively as they have done since the HRA entered into force. Whilst ostensibly public in nature, hybrid public authorities are institutionally private bodies. The crucial effect of this, coupled with a close analysis of relevant Strasbourg jurisprudence, is that hybrids enjoy Convention rights themselves under the HRA, even during the performance of their public functions. They can therefore assert their own Convention rights as a defence to Convention-based challenges by claimants in court – a powerful method of self-protection which, once properly appreciated, should help ease judicial reluctance to

¹ See chapters XXX and XXX.

² HRA, ss 6(1), 6(3)(b) and 6(5). The third route is through the interpretative obligation under s 3 HRA. For discussion see chapter XXX by Jan van Zyl Smit.

³ See A. Williams, ‘A Fresh Perspective on Hybrid Public Authorities under the Human Rights Act: Private Contractors, Rights-Stripping and “Chameleonic” Horizontal Effect’ [2011] PL 139.

widen the scope of s 6(3)(b) to encompass a greater range of functions performed by private bodies.

In substance, then, the hybrid scheme is one of *horizontal* effect – what may be termed ‘public liability’ horizontality.⁴ Section 6(3)(b) may treat private bodies performing public functions as public authorities for the purpose of furnishing claimants with a Convention-based cause of action to bring them to court, but they must be treated by the court as private bodies for the different purpose of allowing them to rely on their own Convention rights. To ensure that the Convention rights of hybrid public authorities are fully protected, the hybrid scheme should be read, it is suggested, as generating ‘chameleonic’ horizontal effect. Aside from guaranteeing hybrids’ Convention rights, the chameleonic model should appeal to the courts for the additional reason that it produces a form of horizontal effect not dissimilar in scope and effect from that which they have already endorsed in the parallel common law context mentioned above.

The chapter begins by introducing the basic problems with the courts’ approach to s 6(3)(b) and discusses why hybrids should be regarded as capable of relying on their own Convention rights under the HRA. It then considers the importance of the chameleonic model and how the model derives additional support from the courts’ case law on common law horizontal effect.

A. The hybrid issue

⁴ See chapter XXX, p. 000.

There are two main problems with the courts' approach to the hybrid scheme. The first is that they appear to have taken too narrow an interpretation of the term 'functions of a public nature' under s 6(3)(b). It is clear from the case law that s 6(3)(b) applies to relatively straightforward examples of public activity such as the exercise by a private organisation of statutory coercive powers.⁵ The courts have also held, again not controversially, that s 6(3)(b) will apply to the actions of a private organisation which is created and assisted by a local authority to take over the running of a particular public service.⁶ But beyond these contexts claimants have found it notoriously difficult to persuade the courts that a defendant exercises public functions. In particular, the courts have held that the delivery of contracted out public services by a private organisation acting on behalf of central or local government, of itself, is not a public function.⁷ This is of especial concern given that contracting out has now become an accepted and widespread method of delivering such services.⁸ In *R (Heather) v Leonard Cheshire Foundation*,⁹ the appellants were placed by their local authority in a private care home run by LCF, a charity who delivered the services on the local authority's behalf. LCF later decided to close the home and the appellants claimed that this would amount to a breach by LCF of their right to a home life under Art 8. The Court of Appeal held that LCF was not performing public functions when delivering the residential care services. Giving the judgment of the court, Lord Woolf CJ emphasised that LCF's functions were private even

⁵ *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin), [2002] 1 WLR 2610.

⁶ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48; *R (Beer) v Hampshire Farmer's Markets Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233.

⁷ The courts have also held that s 6(3)(b) does not apply to the delivery of privatised services: *Cameron v Network Rail Infrastructure Ltd* [2006] EWHC 1133 (QB), [2007] 1 WLR 163; *James v London Electricity Plc* [2004] EWHC 3226 (QB).

⁸ For fuller discussion of the rise in outsourcing and its impact on public law, see M. Hunt, 'Constitutionalism and the Contractualisation of Government' and M. Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing', both in M. Taggart (ed.), *The Province of Administrative Law* (Hart Publishing, Oxford, 1997), at p. 21 and p. 40 respectively.

⁹ [2002] EWCA Civ 366, [2002] HRLR 30.

though the local authority would have been regarded as performing a public function had it delivered the services itself.¹⁰ *Leonard Cheshire* was affirmed in *YL v Birmingham City Council*,¹¹ in which a bare majority of the House of Lords ruled that a private company in the same position as LCF in *Leonard Cheshire* was not a hybrid public authority. The resulting incongruity and arbitrariness is concerning. Vulnerable service users can plead their Convention rights against the service provider if the local authority decides to deliver the services in-house,¹² but not if it decides – which is completely beyond the service user’s control – to contract them out.¹³

Parliament has since intervened to reverse the *YL* and *Leonard Cheshire* result. Under s 145 of the Health and Social Care Act 2008 (HSCA), the delivery of residential care services in these circumstances will amount to a public function under s 6(3)(b) HRA. But the reasoning underlying the decisions has been left untouched and remains equally applicable to other contexts in which contracting out may arise. The reasoning in *YL* and *Leonard Cheshire* is unpalatable because it seems illogical on its face. It is difficult to see how the mere fact of contracting out a function can change its nature from public to private.¹⁴ If a function is regarded as public when delivered by a local authority in-house, it should equally be regarded

¹⁰ *Ibid.*, at [15]. It should be stressed that the nature of the function is irrelevant to the *local authority*’s Convention liability because the local authority is a core public authority and therefore bound to respect the Convention in everything it does (see below, p. 000).

¹¹ [2007] UKHL 27, [2008] 1 AC 95.

¹² This is because local authorities are core public authorities: see below, p. 000.

¹³ For criticism of the courts’ approach to s 6(3)(b), see especially 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; S. Palmer, ‘Public functions and private services: a gap in human rights protection’ (2008) 6 IJCL 585; A. Williams, ‘*YL v Birmingham City Council*: Contracting out and “functions of a public nature”’ [2008] EHRLR 524; Joint Committee on Human Rights, Seventh Report, *The Meaning of Public Authority under the Human Rights Act* (2003-04 HL 39), (2003-04 HC 382); Joint Committee on Human Rights, Ninth Report, *The Meaning of Public Authority under the Human Rights Act* (2006-07 HL 77), (2006-07 HC 410). Cf D. Oliver, ‘Functions of a public nature under the Human Rights Act’ [2004] PL 329.

¹⁴ Craig ‘Contracting out’, 556.

as public under the HRA when contracted out to be performed by a private organisation on the local authority's behalf.¹⁵

The majority of the House of Lords in *YL* made a number of attempts to explain this argument away, but none were particularly convincing.¹⁶ In particular, their Lordships believed that the performance of functions for commercial gain 'point[ed] against' those functions being public.¹⁷ They seemed to believe the dividing line between 'public' and 'private' under s 6(3)(b), in other words, to mirror the classically liberal distinction between the public-facing state and the self-interested private individual; between bodies created and controlled by law and politics to serve the public interest, on the one hand, and bodies who are entitled to act for their own (lawful) ends, on the other.¹⁸ Though such a divide does appear to run through Strasbourg's jurisprudence on the distinction between governmental and non-governmental organisations under the Convention,¹⁹ it is clear that s 6(3)(b) intends the public-private divide to be drawn in a different place. Excluding commercially-motivated activity from s 6(3)(b) tends to empty it of any real purpose as a provision intended to apply to *private* bodies – bodies who, by their very nature in liberal societies, are entitled to act for their own motivations rather than being bound to serve the public interest.²⁰ Excluding

¹⁵ *Ibid.*

¹⁶ For fuller discussion see Williams, 'A Fresh Perspective on Hybrid Public Authorities', 144-145.

¹⁷ *YL*, n 11 above, at [116] (Lord Mance). Lords Scott and Neuberger agreed.

¹⁸ See further *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513 (QB), p. 524 (Laws J); *R (Heather) v Leonard Cheshire Foundation* [2001] EWHC 429 (Admin) at [72] (Stanley Burnton J).

¹⁹ See below, pp.000-000. It also seems to reflect the distinction between core public authorities and private persons under the HRA: D. Oliver, 'The frontiers of the State: public authorities and public functions under the Human Rights Act' [2000] PL 476, pp.481-483. See further *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 at [14] (Lord Nicholls), [62] (Lord Hope), [86] (Lord Hobhouse) and [156] (Lord Rodger).

²⁰ Palmer, 'Public functions and private services', 601.

commercially motivated activity would even seem, as one commentator has observed,²¹ to conflict with the uncontroversial ruling of Keith J in *R (A) v Partnerships in Care Ltd*²² by excluding the exercise of statutory powers of detention by a private psychiatric hospital from s 6(3)(b). The *YL* reasoning is highly questionable from a doctrinal perspective and the meaning of the term ‘functions of a public nature’ should therefore still be a live issue for the Supreme Court.

The second problem with the courts’ approach to the hybrid scheme is the confusion surrounding the Convention rights of hybrid public authorities themselves. The issue has never been comprehensively addressed in court,²³ and Buxton LJ once curtly stated that when discharging its public functions a hybrid ‘has no such rights’.²⁴ The view that hybrid public authorities are somehow ‘stripped’ of the ability to rely on the Convention in their public capacities is also held, again with little or no supporting analysis, by a surprising number of academic writers.²⁵

Issues one and two – the width of s 6(3)(b) and the ability of hybrids to rely on the Convention themselves – are bound to be linked.²⁶ The more disruptive the impact on private individuals of being subjected to the Convention, the narrower one would expect Parliament

²¹ J. Landau, ‘Functional public authorities after *YL*’ [2007] PL 630, p. 636.

²² *Partnerships in Care*, n 5 above.

²³ Baroness Hale left the issue ‘for another day’ in her dissent in *YL*, n 11 above, at [74]. Lord Nicholls stated simply that hybrid public authorities should be able to rely on their own Convention rights ‘when necessary’ in *Aston Cantlow*, n 19 above, at [11].

²⁴ *YL v Birmingham City Council* [2007] EWCA Civ 26, [2008] QB 1 at [75].

²⁵ See e.g. Oliver, ‘The frontiers of the State’, 492; H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (OUP, Oxford, 2006), p. 122; H. Quane, ‘The Strasbourg jurisprudence and the meaning of “public authority” under the Human Rights Act’ [2006] PL 106, p. 109. Cf H. Davis, ‘Public Authorities as “Victims” under the Human Rights Act’ [2005] CLJ 315, p. 321. For a fuller discussion see Williams, ‘A Fresh Perspective on Hybrid Public Authorities’, 145-154.

²⁶ On the link between a public authority’s ability to rely on the Convention and the width of the term ‘public authority’ under s 6, see Oliver, ‘The frontiers of the State’, 490-492.

to have intended s 6(3)(b) to apply. This is an important consideration because the term ‘functions of a public nature’ is so vague that judges are likely to fall back onto policy and fairness considerations when determining its meaning.²⁷ If the rights-stripping idea can be convincingly debunked,²⁸ judges should be less reluctant to extend their interpretation of the public functions term in future.

Debunking rights-stripping

Aside from courts and hybrid public authorities, which are listed as public authorities by ss 6(3)(a) and (b) respectively, the HRA is commonly acknowledged to give rise to a third species of ‘core’ public authority. The existence of these ‘obviously’ public bodies is implied by the non-exhaustive wording of s 6(3), which states that public authority ‘includes’ the public authorities set out in its list. Unlike hybrids, core public authorities must comply with the Convention in everything they do, whether public or private activity. This is because s 6(5) alleviates only *hybrids* – and not core public authorities – from the duty to act Convention-compatibly during private activity.

It is clear that core public authorities lack Convention rights under the HRA because the HRA affords Convention protection only to ‘victims’,²⁹ i.e. bodies who qualify as ‘non-

²⁷ In *YL*, n 11 above, Lord Neuberger stated, at [128], that the words ‘are so imprecise in their meaning that one searches for a policy as an aid to interpretation.’ Along similar lines, see M. Elliott, ““Public” and “private”: defining the scope of the Human Rights Act” [2007] CLJ 485, p. 487.

²⁸ In *YL (ibid.)*, at [116], Lord Mance stated that SCH, if it were a hybrid public authority, could have relied on its ‘ordinary private law freedom to carry on operations under agreed contractual terms’ under Art 8(2) as a defence, presumably under the ‘rights and freedoms of others’ qualification. His Lordship did not refer specifically to SCH’s Convention rights, however, and his view that the ‘rights of others’ extends to a general right to contractual autonomy sits uncomfortably with Strasbourg case law to the effect that Convention qualifications are exhaustive and should be narrowly construed: see *Klass v Germany* (1979-80) 2 EHRR 214 at [42]; *Golder v United Kingdom* (1979-80) 1 EHRR 524 at [44].

²⁹ HRA, s 7(1).

governmental organisations’ under Art 34.³⁰ The effect of Art 34 is to distinguish between non-governmental organisations, who can file Convention claims in Strasbourg, and governmental organisations, who cannot. It is difficult to see how core public authorities, inherently part of the fabric of government, could ever claim to be non-governmental organisations under Art 34.³¹ It is equally clear that hybrids, by contrast, *do* enjoy Convention rights, at least when they engage in only private activity. This is because hybrids are *private* bodies. Section 6(5) emphasises their institutionally private nature by treating them as ordinary private individuals when they act in their private capacities. As private bodies, hybrids will straightforwardly fall within the definition of a non-governmental organisation under Art 34 when engaging in only private activity.

Although the HRA treats hybrids as public authorities for the purpose of generating a Convention-based statutory cause of action against them, it does not follow that the HRA intends to treat them as public authorities for all other purposes, too. Whether or not hybrid public authorities are stripped of their Convention rights when performing public functions depends on Strasbourg’s definition of a governmental organisation. Hybrids can only be said to lose Convention protection when performing public functions if Strasbourg would regard them as governmental organisations when performing public functions. It is important not to misinterpret the Strasbourg case law. Domestic courts risk misclassifying hybrids and wrongly denying them Convention protection if they reach the conclusion that Strasbourg would regard them as governmental organisations too readily. There is an important burden of proof issue here – those who believe that hybrids are rights-stripped must demonstrate

³⁰ HRA, s 7(7).

³¹ *Aston Cantlow*, n 19 above, at [8] (Lord Nicholls).

convincingly that Strasbourg would regard private bodies as governmental organisations when performing public functions.

A number of judges and academic writers do seem to believe that hybrids become governmental organisations when performing public functions.³² But this is only a tacit assumption that emerges from their view that the governmental organisation jurisprudence can assist domestic courts in identifying a public function under s 6(3)(b) (that jurisprudence must therefore extend to private bodies performing public functions in their eyes). The flimsiness of this assumption is exposed by a more detailed analysis of the Strasbourg case law with the specific task of determining the rights-status of hybrids in mind.

Aside from the definition of a governmental organisation under Art 34, there is another branch of Strasbourg jurisprudence relevant to this task. This jurisprudence relates to the issue of state responsibility. If a body acts in such a way as to affect the enjoyment by a victim of their Convention rights, that body is either an emanation of the state or it is not. If it is an emanation of the state such as a government minister,³³ the state will be directly responsible for its behaviour in Strasbourg. If the body is a private body rather than an emanation of the state, the state will only be responsible for the body's behaviour indirectly, i.e. if the Convention places the state under a positive obligation to regulate the body's behaviour in the circumstances in question. Strasbourg has made it clear that the distinction between emanations of the state and private bodies in this context is identical to the

³² See Quane, 'The Strasbourg jurisprudence'; *R (West) v Lloyd's of London* [2004] EWCA Civ 506, [2004] HRLR 27 at [36]-[39] (Brooke LJ); *YL*, n 11 above, at [161] (Lord Neuberger); *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2009] HRLR 29 at [35] (Elias LJ) and [117]-[118] (Rix LJ) (dissenting).

³³ See *Golder v United Kingdom*, n 28 above.

distinction between governmental and non-governmental organisations under Art 34.³⁴ As a result, the state responsibility jurisprudence also helps identify the meaning of a governmental organisation in Strasbourg. I have conducted an extensive analysis of both branches of Strasbourg jurisprudence elsewhere and do not intend to repeat that analysis in full here.³⁵ Some examples will suffice to make the point that Strasbourg cannot convincingly be said to regard private bodies performing public functions as governmental organisations.

In liberal theory, as seen above, private bodies and individuals can usually be distinguished from public or ‘state’ bodies by their motives. Whereas public bodies must serve the public interest, private bodies can act for their own ends within the confines of the law. This basic distinction may be termed the ‘selflessness’ principle – the lawful selfishness of private bodies contrasts with the necessary ‘selflessness’ of public ones. To infer with any confidence that Strasbourg regards private bodies performing public functions as governmental organisations, one would need to see a clear example in the case law of a self-serving private organisation such as a profit-making company being treated by Strasbourg as a governmental organisation upon the performance of a particular, public, function. No clear examples can be found in the Art 34 context, however. In fact, Strasbourg has recently ruled on two occasions that bodies will *not* be governmental organisations under Art 34 if they possess predominantly self-serving commercial motives.³⁶ It is true that Strasbourg

³⁴ *Danderyds Kommun v Sweden* (52559/99), applied in that respect in the Scottish case of *Grampian University Hospitals NHS Trust v Napier* (2004) JC 117; *Hautaniemi v Sweden* (1996) 22 EHRR CD 155; *Novoseletskiy v Ukraine* (2006) 43 EHRR 53 at [82].

³⁵ For fuller discussion see Williams, ‘A Fresh Perspective on Hybrid Public Authorities’, 145-154.

³⁶ *Islamic Republic of Iran Shipping Lines v Turkey* (2008) 47 EHRR 24 at [73]; *Ukraine-Tyumen v Ukraine* (22603/02) at [27].

sometimes uses the term ‘public functions’ to describe the activities of bodies whom it regards to be governmental organisations under Art 34. For example, in *Consejo General de Colegios Oficiales de Economistas de España v Spain*,³⁷ the Commission ruled that the General Council of Official Economists’ Associations (GCOEA), a professional regulatory body, was a governmental organisation under Art 34 because it was a ‘national authority exercising public functions’. But despite the linguistic similarity of this remark with the term ‘functions of a public nature’ under s 6(3)(b), domestic lawyers should not assume that the GCOEA was what the HRA would regard as a hybrid public authority. It is by no means clear that the GCOEA, which was created by law to regulate a particular profession, was an institutionally private person entitled to further its own interests, like a profit-making company, over those of the public. Curiously, the Commission also remarked in *Consejo General* that the GCOEA, as a governmental organisation, could *never* file an application in Strasbourg. If Strasbourg really does believe that private bodies become governmental organisations when performing public functions, the Commission is suggesting that these bodies are unable to file applications under Art 34 even in respect of their *private* functions.³⁸ It is difficult to see why this should be, and no explanation was proffered in *Consejo General* itself. It is far more natural to infer from *Consejo General* that the Commission regarded the GCOEA as a governmental organisation not because it was a private body performing public functions but, instead, because it was a selfless governmental organisation – what the HRA would regard as a *core* public authority – created and controlled to serve the public interest.

³⁷ (1995) DR 82-B.

³⁸ Quane, ‘The Strasbourg jurisprudence’, 117. Rather than concluding that the governmental organisation jurisprudence fails to extend to private bodies performing governmental functions, Quane concludes that Strasbourg’s ‘hybrid’ governmental organisation concept is unduly harsh on hybrids and urges Strasbourg to reconsider its remarks in *Consejo General*. In response, see Williams, ‘A Fresh Perspective on Hybrid Public Authorities’, 154.

Like the Art 34 jurisprudence, the state responsibility jurisprudence can be easily misread. In *Costello-Roberts v United Kingdom*,³⁹ for example, a schoolboy received corporal punishment from the headmaster of his private school and sought to claim a breach of Arts 3 and 8 in Strasbourg. The issue therefore arose as to whether the state could be responsible for the actions of the private school. Despite ruling that there had been no Convention breach on the facts, the Strasbourg court agreed with the applicant that the school engaged the state's responsibility. To support its conclusion, the court made three points.⁴⁰ First, states are required by Art 2 of the First Protocol 'to secure to children their right to education' and disciplinary functions are not 'merely ancillary to the educational process'. Second, independent schools 'co-exist with a system of public education' in the United Kingdom. Third, 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.' It is by no means clear from these rather cryptic remarks, in reply to one academic writer,⁴¹ that the private school engaged the state's responsibility *as a governmental organisation*, especially given that the court began its analysis of the state responsibility issue by emphasising that the Convention can place states under positive obligations to regulate the behaviour of *private bodies* in specific situations.⁴²

³⁹ (1995) 19 EHRR 112.

⁴⁰ *Ibid.*, at [27]-[28].

⁴¹ Quane evidently interprets Strasbourg's ruling in *Costello-Roberts* as a governmental organisation ruling because she believes the ruling to be instructive in determining the meaning of 'functions of a public nature' under s 6(3)(b), having earlier argued that Strasbourg's positive obligation jurisprudence can never be relevant to the domestic courts' treatment of that provision: see Quane, 'The Strasbourg jurisprudence', 108 and 110. In response to the view that the positive obligation jurisprudence can never be relevant to interpreting s 6(3)(b), see Williams, 'A Fresh Perspective on Hybrid Public Authorities', 147-148.

⁴² *Ibid.*, at [26]. The Strasbourg court in *Storck v Germany* (2006) 43 EHRR 6 and Lord Mance in *YL*, n 11 above, at [95], also saw *Costello-Roberts* as a positive obligations case.

It cannot be reliably inferred from either the Art 34 or state responsibility strands of jurisprudence that Strasbourg regards private bodies as governmental organisations when they perform public functions. The better view is that private bodies remain non-governmental organisations through and through. Most obviously this conclusion exposes the irrelevance of the governmental organisation jurisprudence to the meaning of the term ‘functions of a public nature’ under s 6(3)(b).⁴³ More importantly for present purposes however, the conclusion that private bodies remain non-governmental organisations when performing public functions debunks the rights-stripping idea. Hybrids enjoy Convention rights under the HRA, even when performing public functions.

B. The chameleonic model

Acknowledging that hybrid public authorities enjoy Convention rights in their public capacities is one thing; protecting their Convention rights is another. For the most part the courts should not find this a difficult task. All they need to do is recognise that the performance by a hybrid of public functions has no bearing on its ability to make Convention claims in court. So, for example, if a local authority applies to revoke a private care home’s operating licence without adequate notice of the proceedings with the result that the operator’s business is destroyed, the operator should be able to allege under the HRA that the local authority has breached its rights under Art 1 of the First Protocol and Art 6.⁴⁴ The fact that the operator’s business may consist of delivering contracted out residential care services,

⁴³ This serves as a rebuttal, therefore, to the views of the judges and academics at n 32 above.

⁴⁴ These were the facts of *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 AC 853, but the claimants were unable to make the Convention argument because the facts arose before the HRA entered into force.

and that in the light of s 145 HSCA the operator is performing public functions under s 6(3)(b) HRA when doing so, will be irrelevant to its ability to make that claim. The same would also be true if the hybrid sought to rely defensively on its Convention rights against a public authority by way of collateral challenge,⁴⁵ or if the hybrid sought to use the common law horizontal effect mechanism to advance its Convention rights against a private defendant. All the courts need to do is allow the hybrid to advance those claims notwithstanding that it might be doing so during the discharge of its public functions.

In one respect the situation is more problematic however, which is why the hybrid scheme should be read as generating *chameleonic* horizontal effect. On its face, by labelling private bodies performing public functions as public authorities, the hybrid scheme intends to treat hybrids in the same manner as core public authorities such as local authorities or government ministers in court. If a claimant brings an Art 8 claim against a local authority, for example, courts assessing the merits of that claim will work through the standard analytical formula of deciding whether there has been an interference by the local authority with the claimant's *prima facie* right and, if so, whether that interference is prescribed by law and has a legitimate aim according to Art 8(2). At this stage the local authority can rely on applicable Convention qualifications by claiming that it interfered with the claimant's right for the protection of the rights and freedoms of others, or for the prevention of disorder or crime, and so on. But complications arise if hybrids are treated in the same way as core public authorities and the court works through the same analytical process with a hybrid defendant performing public functions. Whilst hybrids might be able to avail themselves of certain

⁴⁵ Section 7(1)(b) HRA allows the victim to rely on their Convention rights in proceedings which are already underway.

Convention qualifications in isolated situations – private prison operators could claim that they were acting for the prevention of disorder or crime by routinely intercepting prisoners’ communications, for example⁴⁶ – they will generally find it hard to do so. As Stanley Burnton J observed at first instance in *Leonard Cheshire*, ‘the justifications referred to in Article 8.2 [ECHR] are all matters relevant to government, and not of any non-public body’ such as a care home operator.⁴⁷ It is difficult to see how a private care home operator could claim that it was acting in the ‘economic well-being of the country’, for instance, when attempting to serve notice on residents to quit as in *Leonard Cheshire* and *YL*. Most importantly, it is difficult to see how it – or any other hybrid – could claim to be acting for the protection of the rights of *others* when seeking to advance its *own* right, say, to respect for property under Art 1 of the First Protocol. If insufficient account is taken of the private nature of the hybrid defendant and hence the necessarily *horizontal* nature of the dispute, the risk arises that hybrids are unable to deploy their own Convention rights defensively against private claimants through the ‘rights of others’ qualification. This is problematic because the HRA, through the Strasbourg scheme, requires hybrids to be able to rely on the Convention regardless of whether they perform public functions at the time.

Contrast the position of hybrid defendants under a purely ‘vertical’ reading of the hybrid scheme with that of ordinary private defendants in the parallel common law horizontal effect context. In the common law context, private defendants *can* deploy their own Convention rights through the Convention qualifications if a claimant seeks to use the Convention against

⁴⁶ C. Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (OUP, Oxford, 2007), p. 261.

⁴⁷ *Leonard Cheshire*, n 18 above, at [71]. See also Oliver, ‘Functions of a public nature’, 343-344; R. Buxton, ‘Private life and the English judges’ (2009) OJLS 413, p. 416.

them. This is because Convention rights are deployed by a claimant *indirectly* in the common law context, i.e. against the court, whose duty as a public authority requires it to develop existing causes of action in a Convention-friendly fashion in order to safeguard the claimant's rights.⁴⁸ If the defendant feels that developing the common law in this way would infringe its own rights, it can plead those rights as a defence to the claimant's claim because the court, as a public authority, can claim that *it* is acting for the protection of the rights and freedoms of 'others' (i.e. the defendant's Convention rights) by doing so.⁴⁹ The court then balances the competing rights to see which should prevail.

So if the claimant deploys his or her Convention rights indirectly, against the court, the defendant has no difficulty asserting its own Convention rights in response. To avoid the risk of rights-stripping hybrids by failing to attach sufficient weight to the horizontal nature of the hybrid scheme, the hybrid scheme should be interpreted in the same way. This is the 'chameleonic' reading of the hybrid scheme. Although the scheme creates an ostensibly vertical framework of rights protection against a private body by designating it a public authority, the framework switches to take on a more horizontal character when the dispute gets underway. When in court, the claimant should be taken, as in the common law context, to assert their rights through the court rather than directly against the hybrid defendant itself.

C. Why the model works

⁴⁸ See chapter XXX.

⁴⁹ Because unqualified Convention rights cannot be balanced against the rights of others, the defendant could only advance their Convention rights if the claimant relied on a *qualified* right against them.

Not only does the chameleonic model fully guarantee the ability of hybrid public authorities to rely on the Convention; it also exposes the hybrid scheme as giving rise to a form of horizontal effect similar to that which seems to operate in the parallel common law context.

The hybrid scheme, properly understood, contains elements of vertical and horizontal effect. It is vertical in the sense that it generates a statutory cause of action against an ostensibly public body. It is directly horizontal in the sense that the defendant hybrid public authority is in reality a private individual. In substance, the scheme also resembles one of *indirect* horizontal effect. Not perfectly so, because an indirectly horizontal scheme applies Convention rights to the *law* rather than generating a cause of action directly against the defendant itself, as the hybrid scheme does.⁵⁰ But common law indirect horizontal effect bears an additional defining characteristic, which *is* shared by the hybrid scheme once the dispute reaches court – that the claimant asserts their rights *through the court*, which sits at the apex of the dispute and balances the competing rights of the claimant and defendant. The switch that occurs in the rights protection framework under the chameleonic model therefore represents a shift from an ostensibly vertical framework to a framework roughly describable as indirectly horizontal in nature.

The hybrid scheme, as a scheme of horizontal effect broadly conceived, is not unlike the scheme of horizontal effect that the courts apply in the common law. This, too, is one of indirect horizontal effect. The courts do not appear to regard themselves as bound to create

⁵⁰ S. Gardbaum, 'Where the (state) action is' (2006) IJCL 760, p. 764.

brand new Convention-based causes of action.⁵¹ Their view, instead, is that they must develop *existing* causes of action in a Convention-friendly fashion. Little evidence suggests that the courts subscribe to the ‘weak’ model of indirect horizontal effect which requires them simply to consider and balance the values contained in the Convention against existing common law factors.⁵² Rather, judges seem to regard themselves as *bound* to develop those causes of action consistently with Convention rights. In other words, they *apply* those Convention rights,⁵³ which supplant the existing law with Convention norms,⁵⁴ between the claimant and defendant to the dispute.⁵⁵ In *A v B plc* for instance, Lord Woolf CJ stated in the breach of confidence context that the court’s duty under s 6 should be discharged by ‘absorbing the rights which articles 8 and 10 protect into the [existing cause of action]... so that it accommodates the requirements of those articles.’⁵⁶ Further support for this view can be found in more recent cases. Thus, Buxton LJ stated in *McKennitt v Ash* that ‘in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10.’⁵⁷ Echoing the remarks of Lord Woolf CJ in *A v B*, his Lordship then described those articles as ‘not merely of persuasive or parallel effect but...

⁵¹ Baroness Hale gave a clear statement to that effect in *Campbell v MGN* [2004] UKHL 22, [2004] 2 AC 457 at [132]. It is clear also from the courts’ approach in the common law privacy cases – where they develop the existing breach of confidence action – that they have rejected the idea that they must fashion brand new Convention-based causes of action. See chapter XXX for Gavin Phillipson’s response to the contrary view advanced by T. Bennett, ‘Horizontality’s new horizons- re-examining horizontal effect: privacy, defamation and the Human Rights Act’ (2010) 21(3) *Entertainment Law Review* 96 (Part 1) and 145 (Part 2).

⁵² Lord Nicholls’s remarks in *Campbell* (*ibid.*) at [17], could be taken to endorse the weak model, however. For general discussion of the varied *dicta* in *Campbell*, 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), p. 143, at pp. 157-167.

⁵³ This is the view commonly thought to be advanced by M. Hunt, ‘The “horizontal effect” of the Human Rights Act’ [1998] PL 423. In fact, Hunt seems to have envisaged s 6 requiring more gradual, incremental development of the common law: see p. 442.

⁵⁴ Morgan criticises the view that the courts must *apply* Convention rights to all existing causes of action on the basis that it effectively requires the content of the cause of action to be ignored and the Convention’s content simply ‘poured’ in: J. Morgan, ‘Questioning the “true effect” of the Human Rights Act’ (2002) 22 LS 259, 271.

⁵⁵ It is not entirely clear whether the courts regard themselves as bound to develop the law only *incrementally*, however. For further discussion see Gavin Phillipson’s chapter, at pp.000-000.

⁵⁶ *A v B plc* [2002] EWCA Civ 337, [2003] QB 195 at [4].

⁵⁷ *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 at [11].

the very content of the domestic tort that the English court has to enforce.’⁵⁸ Similarly, Eady J stated in *Mosley v News Group Newspapers* that the HRA required the values expressed in Arts 8 and 10 to be ‘acknowledged *and enforced* by the courts.’⁵⁹

In the common law as well as the hybrid context, then, the court applies the Convention rights between the parties and balances competing rights, if necessary, to determine which should prevail. This is significant. In both the common law and hybrid contexts, Parliament has been unclear about *when* it expects Convention rights to apply between individuals. There are various linguistically plausible interpretations of the term ‘functions of a public nature’ under s 6(3)(b) and, as seen above, various linguistically plausible interpretations of the scope and effect of the court’s duty to give develop the common law in a Convention-friendly fashion. Judges are likely in both contexts to be resolving the issues with at least some reference to their own ‘feel’ for how far Convention rights should be permitted to infuse the private sphere. If the judges are prepared to endorse something akin to the strong indirect horizontal effect model in the common law context, they should not be too unhappy with the chameleonic reading – which is substantially similar – of the hybrid public authority scheme.

This is not to suggest that the chameleonic model is identical in nature and scope to the model adopted by the courts in the common law context, however. First, it is clear that the remedial provisions differ under each scheme. The court’s remedial powers are governed by s 8 HRA under the hybrid scheme whereas the court awards remedies according to its own

⁵⁸ *Ibid.*

⁵⁹ [2008] EWHC 1777 (QB), [2008] EMLR 20 at [8] (emphasis added). Discussed further in chapter XXX.

domestic precedents in the common law context.⁶⁰ Second, the scope of each scheme, i.e. *when* a claimant can assert their Convention rights against the defendant, also differs. Under the common law scheme, the claimant cannot assert their Convention rights against the defendant unless he or she can convince the court that the state would be liable in Strasbourg if his or her Convention rights were left unprotected in the circumstances in question – if the state would not be liable in Strasbourg, the claimant’s rights are already protected and the court will not be acting unlawfully by refusing to develop the common law.⁶¹ Claimants in the hybrid context need not demonstrate that the state would be liable in Strasbourg, however, because by necessary implication the hybrid scheme generates Convention remedies in domestic law which *expand* on those available against the state. This is because a particular body can only engage the state’s responsibility in one of two ways in Strasbourg,⁶² and Parliament has provided for domestic remedies in each situation using other schemes of liability under the HRA. If the claimant’s rights are interfered with by what Strasbourg would regard as an emanation of the state, the claimant can pursue a direct claim against that body as a core public authority under s 6 HRA.⁶³ If the behaviour emanates instead from a private person whose behaviour the state is under a positive obligation to regulate, the claimant can pursue a remedy through the common law horizontal effect mechanism, as seen above. Provided that the subject matter of the claimant’s complaint falls within the scope of an applicable Convention right, in the hybrid context it is not necessary for the claimant to show

⁶⁰ For criticism of the courts’ approach to damages under the HRA see chapter XXX by Jason Varuhas.

⁶¹ See chapter XXX.

⁶² See above, pp.000-000.

⁶³ The governmental organisation and core public authority categories seem to be coterminous: see above, pp. 000-000 and *Aston Cantlow*, n 19 above, at [6]-[7] (Lord Nicholls), [47] (Lord Hope), [160] (Lord Rodger), [129] (Lord Scott) and [87] (Lord Hobhouse).

that the state itself would be liable in Strasbourg if he or she were left without a remedy in domestic law.

Domestic courts have considerable room to expand their definition of a public function before the hybrid scheme can be said to overburden private defendants. It should be remembered that claimants can only assert their Convention rights against private defendants who perform public functions under the hybrid scheme. Even on a broader construction of s 6(3)(b) which included the delivery of contracted out public services, the vast majority of activities undertaken by private bodies would still fall outwith the definition of a public function with the result that private defendants would be largely shielded from liability under the hybrid scheme. This contrasts with the relatively claimant-friendly position in the common law horizontal effect context – all the claimant needs to do here is present a cause of action which is ‘relevant’ to the nature of the Convention claim made.⁶⁴ The extent to which the courts have been prepared to stretch the breach of confidence action to ensure compatibility with Art 8 demonstrates the relative ease with which claimants can assert their rights in the common law context.⁶⁵

D. Conclusion

Whilst it previously appears to have gone unrecognised, hybrid public authorities do in fact enjoy Convention rights of their own under the HRA during the performance of public

⁶⁴ *Campbell*, n 51 above, at [132] (Baroness Hale).

⁶⁵ Judges in more recent cases have even referred to the newly-developed aspects of the law as a tort of misuse of private information in recognition of the nature and extent of that development: see e.g. *McKennitt v Ash*, n 57 above, at [86] (Longmore LJ), and *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 at [24] (Sir Anthony Clarke MR).

functions. The prevailing academic and judicial assumption that a hybrid is somehow ‘stripped’ of Convention rights in its public capacity is a myth. Not only does this confirm that hybrids can use their Convention rights to mount challenges against other public authorities when acting publicly; it also opens up a valuable line of defence to hybrids who find themselves on the receiving end of Convention claims in court. In order to ensure that hybrids can make use of this defence, however, the hybrid scheme should be read as generating chameleonic horizontal effect.

Properly understood in this way and juxtaposed against the courts’ treatment of the horizontality issue in the parallel common law context, the hybrid scheme is far riper for expansion in scope than the judges appear to believe. The courts’ own case law in the common law context indicates that they should not regard expanding s 6(3)(b) to include contracted out public services as causing undue harm to hybrid defendants. The width of the term ‘functions of a public nature’ under s 6(3)(b) is not the only factor responsible for determining the defendant’s liability in court. Even if a claimant succeeds in demonstrating that a private defendant performs public functions, the claimant must then show, if the hybrid asserts its own Convention right in response, that *the claimant’s* Convention right should prevail. It is at this stage that the court will be able to conduct an intricate and context-sensitive balancing exercise between the competing rights.⁶⁶ This is the forum in which judges should air and accord due weight to any concerns that they might harbour about the impact on the defendant if the claimant’s claim is upheld. Foreclosing the issue at the

⁶⁶ A defence based on the right to respect for property under Art 1 of the First Protocol is likely to be a strong one: see chapter XXX by Amy Goymour.

threshold stage by construing the meaning of a public function unduly narrowly is not the answer.