

Human Rights and the Private Sphere

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Section 6 of the Human Rights Act (HRA) does not provide for horizontal effect of convention rights. It provides instead that 'public authorities' are bound to act compatibly with those rights, and defines such authorities to include private bodies performing 'functions of a public nature' unless the nature of the act in question was private. In the case of *YL v Birmingham City Council* the House of Lords decided by a majority of three to two that a private care home was not performing a 'function of a public nature' in relation to a resident who was being paid for by her local authority; consequently a claim by the resident that the owners of the home were in breach of Article 8 of the European Convention of Human Rights (ECHR) when it sought to remove her from the home failed.¹

The *YL* decision was controversial. In government statements as the Human Rights Bill went through Parliament indications had been given that it was the government's intention that privatised activities should give rise to HRA protection. The Joint Committee on Human Rights (JCHR) had published three reports before the hearing of *YL* that were critical of the approach that had been adopted by the courts in previous cases on the meaning of 'functions of a public nature' and urged the case for a different interpretation.² Indeed, the Secretary of State for Constitutional Affairs, unusually, intervened in *YL* to press for a broader interpretation of 'function of a public nature.' The House of Lords did not do so. After the decision, the JCHR pressed for steps to be taken to fill what is considered by some to be a 'gap' in human rights protection.³ Ultimately, in July 2008, a new provision, Section 145 of the Health and Social Care Act 2008 (HSCA) was passed, which provides - paraphrased - that care homes are to be taken to be exercising a function of a public nature for the purposes of Section 6 (3) (b) of the Human Rights Act 1998 when providing accommodation together with nursing or personal care to a person paid for out of public funds.

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¹ *YL v Birmingham City Council* [2007] UKHL 27.

² *The Meaning of Public Authority under the Human Rights Act* 7th Report, (2003-04) HL 39 HC 382;

The Meaning of Public Authority under the Human Rights Act 9th Report, (2006-07) HL 77 HC 410;

The Human Rights of Older People in Healthcare 18th Report, (2006-07) HL 156 HC 378. See also

Government Response First Report, (2007-08) HL 5 HC 72.

³ *Legislative Scrutiny: Health and Social Care Bill* 8th Report, (2007-08) HL 46 HC 303.

Among the reasons advanced against treating private care homes as 'public authorities' within section 6 of the Human Rights Act 1998 was that this would involve superimposing statutory terms in the contracts between the home and the resident or local authority - i.e. interfering in contractual relations, without specific statutory authority and without dealing with the lacuna in the law and legal uncertainty that this would generate;⁴ and that it would create anomalies, since self-paying residents or residents paid for by their families would not be regarded as being subjects of 'functions of a public nature' and consequently, unlike residents in other rooms, would not have the protection for their homes that those paid for out of public funds would enjoy.⁵

Of course, the British government is under a positive obligation under the ECHR to secure that its legal system provides proper protection for convention rights. But it is not obvious that Article 8 ECHR itself requires that residents in care homes (or residents in other kinds of property, including privately rented premises) should have security of tenure in order to protect their 'right to respect for their home.'⁶ Whether or not the UK was in breach of the positive obligation, the new section 145 of the HSC Act now covers the case - in respect of care home residents only.

My focus in this short article is on the implications that would flow from giving 'horizontal effect' to convention rights, i.e. from requiring private bodies to respect the human rights, *qua* human rights, of those they deal with. We need to bear in mind that the starting point in most constitutional human rights provisions in the past has been that they have only vertical effect - effect as against *state institutions*. For instance, the Constitution of the USA, the first to include human rights protections, only does so in relation to 'state action.' The Canadian Constitution provides similarly, that human rights obligations only bind governments and legislatures. The applicability of explicit human rights protections has not depended on the nature of the function that was being performed, but on the identity of the respondent in a case.

It is only relatively recently that some countries have moved, often tentatively, towards requiring private bodies to respect human rights - i.e. towards giving horizontal effect, whether direct or indirect (the meaning of which is discussed below) to human rights provisions. Such extensions raise a number of practical and theoretical issues, which we shall outline below. It is concern on the part of the courts about these issues that has, in reality, produced the decisions in *YL* and other English cases.

Those who objected to the fact that private care homes were not regarded as exercising functions of a public nature were in reality saying that

⁴ *YL* (n 1) paras [27-31] (Lord Scott) and para [116] (Lord Mance).

⁵ *YL* (n 1) paras [115], [117], [119] (Lord Mance) and paras [135-137] (Lord Neuberger). See also Oliver, 'Functions of a public nature under the Human Rights Act' [2004] *PL* 329.

⁶ See the *Qazi* case (n 9) below on this.

such private bodies ought to respect the convention rights of those they deal with, especially where they are vulnerable, as those in care homes are. Of course most convention rights are in fact protected by the ordinary law of contract and tort and by property law. A reason why there has been a crop of cases about care homes and low cost housing, some before and some since the coming into effect of the HRA is that ordinary English law does not generally provide rights to respect for a person's private or family life, home and correspondence, and in particular none for respect for privacy or for the 'home' when it is not owned or rented by the claimant.⁷ Nor have our courts considered that a right to respect for one's home requires security of tenure. For instance, in *Qazi v Harrow LBC* the House of Lords held that it was not inconsistent with the essence of the right to respect for a home under Article 8 ECHR for a local authority to recover possession from an occupier after the termination of the tenancy by a valid notice to quit.⁸ However, some statutory exceptions to the general rule are provided for by the housing legislation. This protects residential tenants and their surviving partners or family members under 'assured' tenancies.⁹ But this legislation did not extend to residents of care homes.

So what are the arguments around extending horizontal effect to human rights generally? Professor Joerg Fedtke of the UCL Faculty of Laws and I have recently completed a comparative study¹⁰ of the extent, if any, to which fourteen countries (and the European Court of Human Rights) give effect to civil and political rights 'in the private sphere.'¹¹ These findings are very illuminating. While some countries do give such effect without specific legislation providing for it, generally giving direct horizontal effect (I prefer 'direct horizontal effect' to the German term '*unmittelbare Drittwirkung*') to human rights provision is considered inappropriate for various reasons, as the following discussion will show.

Practice in Other Jurisdictions

Human rights provisions may be included in the constitutions of states, or in constitutional or Basic Laws, or in international instruments. In none of the jurisdictions in our study did the constitution make specific provision for directly enforceable horizontal effect. The courts in some countries have nevertheless developed horizontal effect. Such effect may be direct or

⁷ *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213; *Poplar Housing and Regeneration Community Association v. Donoghue* [2001] EWC Civ 595; *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366; *R v Servite Houses and Wandsworth LBC, ex parte Goldsmith and Chatting* [2002] 2 LGLR 997; YL (n 1).

⁸ *Qazi v Harrow LBC* [2003] UKHL 43.

⁹ *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557.

¹⁰ D Oliver and J Fedtke (eds), *Human Rights and the Private Sphere* (Abingdon: Routledge-Cavendish 2007).

¹¹ The countries are Canada, Denmark, England and Wales, France, Germany, Greece, India, Ireland, Israel, Italy, New Zealand, South Africa, Spain, and the United States of America.

indirect. Indirect effect may require that laws be *interpreted* compatibly with human rights instruments, or that the courts should *develop the ordinary law* so as to give effect to such rights. Courts in most countries *interpret* their ordinary laws - statutes or civil codes, for instance - compatibly with human rights. But generally, especially in civil law countries, the courts do not *develop* the law (except by interpretation) since this would be contrary to the separation of powers as understood in those countries. There follows a brief summary of the position in some of the countries we included in our survey.¹²

Direct Horizontal Effect

Only India¹³ and Spain¹⁴ in our study give general direct horizontal effect to the rights set out in their constitutions. It is perhaps not surprising that India gives such direct horizontal effect, since it is a common law country and it is accustomed to courts exercising considerable inventiveness in developing the law. Spain is a rather more surprising example, since the tradition in civil law jurisdictions is against judges having a law-creative, in effect a legislative, function, for separation of powers reasons. But in Spain this is not regarded as a problem. Ireland¹⁵ treats the breach of the human rights in the constitution as a constitutional tort, thus giving them direct effect, but only if ordinary law gives plainly inadequate protection for the right or is manifestly deficient. Italian courts give direct horizontal effect to constitutional rights only - exceptionally - if there is a gap in legislation. The Greek¹⁶ constitution purports to give direct horizontal effect to rights, but the constitution is not self-executing and so these rights are only given effect if they are included in, for instance, the civil code. French¹⁷ courts give direct horizontal effect to the rights set out in the European Convention on Human Rights, but not to 'constitutional' rights; the French Constitution is not self-executing.

Indirect Horizontal Effect

Many countries' courts are expressly bound by their Constitutions to interpret their laws compatibly with the ECHR - Denmark,¹⁸ Ireland¹⁹ and Spain²⁰ are among these. In the UK,²¹ lacking a written Constitution, Section

¹² Footnote references in what follows are to the chapter in the book and the page in the summary chart giving the position in each jurisdiction at the end of the book *Oliver & Fedtke* (n 11).

¹³ *Oliver & Fedtke* (n 11) Chapter 6, chart 536.

¹⁴ *Ibid.* Chapter 12, chart 550.

¹⁵ *Ibid.* Chapter 7, chart 539.

¹⁶ *Ibid.* Chapter 5, chart 531.

¹⁷ *Ibid.* Chapter 3, chart 526.

¹⁸ *Ibid.* Chapter 1, chart 522.

¹⁹ *Ibid.* Chapter 7, chart 539.

²⁰ *Ibid.* Chapter 12, chart 550.

²¹ *Ibid.* Chapter 2, chart 524 (refers to England and Wales).

3 of the Human Rights Act 1998 provides that so far as possible statutory provisions are to be interpreted compatibly with convention rights. Even in the absence of constitutional or statutory provisions to that effect, a number of countries' courts give indirect horizontal effect to rights set out in constitutional instruments or in international instruments, either by adopting a principle of compatible *interpretation* or by the exercise by the courts of their powers, where they exist, to *develop* the law, for instance under their civil codes, so as to be compatible with constitutional values. In the UK, Section 6 HRA is taken to require the courts to develop the law so as to be compatible with the ECHR rights, a developmental duty. In Greece²² and Germany²³ the courts interpret the civil codes compatibly with constitutional rights; in Israel²⁴ the courts interpret legislative terms such as 'public policy,' 'unlawfulness' and 'good faith' consistently with the Basic Laws. In South Africa²⁵ the courts take constitutional values into account when interpreting and developing the law.

The Balancing of Rights and Interests and Public Interests

In the countries where human rights do have direct or indirect horizontal effect, the courts have to carry out a balancing exercise as between the rights of the claimant, the rights or interests of the respondent, and the public interest. This exercise is more complex than in vertical effect situations where the balance is between the claimant's right and the public interest. Courts have approached this balancing function in a range of ways.

In Denmark²⁶ private sphere claims are rejected where the balancing exercise would have negative effects on legal certainty. In the UK,²⁷ France,²⁸ Greece,²⁹ Germany³⁰ and South Africa,³¹ the balancing process is acknowledged to involve a proportionality analysis.³² If the clash is between rights to privacy - reputation - and the freedom of the press a public interest in the latter in the name of democracy is in play: in Israel the democratic consideration will trump the right to privacy. In Israel ordinary tort law is regarded as having established satisfactory balances between private rights and social interests, so that 'rights' have indirect horizontal effect in any event. The introduction of a 'right to dignity' in the Basic Law of 1992 has affected the development of tort law.

²² *Ibid.* Chapter 5, chart 531.

²³ *Ibid.* Chapter 4, chart 529.

²⁴ *Ibid.* Chapter 8, chart 541.

²⁵ *Ibid.* Chapter 11, chart 549.

²⁶ *Ibid.* Chapter 1, chart 522.

²⁷ *Ibid.* Chapter 2, chart 524.

²⁸ *Ibid.* Chapter 3, chart 526.

²⁹ *Ibid.* Chapter 5, chart 531.

³⁰ *Ibid.* Chapter 4, chart 529.

³¹ *Ibid.* Chapter 11, chart 549.

³² *Ibid.* at 507-511.

In New Zealand³³ the Bill of Rights Act (BORA) provides that rights are subject to 'reasonable limits prescribed by law' that are 'demonstrably justified in a free and democratic society' and this has been influential in the development of a new tort of invasion of privacy. It involves giving 'appropriate weight' to each conflicting right but the BORA does not give guidance as to what weight should be attached to each right. In South Africa³⁴ and Germany³⁵ similar proportionality tests are applied in both vertical and horizontal effect cases. This could be problematic, at least in theory, though in practice it does not seem to cause difficulties for the courts. Yet other jurisdictions, Greece³⁶ and India³⁷ among them, adopt a pragmatic approach and do not articulate tests as proportionality when balancing conflicting private rights.

Reflections

Turning to the UK, in the *YL* scenario, if the issue was conceptualised as one of horizontal effect, there would need to be a balancing of the 'rights' of the residents and the rights (e.g. property rights) and interests (e.g. in the proper management of their homes, the need to cover costs, profit margins) of the respondent owner of the home in question. Wider public interests may well be at stake in such cases. For instance, in the care home scenario, there might be a strong public interest in the owners of a home for severely disabled people being able to upgrade the home to provide proper facilities for the most severely disabled - this was the owners' position in the *Leonard Cheshire* case.³⁸ This might mean that current residents have to be moved to another home. It would in my view be contrary to the public interest if privately owned and run, often charitable, care homes were prevented from modernising and upgrading their facilities because they could not move current residents.

Further, limiting the powers of managers of care homes to ask residents to vacate their rooms (perhaps because the resident has become so dependant that the care home does not have the qualified staff and equipment needed to provide for them) - as Section 145 HSCA 2008 does - will raise the costs of care home provision, and the legal uncertainty and consequent risk to which owners become subject, so that in time the supply of private care homes may be reduced. Many privately run care homes operate on narrow profit margins and the sums paid by local authorities for publicly funded residents often do not cover the actual costs. Private, self-paying residents may be cross-subsidising the publicly funded ones. A

³³ *Ibid.* Chapter 10, chart 547.

³⁴ *Ibid.* Chapter 11, chart 549.

³⁵ *Ibid.* Chapter 4, chart 529.

³⁶ *Ibid.* Chapter 5, chart 531.

³⁷ *Ibid.* Chapter 6, chart 536.

³⁸ *Leonard Cheshire* (n 8).

parallel may be drawn here with the effect of the security of tenure legislation for private residential tenants and rent control after the Second World War. This resulted in a severe shortage of good quality low cost private housing for rent. There could then, be long-term negative consequences for the population of potential care home residents if managers were, because of inability to remove residents, unable to manage their homes and make accommodation available.

One could of course take the view that the needs of current care home residents are the most important consideration, and the longer-term negative implications for public policy and future care home residents of increasing security of tenure are not sufficiently strong to outweigh the interests of current residents. But the 'one' who takes that view should in my view be a politically accountable 'one.' Hence it is appropriate that the decision to extend security of tenure to care home residents paid for by the state has been taken by Parliament under the HSCA. That decision should be taken on the basis of evidence about the implications of extending security of tenure, and having weighed up the pros and cons and then persuaded Parliament to legislate on the matter. Some information was before Parliament about those matters when Section 145 was passed, though how much research had been done into the implications is not known. In any event it should not be a matter for a court operating on vague general statutory provisions about a 'function of a public nature' to decide such complex matters. I am not convinced that the courts are the right bodies to carry out the balancing exercise that decisions under section 145 will require - i.e. when a care home requires a resident to leave and the resident applies to a court under Section 145, claiming that the decision is in breach of Article 8 of the ECHR - given the absence of statutory criteria and guidance in the HSCA. Such criteria should require the courts to take into account matters such as the needs of the resident, the likely effect on the resident of being moved, the effect of non-removal of a disruptive or difficult resident on other residents, the ability of the home to provide the required level of care for the claimant, the needs of others seeking residential care, the financial implications of non-removal for the home, and public interests in, for instance, the availability of care home places or of provision for disabled people in the area. It is not at all clear from the wording of the ECHR that either such conflicting private interests or the conflicts between private and public interests are intended to be balanced in such cases, especially where what is at stake is the right to respect for one's home. As it is the courts will have to do their best in these cases without statutory guidance and there will be uncertainty until matters are clarified by case law. It may well be that a special tribunal rather like the former Rent Tribunals which dealt with security of tenure - and rent - disputes between private residential landlords and their tenants should have been established to deal with such cases, working within clear statutory criteria.

Returning to our comparative study, a number of jurisdictions have previously been keen to give direct horizontal effect to human rights provisions in their constitution or, in the case of Israel, a Basic Law. But they have rowed back from that position over the years, finding that such direct effect destabilises ordinary private law i.e. tort. Thus although the Supreme Court of Ireland initially decided that the human rights provisions in the constitution gave rise to a claim in a 'constitutional tort' since the 1950s that court has taken the view that claimants should normally plead their claims in ordinary tort law or whatever other part of the law might apply, and that constitutional tort claims for breach of human rights may only be brought exceptionally. In Israel too the concept of a constitutional law of torts has been rejected because of concerns about overlap and conflict with ordinary tort law and the need to develop a new set of general doctrines such as causation, vicarious liability, remedies etc. if a new constitutional law of torts were to be developed.

In conclusion, there are limits to how far the courts can go, in the absence of specific statutory provisions, in requiring private bodies to be bound to respect the convention rights or other human rights of individuals. The problems about horizontal effect are the same as those encountered in deciding whether something is a 'function of a public nature' under the Human Rights Act. My own view is that it is for Parliament to decide these matters. The courts will develop the law, including private law, towards creating indirect horizontal effect of convention rights, but they will be rightly concerned not to disturb the operation of ordinary law or to create over complex balancing exercises for themselves, with negative unintended consequences.

REFERENCES

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