Turning to Part III of this book and the issue of controls on the private delegates of governmental power, the first question that arises relates to the extent to which private delegates are bound by human rights laws. If they are fully bound, then one of the primary challenges of private delegation, identified in Chapter Three, is addressed. Whether private actors should ever be held accountable for human rights violations is, however, a contentious issue. On the one side, it is argued that horizontal enforcement of human rights is necessary to ensure a flourishing human rights culture; on the other, the need for individual autonomy, and for a zone free from interference by the state, is asserted. The focus of this chapter is not on the general question of whether human rights should be fully horizontally enforceable, but rather on the narrower question of whether private delegates of governmental power should be expected to comply with human rights obligations. Private delegates exercising governmental power are different from individuals acting in the course of their inter-personal relationships—and they should be treated accordingly. Quite simply, they should be considered to be ‘public’ for the scope of the delegation. What is argued for here, therefore, preserves vertical human rights enforceability, but seeks what has been called, a ‘new definition of the public sphere’. Unfortunately, though, as will be seen, it seems that judicial reluctance to engage in complete horizontal enforcement of human rights obligations has at times coloured judicial analysis and enabled private delegates in all three jurisdictions to evade human rights compliance.

2 Above 3.5.
3 D Barak-Erez, ‘Civil Rights in the Privatized State: A Comparative View’ (1999) 28 Anglo-American L Rev 503, 514. This is not to say that full horizontal enforceability of human rights is inappropriate; it is just not necessary to hold private delegates accountable for human rights violations.
4 The focus of this chapter is on human rights obligations applicable within the three jurisdictions and does not address the question of the extent to which international human rights obligations may bind private actors. For this, see, generally, A Clapham, Human Rights Obligations of Non-State Actors (OUP, Oxford 2006); A Clapham, Human Rights in the Private Sphere (Clarendon Press, Oxford 1993).
Structurally, the chapter is divided into three parts. What is attempted is, first, a justification for the extension of human rights obligations to private delegates of governmental power. The second part of this chapter (ie, section 6.3) then presents an overview of the law in all three jurisdictions. In terms of sources of human rights obligations, the primary source in the US, at both state and federal level, is constitutional. Insofar as England is concerned, the focus of this chapter will be on the Human Rights Act 1998 (‘the HRA’), which, as is well-known, incorporates the ECHR into domestic law. There is also a common law of human rights in England,⁵ access to which is regulated by the same principles that govern access to administrative judicial review. These principles will be discussed separately in Chapter Seven. In the EU, human rights obligations have multiple sources—from Treaty provisions and directives to the Court’s jurisprudence and the Charter of Fundamental Rights of the European Union (‘the Charter’)⁶—and, as will be seen, the source of a right is critical to its applicability. For all three jurisdictions, though, it is shown that the criteria used by the courts to determine applicability of human rights to private delegates are often unsuitable in the context of modern governance: it is a case of ‘old tests [being] applied to new realities’.⁷ The failure to distinguish delegates of governmental power from citizens acting in the course of their inter-personal relationships has also had a detrimental impact on the ability of human rights to reach private delegates. In the EU context, though, it will be seen that features of the EU legal order, unrelated to human rights protection, have assisted in the extension of human rights obligations to private delegates. Finally, in the third part of this chapter (ie, section 6.4), a tentative proposal is suggested for a suitable framework to hold private delegates liable for human rights violations. It is argued that in the context of private delegation, as Justice Stevens proposed, whether power should be characterized as ‘governmental’ should depend on its nature, not its holder.

6.2 Private Delegates and Human Rights: A Justification

6.2.1 The case for a ‘new definition of the public sphere’

There are important justifications for holding private delegates liable for human rights violations.⁸ First, in exercising governmental power, private delegates enjoy enormous capacity to violate human rights, and should be subject to the same constraints as government would be if exercising the power itself. A narrow

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⁵ See, eg, R v Secretary of State, ex p McQuillan [1995] 4 All ER 400 (QB) 421–2; R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115 (HL) 131–2.
⁷ Barak-Erez (n 3) 518.
vertical model of human rights enforceability derives partly from ‘historical contingency’, whereby it is assumed that the state is the only entity in society sufficiently powerful to be capable of violating individuals’ rights,⁹ and partly from ‘differing normative perceptions of the roles of government and private citizen’.¹⁰ What is increasingly apparent, however, is that the power to violate rights is located as frequently with private as with governmental actors. Actions have been taken against private actors for violation of a wide variety of human rights, including freedom of speech,¹¹ due process,¹² the right to a home,¹³ liberty,¹⁴ property,¹⁵ and equality.¹⁶ The power exercised by the state is often ‘not different, in kind or in degree, from much of the power that some individuals and private groups can lawfully exercise against other individuals’.¹⁷ Rights are threatened ‘by concentrated institutional power whether or not this power is exercised by an organ of state or of civil society’.¹⁸ This is especially true where the power in question has just been transferred directly from the state to a private partner, as occurs in the private delegation context. Similarly, any ‘differing normative perceptions’ of the roles of government and citizen are displaced where private delegation is at issue, since private delegates undertake government’s role vis-à-vis citizens. When adjudicating on welfare entitlements, promulgating accreditation rules or operating welfare housing schemes, private delegates exercise the exact same power that would be exercised by the governmental actor without the delegation. Given that the power does not change when transferred from public to private, it is difficult to understand why the controls on the power should change: again, control should depend on the nature of the power—not on the identity of the power-holder. Additionally on this point, it is accepted in relations between private actors that increasingly ‘the right to act selfishly is being qualified by some level of obligation to have regard to the interest/expectations of others affected by one’s actions’.¹⁹ If, in the contractual context between two equally placed private


¹² Ibid.


¹⁴ Richardson v McKnight 521 US 399, 401 (1997).


actors, it is considered acceptable to impose obligations of good faith and fair conduct, it must follow that where private actors are acting on behalf of government and as delegates of governmental power, they should be expected to comply with even higher standards of conduct, including human rights obligations.

Second, and on a more basic level, the award of government contracts has a politically symbolic character: it is not simply an economic activity by the administration. Given that governments and public bodies award contracts on behalf of the communities they serve, ‘[i]t is not unreasonable that these communities expect that public contracts should, all other things being equal, go to contractors who do not violate what are the basic norms of that community’.²⁰

Third, given the increasing role of private delegates in governance, failure to enforce human rights protections against such private delegates has the potential to undermine human rights protection more generally. Writing prior to the introduction of the HRA in England, Birkinshaw, Harden and Lewis noted that it would be

a fine irony if British citizens were to get a bill of rights only to find that the ‘public’ authorities against which the rights might be impleaded had largely been replaced by ‘private’ bodies, which could be rendered accountable only through private law mechanisms.²¹

Similarly, in the US context, Michelman has noted that if the state action doctrine,

stand[s] fast under privatization pressures...the result then—as the state space became increasingly void of socially significant activity—would be a major practical contraction...of the application of the Bill of Rights.²²

The extent to which human rights are protected in a society is as much dependent on the reach of the rights as on their content.

Fourth, failing to hold private delegates to human rights standards results in huge inequality for citizens, with, as Craig has put it, human rights protections varying ‘according to the method of service delivery’.²³ Whether an elderly lady ends up in privately run accommodation or accommodation operated by a local authority, is a matter over which she has no control—and is a matter which is subject to the particular management choices of individual local authorities or state agencies. Although fulfilling the same purpose or satisfying the same statutory

²² FI Michelman, ‘W(h)ither the Constitution?’ (2000) 21 Cardozo L Rev 1063, 1081. See also JM Beermann, ‘The Unhappy History of Civil Rights Legislation, Fifty Years Later’ (2002) 34 Connecticut L Rev 981, 985 (noting that the ‘state action doctrine was the most important tool used by the Court to dismantle Congress’s civil rights legislation’).
governmental obligation, under narrow vertical enforcement, in-house providers will be held to different standards from private delegates and public recipients will be entitled to rights to which private recipients are not entitled. This denial of equality should not be tolerated.

Fifth, even if the governmental delegator who delegated the function retains an obligation to fulfil the primary human rights duty, or alternatively is vicariously liable for the private delegate, the delegator may not be able to provide an appropriate remedy for the victim. The argument that the governmental delegator will still be bound by human rights obligations is one which has been found to be particularly persuasive in English judicial reasoning for refusing extension of human rights obligations. However, given the difficulty of demonstrating state action or ‘public function’, the number of cases taken seeking to do just that is testimony to the fact that, frequently, individuals will not have a viable claim against the relevant governmental authority. Vindication of the right may involve compelling the private delegate to perform a specific task, which the delegator will not be in a position to perform and will not be in a position to compel the private delegate to perform. So for instance, in one English case, the court falsely equated compelling a housing authority to operate particular welfare accommodation, with a local authority’s duty to provide accommodation generally—but, actually, the general duty to provide any accommodation would be inadequate if vindication of the right to a home required that the particular accommodation be provided. As Arrowsmith has noted, in practice, it might be difficult to obtain effective redress when it is the actions of the contractor, rather than the authority itself, which are the subject of the complaint.

In a similar vein, it has also been suggested, in the English context, that those affected by delegated governmental functions should be able to require that any contract between the governmental body and the private delegate oblige the latter to comply with human rights duties. This possibility will be discussed in detail in Chapter Eight. It suffices to note at this point that most citizens will be unable to do this—primarily because the process for contract negotiation between private delegates and government usually does not invite citizen participation; but also because of lack of awareness of their rights or because of their own personal situation. Realistically, individuals relying on government to provide housing or other benefits will be in a position of some desperation and are more likely

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24 See, eg, Leonard Cheshire (n 13) [33]. In YL v Birmingham City Council [2006] EWHC 1714 (Admin) [44] and [2007] EWCA Civ 26, [2007] 2 WLR 1097 [17], as was discussed in Ch Four (4.4.1.1), this point was relevant to defeating a claimant’s attempt to construct a non-delegation doctrine based on the HRA. See also House of Lords judgment (n 13) and below 6.3.2.4.

25 Craig (n 23) 561.

26 Leonard Cheshire (n 13) [33].


28 Leonard Cheshire (n 13) [34].
to accept anything offered, rather than demand protective contractual clauses that they might perceive to hinder their very chances of being granted the governmental benefit in the first instance. Furthermore, as will be considered in Chapter Eight, there is no established practice of third party beneficiary rights in contract law.

6.2.2 Refuting the case for a narrow definition of the public sphere

There are six primary justifications that are often posited for confining the scope of human rights obligations: private autonomy, separation of powers, political compromise, excessive litigation, avoidance of discrimination, and avoidance of indeterminacy. Yet none of these justifications can be considered to have conclusive force in the private delegation context.

First, the most commonly cited defence of narrow enforceability of human rights is the preservation of private autonomy. The freedom of the individual to be ‘irrational, arbitrary, capricious, even unjust in his personal relations’ is deemed to deserve a large measure of governmental protection. In the context of private delegation, however, this argument is unpersuasive. A private delegate is an instrument of government: the interaction between the manager of a private prison and his or her prisoner is not equivalent to that between a dinner host and his or her guests. While the private autonomy of the private contractor may be a factor to be considered in each individual assessment of whether an interference with a human right is justified or whether a particular relief should be granted, it should not be posited as an argument for completely releasing the private contractor from human rights obligations.

Second, on another level, the vertical model is said to regulate power between the judiciary and the legislature and, in this way, to promote separation of powers. This argument generally has two aspects, but also has a third additional connotation in the US. First, it is argued, if courts are precluded from invoking human rights to regulate private conduct, this power is preserved for the legislature. So, if the legislature wishes discrimination by private employers to be outlawed, it can legislate to do so, and the horizontal/vertical dilemma is circumvented. Certainly, the legislatures in all three jurisdictions have legislated to expand the reach of human rights protection. In the US, there are a number of Civil Rights statutes, such as Title VII of the Civil Rights Act 1964 prohibiting

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29 Craig (n 23) 560–61.
30 Below 8.3.2.2.
discrimination by employers.³³ England has, inter alia, race relations legislation,³⁴ and in the EU legislation in the form of directives has been used extensively to further the scope of gender equality.³⁵ However, there are limitations with legislation. Its scope may be narrow, as legislators often only respond where ‘systematic, highly publicized violations occur’ such as with racial discrimination—and not where there is a lack of public awareness and insufficient pressure for legislation.³⁶ The legislature may also be slow to intervene: as noted by Sir John Donaldson MR in *R v Panel on Take-Overs and Mergers, ex p Datafin*, when it was argued by counsel that Parliament would intervene if the Panel were to act unfairly: ‘Maybe, but how long would that take and who in the meantime could or would come to the assistance of those who were being oppressed by such conduct?’³⁷ At the state level in the US also, this aspect of the separation of powers argument is weakened where, as was observed in Chapter Two, judges are elected and therefore politically accountable for their role in developing civil rights policy.³⁸ The second element of the separation of powers argument posits that allowing courts to decide that private actors can be held liable for human rights violations involves courts in inappropriate policy judgments about privatization. If courts are allowed to require private delegates of governmental power to comply with human rights obligations, this may have the effect of ‘handicapping the privatization movement’.³⁹ As Craig has noted, though, the solution to this problem is fairly straightforward. The costs of compliance with human rights obligations should be taken into consideration by the private actor when it is bidding for the contract.⁴⁰ Craig notes that the risks of compliance would probably be quite small and any adjustment to the bidding price minor.⁴¹ Inquiries in England have also indicated that private contractors would not necessarily abandon markets just because they might be compelled to comply with human rights obligations.⁴² The third connotation of the separation of powers argument, peculiar

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³³ 42 USC § 2000e et seq. See also Executive Order No 11,246, 30 Fed Reg 12,319 (September 24, 1965) (requiring government contractors and subcontractors to refrain from discrimination); 41 CFR § 60-50.3 (requiring reasonable accommodations for religious needs).
³⁶ Chemerinsky (n 32) 519.
⁴⁰ Craig (n 23) 555.
⁴¹ Ibid.
Delegation of Governmental Power to Private Parties

to the US, is that at the federal level at least, concerns as to the appropriate role of the judiciary acquire an added resonance given the importance in American constitutionalism, as noted in Chapter Two, of interpreting the Constitution in accordance with its original context, as experienced by the Framers. As will be seen, this issue has influenced the formulation of the state action tests and, in particular, the requirement of a function ‘traditionally’ performed by the state. Without engaging in the larger debate of the merits of interpretations searching for ‘original intent’, in this context it has certainly narrowed the scope for holding private delegates accountable for human rights violations.

Returning then to the six general justifications for confining human rights obligations, the third such justification, a further distribution of power argument, is political compromise. In the EU, the refusal to enforce obligations of directives against individuals can be seen as an offer of a compromise under which the European Court will limit the direct effect of directives to vertical direct effect if national courts will accept it to that limited extent. Similarly, in the US, one of the most important values a strict state action requirement is said to protect is that of a proper allocation of power between state and federal government. In particular, the doctrine is said to help maintain the power of states to determine the extent to which regulatory power should be applied to private action. In response, first, this justification clearly does not apply in the English context, in a unitary state; nor does it apply at the US state level. Second, in the EU context, as will be seen, the political compromise reached has been significantly undermined by the ECJ’s alternative methods for expanding the scope of directives. Third, in the US, it has been suggested that the argument is based on an out-dated premise. In the Civil Rights Cases, where the state action

43 Above 2.3.1.1.
45 Spencer v Lee 864 F2d 1376 (7th Cir 1989); below 6.3.1.1(c).
51 Below 6.3.3.2.
52 Chemerinsky (n 32) 542–4.
doctrine originated, the Court explicitly stated that the Tenth Amendment of the federal Constitution created a zone of state sovereignty and that congressional regulation of private conduct was ‘repugnant to the Tenth Amendment’.⁵³ This amendment provides that ‘[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people’.⁵⁴ Chemerinsky has shown that this doctrine of dual sovereignty dominated constitutional thinking from the late nineteenth century until around 1937, but that after that period, with the advent of the New Deal, the perceived need for federal government actions led to the demise of the concept of dual sovereignty. As was considered in Chapter Two, patterns of cooperative and pre-emptive federalism emerged instead.⁵⁵ By 1940 dual sovereignty was considered to be no more than a ‘truism that all is retained which has not been surrendered’⁵⁶—meaning that Congress could legislate on any issue if it could point to an enumerated power.⁵⁷

The fourth argument against generous applicability for human rights obligations, made most cogently by Oliver, is that such generous applicability would encourage litigation between private parties, thereby generating legal uncertainty, diverting important resources from worthy private sector activities, and undermining the ability of private contractors to provide services in the first instance.⁵⁸ This is obviously an important caution which should be taken seriously. However, a generous application of human rights obligations will not inevitably result in a surge of litigation. To the extent that frivolous claims are brought, they can be dealt with speedily and dismissed at an early stage.⁵⁹ Moreover, legal certainty could just as easily be achieved by a clear generous rule, as with a narrow rule.

Fifth, Oliver also notes that it would be discriminatory to distinguish between the recipients of contracted-out services, for whom the government pays, and the other recipients of services of the private contractor, paying for those services themselves.⁶⁰ Although it is difficult to think in terms of degrees of insidiousness of discrimination, it is certainly arguable that the discrimination outlined above between recipients of services provided in-house and recipients of contracted-out services is more problematic. This is because, as far as the recipient of a contracted-out service is concerned, the private contractor may as well be the governmental provider, as the former simply takes the place of the latter. There is a reasonable expectation on the part of service recipients that there is no difference between receiving the service directly from the government, with the corresponding human rights protections, and receiving it from the contractor. By contrast,

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⁵⁴ US Const Amend X. See also above 2.2.1 and 2.3.1.2.
⁵⁵ Above 2.3.1.2.
⁵⁶ US v Darby 312 US 100, 124 (1941).
⁵⁷ Chemerinsky (n 32) 543–4.
⁵⁹ CPR 54.4 (leave stage); see also Federal Rules of Civil Procedure r 11.
⁶⁰ Oliver (n 58) 343.
self-funding service recipients will have no reason to expect human rights protection since they will have no sense that they are dealing with the government and no expectation that the private service provider protect their human rights.

Finally, Oliver also makes the point that the difficulty of balancing the rights of private bodies performing functions of a public nature and the rights of service recipients, although not in itself a conclusive argument against a generous interpretation of human rights obligations, should cause the judiciary to be hesitant about adopting such an interpretation.⁶¹ As will be seen below, in the English context, due to the specific wording of the HRA and the ECHR, the extent to which a functional public authority will be entitled to assert its own ECHR rights as against those of the service recipient is actually debatable.⁶² However, as a matter of general principle, while it is certainly true, as Oliver notes, that bills of rights usually provide very little, if any, guidance on how to weigh competing rights,⁶³ the process of balancing competing rights seems to be no different from, and no more or less unpredictable than, the process undertaken by the judiciary of balancing rights with competing public interests, whether it be national security, the prevention of disorder or crime, or the protection of health or morals.⁶⁴ It is also not far-removed from the type of balancing which courts undertake regularly as part of statutory interpretation.⁶⁵

6.3 Private Delegates and Human Rights: The Jurisdictions

6.3.1 United States

Condemned, to borrow the oft-cited description, as ‘a conceptual disaster area’,⁶⁶ the state action doctrine in the US determines the extent to which private actors are compelled by constitutional rights at both state and federal level. Aside from the Thirteenth Amendment, which prohibits the practice of slavery,⁶⁷ federal constitutional rights erect ‘no shield against merely private conduct, however

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⁶² Below 6.3.2.3.
⁶³ Oliver (n 58) 344.
⁶⁴ ECHR Art 8(2); see also Arts 9(2), 10(2), 11(2); see also US Const Amends I, V, XI; Charter of Fundamental Rights of the European Union Art 52.
⁶⁷ See, eg, US v Kozminski 487 US 931, 942 (1988). In the private delegation context, however, the application of the Thirteenth Amendment is still problematic due to the fact that the Supreme Court has not decided whether, in the absence of ancillary statutes, an action for violation of the Thirteenth Amendment may be filed by a private actor against another private actor. See JM Chacón, ‘Misery and Myopia: Understanding the Failures of US Efforts to Stop Human Trafficking’ (2006) 74 Fordham L Rev 2977, 2994.
discriminatory or wrongful\(^{68}\) and only bind federal and state actors. The understanding of ‘state action’ experienced a period of expansion from about the 1940s to the 1970s,\(^{69}\) but this has since been replaced by a very restrictive attitude on the part of the Supreme Court\(^{70}\)—although as will be seen below, lower federal courts on occasion apply the doctrine with slightly greater flexibility. The timing of the Supreme Court’s retreat from expansiveness in the state action doctrine has been attributed by some to an early concern to eliminate racial discrimination, which became less urgent with the advent of the Civil Rights Acts in the late 1960s.\(^{71}\) In federal jurisprudence, verticality has its basis in the wording of the federal Constitution and in particular the Fourteenth and Fifth Amendments and was, as just outlined, first established in the *Civil Rights Cases*, in which the Supreme Court held unconstitutional a federal statute that would have forbidden private discrimination in certain businesses and industries.\(^{72}\) At state level, verticality is also dominant and seems to have been introduced more in reliance on federal jurisprudence than due to any constitutional requirements.\(^{73}\) However, certain state human rights provisions have been drafted to permit more generous application and, as a general observation, state courts seem to be more comfortable than federal courts with enforcing equal treatment obligations (not just on race) against private actors.

### 6.3.1.1 State action doctrine under the federal Constitution

In determining whether a private entity is a state actor, three very stringent tests are applied, which, although alternatives, are each tremendously difficult to fulfil.\(^{74}\) The first test scrutinizes whether there is joint participation between the

\(^{68}\) *Shelley v Kraemer* 334 US 1, 13 (1948).


\(^{70}\) *Moose Lodge* (n 16); *Jackson v Metropolitan Edison Co* 419 US 345 (1974); *Hudgens v National Labor Relations Board*, 424 US 507 (1976); *Flagg Brothers Inc v Brooks* 436 US 149 (1978).


\(^{73}\) See, eg, WW Kilgarlin and B Tarver, ‘The Equal Rights Amendment: Governmental Action and Individual Liberty’ (1990) 68 Texas L Rev 1545, 1565 (criticizing the Texas courts for imposing a state action for the equal rights amendment which the clause did not require).

state and the private actor; the second, whether there is a sufficient nexus between the state and the private actor; and the third, whether the private actor is carrying out a public function. Broadly speaking, the aim of the tests is to establish either or both of two things: that the actor has been *authorized* by the state, or that the actor can be *characterized as* the state.⁷⁵ The tests have proved generally unhelpful, however, for reaching private delegates.

(a) *Joint participation*

The joint participation test involves inquiring whether the private actor is a wilful participant in a joint activity with the state or its agents, and requires showing that the state has ‘so far insinuated itself into a position of interdependence’ with a private actor that it must be recognized as a ‘joint participant’ in the relevant activity.⁷⁶ It seems essential that a state official be present at the committing of the act. Joint participation has been found where private actors joined with public officials in the killing of civil rights workers⁷⁷; but not where a private actor used a self-help remedy authorized by state statute.⁷⁸ The paradigm example of joint participation sufficient to create state action is found in the case of *Lugar v Edmondson Oil Co*⁷⁹: joint participation in the deprivation of due process was found where a writ of prejudgment attachment against Lugar’s property, issued by a clerk of the state court on the ex parte petition of Edmonson, and executed by the county sheriff, was found not to fulfil statutory pre-conditions.

This type of analysis is not very useful for reaching the private delegate of governmental power. One could perhaps envisage extreme situations where it might apply, such as where prison guards of a private prison abused prisoners in the physical presence of a governmental supervisor. However, even assuming the existence of extensive regulatory monitoring regimes,⁸⁰ delegation, by its very nature, involves removing the performance of functions from governmental actors and placing performance with private actors: governmental actors are rarely ever present when private actors perform their delegated tasks and are rarely intricately involved in the performance of those tasks, thus rendering a joint participation finding almost impossible in this context.

(b) *Nexus*

Under the ‘nexus’ test, the challenger attempts to establish that multiple contacts exist between the state and the conduct of the private actor and that the number

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⁷⁵ Buchanan (n 31) 354–63.
⁷⁶ Jackson (n 70) 357.
⁷⁸ *Flagg Brothers* (n 70) 157.
⁸⁰ Above 3.4.4.
and pervasiveness of these contacts are at such a level that the private actor’s conduct ‘may be fairly treated as that of the State itself’. Through a process of state entanglement or entwinement, the private actor’s conduct loses its private identity and is characterized as state action. The search is for ‘benefits mutually conferred’ or ‘entrepreneurial symbiosis’ between the state and the private actor. Three problems seem to have arisen, which hinder the use of the nexus test in reaching private delegates.

First, there is a discord between the principle underlying the test, and its actual application. In principle, an ‘entrepreneurial symbiosis’ between the delegate of governmental power and the governmental actor is surely inevitable. In theory, at least, government delegates power in order to benefit from the expertise, efficiency, and flexibility of private actors, while these actors in turn gain a source of business from their government contracts. In practice, though, the focus of the courts has been on specific factual details. Thus, in the Rendell-Baker v Kohn case, where a contract existed between a private school and the state for provision of education for ‘maladjusted’ school children, no nexus was found—even though there was government funding for at least 90% of the school’s operating budget; there was extensive governmental regulation of the school; and the school was performing an important public function in its education of ‘maladjusted’ high school students, a function that had even been imposed on the state by legislation. Similarly, in Blum v Yaretsky, state licensing of a nursing home, subsidization of its capital and operating costs, and payment of the medical expenses of ninety per cent of its patients, did not establish a symbiotic relationship between the state and the nursing home. On the other hand, a state inter-scholastic athletic association was found to be a state actor, but only because 84% of its membership came from public schools, represented by their officials, and the association’s members were eligible for the state retirement system. Very few private delegates have public officials on their boards and, certainly, very few private delegates or their employees usually qualify for membership of state retirement systems. Similarly, government corporations, such as Amtrak, have been found to satisfy the nexus test; but again, this is of little assistance in the private delegation context.

Second, the test is sometimes applied sequentially, rather than cumulatively, which makes it even more difficult to reach private delegates. So in both Rendell-Baker and Blum, each factor was considered in isolation and disregarded.
if it lacked sufficient force in itself to justify a finding of state action.⁸⁹ Although more of a cumulative or ‘totality’ approach has re-emerged in a number of recent cases,⁹⁰ the very malleability of the nexus test and the ability of courts to apply it sequentially or cumulatively at whim diminish its usefulness. Third, the nexus test is unhelpful where the state has engaged in passive behaviour, by not discouraging discrimination, as it seems that only coercion or active encouragement on the part of the state will suffice to establish a sufficient nexus.⁹¹

(c) Public function

A ‘public function’ test appears to be the most promising for reaching private delegates. Such a test, in theory at least, ‘acknowledges that private individuals or groups may possess sufficient power to deprive persons of their constitutional rights even while lacking formal connections with the state’.⁹² In the past, the test has been applied generously: a private shopping centre, which was generally open to the public,⁹³ a company-owned town,⁹⁴ and a Democratic association that conducted a primary election⁹⁵ were found to be state actors because they were performing public functions. Even more strikingly, in *Evans v Newton*, Justice Douglas stated that a finding of state action was ‘buttressed by the nature of the service rendered to the community by a park. The service rendered even by a private park of this character is municipal in nature’.⁹⁶

However, the current understanding of the test is restrictive, and confined to those cases involving ‘the exercise by a private entity of powers traditionally exclusively reserved to the State’.⁹⁷ Satisfying this test is difficult in the US, where, as discussed in Chapter Two, very few functions have been both traditionally and exclusively reserved to the state.⁹⁸ The Supreme Court has suggested certain functions which might satisfy the test—eminent domain,⁹⁹ and possibly fire and police protection, education, and taxation.¹⁰⁰ Not even performance of these functions will necessarily result in a finding of state action though—for instance,
provision of education has not been considered to be a public function. On the Supreme Court’s reasoning, only two functions seem to unequivocally fall within the ambit of the test: conducting elections and administering town governance. Exercise of police powers has on occasion been considered by the Circuit Courts to satisfy the public function test, but usually only where the powers delegated have been extensive. Where ‘all of the powers of the regular police patrol’ were delegated to special private police officers, or where private deputy sheriffs had powers of conducting criminal investigations, making arrests, and serving civil and criminal papers, they were deemed to be state actors.

The requirement of ‘traditional’ performance by the state has been taken seriously by federal courts. In the case of Spencer v Lee the Seventh Circuit concluded that physicians who civilly commit an individual to a private hospital, under the authorization of a state statute, did not engage in state action, despite the fact that commitment involved detainment of the individual. To justify this conclusion, the Court, in a judgment of Judge Posner, went as far back as practices in ancient Greece and Rome, and in England until the nineteenth century, noting that it was common for private individuals to make arrests and prosecutions. Although the Court accepted ‘[t]hat Socrates was prosecuted by a private denouncer’ was not conclusive in itself, the very fact that it considered the practices of ancient Greece in its public function analysis highlights the weakness of the doctrine and the huge limitation placed on it by the requirement that the function have traditionally been exclusively reserved for the state. After concluding that arrest has never been an exclusive government function, the Court then noted that ‘Not all state-authorized coercion is government action.’ Accordingly, civil commitment was no different from the eviction of trespassers, the repossessing of chattels, or a citizen’s arrest.

Next, the Court examined the history of psychiatric hospitalization to determine whether it was an exclusive governmental function. Again, the Court went

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101 Rendell-Baker (n 11) 840–3; Logiodice v Trustees of Maine Central Institute 296 F3d 22, 26 (2002).
103 See, however, Stroebert v Commission Veteran’s Auditorium 453 FSupp 926, 931 (SD Iowa 1977) (holding that because defendants were ‘acting to provide security for a public facility financed by public monies’, state action was present).
104 Payton v Rush-Presbyterian-St Luke’s Medical Center 184 F3d 623, 630 (7th Cir 1999) (emphasis added).
106 Ibid. By contrast, see Johnson v LaRabida Children’s Hospital 372 F3d 894, 897 (7th Cir 2004) (holding that a hospital security guard was not a state actor because he was not ‘authorized to carry out the functions of a police officer’).
107 864 F2d 1376 (7th Cir 1989). See also Okunieff v Rosenberg 166 F3d 507 (2d Cir 1999); Bass v Parkwood Hospital 180 F3d 234, 243 (5th Cir 1999).
108 864 F2d 1376, 1380 (7th Cir 1989).
109 Ibid.
110 Ibid 1380–81.
back in history, although this time to slightly more recent history—1765 and Blackstone. Blackstone’s *Commentaries on the Laws of England* noted that on the first attack of insanity it was usual to confine the person to the private custody of friends and relatives. Examination of the Illinois Mental Health Code found that, historically, Illinois law permitted confinement by a private person for ten days.¹¹¹ As a result, the Court found that civil commitment was not a traditionally exclusive function of the government.¹¹²

This kind of analysis is very unhelpful for the purpose of reaching the private delegate of governmental power. In the modern world of complex governance, which bears little resemblance to governance of the 1940s, never mind governance of ancient Greece, it is startling that human rights obligations should be decided on the basis of what happened in ancient Greek society. This weakness in the reasoning was highlighted by the four dissenting judges,¹¹³ and Circuit Judge Cummings, joined by Judge Cudahy, summed it up neatly:

However interesting this history lesson may be, the more relevant question for determining whether state action exists is not whether private citizens were capable of unilaterally committing the mentally ill in the days when Bedlam existed in England, but whether under the present law private citizens are capable of depriving individuals of their liberty to the same extent as may the state or whether the state has a superior, unique authority to deprive individuals of liberty in this manner, an authority not inured in the general citizenry. Indeed, as the majority readily concedes, every public function has an analogous private function in history. The majority’s opinion, nonetheless, assumes as a premise of its argument that what constitutes a public function is relatively stagnant over time.¹¹⁴

As for the exclusivity requirement, it seems that quite unique circumstances are required to fulfil it, such as where the state is under a constitutional or legislative duty to perform the function in question. In the *West v Atkins* case, the Supreme Court was persuaded by the fact that the state has an Eighth Amendment obligation to provide adequate medical care to those whom it has incarcerated.¹¹⁵ This function could only be performed by the state since ‘an inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met’.¹¹⁶ Likewise, provision of health care to individuals who have been involuntarily committed to state hospital is a public function, because the state is also under an Eighth Amendment obligation to provide safe

¹¹¹ Ibid 1380.
¹¹² Ibid 1381. See also *Estades-Negroni v CPC Hospital San Juan Capestrano* 412 F3d 1, 8–9 (1st Cir 2005); *San Francisco Arts and Athletics Inc v United States Olympic Committee* 483 US 522, 544–5 (1987) (Powell J noting that organization and coordination of amateur sports had long been performed by private actors).
¹¹³ The case was decided by an 11-judge panel.
¹¹⁴ Above (n 107) 1388.
¹¹⁶ Ibid. See also *Walker v Horn* 385 F3d 321, 332 fn 24 (3d Cir 2004).
conditions to such individuals.¹¹⁷ A legislative duty may also suffice: state action was found where Illinois did not have a constitutional obligation to provide direct child welfare services, but had enacted legislation creating such an obligation where child care was not otherwise available.¹¹⁸ Another function considered to be a ‘unique governmental function’ is that of jury selection and the use of peremptory challenges¹¹⁹—this is a function, however, that is visibly entwined with governmental process in a way that most delegated functions are not.

It is not even clear that the private operation of prisons—perhaps generally considered as the paradigmatic governmental function—would be considered to be a public function in US federal thinking. The Supreme Court has noted in dicta that ‘correctional functions have never been exclusively public’¹²⁰ after a review of the involvement of private contractors in prison management dating back to the eighteenth century¹²¹—and although it has decided that private prison managers are not entitled to immunity from damages for violation of constitutional rights, it has not actually considered whether they are liable in the first place.¹²² The Court has suggested, in passing, that state action may be found where state correctional facilities are operated by private delegates,¹²³ and there have been a number of Circuit decisions recognizing that ‘confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function’.¹²⁴ The issue is far from settled however, and indeed, in one Circuit court case, it has been held that a private school for juvenile offenders did not perform a function which has traditionally fallen within the exclusive province of the state.¹²⁵

(d) Source of power

In light of the jurisprudence that will be discussed in the English and EU contexts, it is important to note briefly at this stage that the source of the private delegate’s power seems to be unimportant to the US courts. In the West case the Court made it expressly clear that the fact that the physician was hired ‘pursuant to a contract . . . did not alter the analysis’.¹²⁶ Indeed, where all other conditions are fulfilled, to differentiate between the performance of the function by

¹¹⁷ Lombard v Eunice Kennedy Shriver Center for Mental Retardation Inc 556 F Supp 677, 678–80 (DC Mass 1983).
¹¹⁸ McAdams v Salem Children’s Home 701 F Supp 630, 634 (ND Ill 1988).
¹²⁰ Richardson (n 14) 405.¹²¹ Ibid 405–6.
¹²⁴ Rosborough v Management and Training Corporation 350 F3d 459, 461 (5th Cir 2003); see also Skelton v Pri-Cor Inc 963 F2d 100, 102 (6th Cir 1991); Flint, ex rel Flint v Kentucky Department of Corrections 270 F3d 340, 351–2 (6th Cir 2001); Cornish v Correctional Services Corporation 402 F3d 545, 550 (5th Cir 2005).
¹²⁵ S v Stetson School, Inc 256 F3d 159, 166 (3d Cir 2001).
¹²⁶ West (n 115) 55; see also Flint (n 124) 351.
Delegation of Governmental Power to Private Parties

the primary state actor and the private contractor, has been dismissed as ‘empty formalism’.¹²⁷

6.3.1.2 State action doctrine at the state level

Although a state has the ‘sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution’,¹²⁸ for the most part the state action doctrine appears as restrictive at the state level as it is at the federal level.¹²⁹ Cole notes that state courts have been ‘overwhelmingly receptive’ to state action doctrine similar to the federal doctrine,¹³⁰ and that even where courts have consciously departed from federal law they have been ‘modest’ in their departure.¹³¹ For instance, in the due process context, it seems that at least nineteen jurisdictions require a showing of state action to trigger state constitutional provisions,¹³² while only one jurisdiction applies its due process provision to purely private actors¹³³—and even this qualification only applies where a private property right has been violated.¹³⁴ New York courts apply a restrictive four-part test of source of authority, entwinement, meaningful state participation, and traditional state function, with satisfaction of one of the criteria not necessarily being determinative of the presence of state action.¹³⁵ On the other hand, both California and New York have accepted as state action an involuntary lien sale,¹³⁶ where the federal Supreme Court refused to find state action.¹³⁷

Much can depend on how the state constitutional protection is articulated. About thirty-five states grant affirmative protection to freedom of expression, as opposed to the federal Constitution’s prohibition of limitations on free speech.¹³⁸

This has on occasion resulted in greater protection for freedom of speech at

¹²⁷ Lombard (n 117) 680.
¹²⁸ Pruneyard Shopping Center v Robins 447 US 74, 81 (1980).
¹³⁰ Ibid 336. ¹³¹ Ibid.
¹³³ Cole (n 129) 336 (citing Alabama).
¹³⁵ People v Raab 621 NYS2d 440, 443–4 (NY Dist Ct 1994).
¹³⁶ Cole (n 129) 337 fn 54, referring to Martin v Heady 163 CalRptr 117, 122 (Cal Ct App 1980); Sharrock v Dell Buick-Cadillac Inc 379 NE2d 1169, 1173–6 (NY 1979).
¹³⁷ Flagg Brothers Inc (n 70) 157–61.
¹³⁸ Chadderdon (n 74) 258.
state than at federal level with the Californian courts holding, for instance, that freedom of speech is protected in privately run shopping centres,¹³⁹ which contrasts with the federal position.¹⁴⁰ On a few occasions, state courts have simply adopted a balancing test; and again, in the private shopping centre situation, the free speech interest has been weighed against the private property interest.¹⁴¹ Such a balancing test could potentially lead to quite far-reaching enforcement of state constitutional rights against private actors. Similarly, a number of states have adopted equal rights amendments which, due to the particular language used, have been enforced against private actors.¹⁴² For example, the Montana Constitution expressly extends its equal rights amendment to private actors,¹⁴³ while the Rhode Island Constitution prohibits discrimination based on race, gender or handicap by the state, its agents or any person or entity doing business with the state.¹⁴⁴ Aside from such notable exceptions, however, the general trend across the states is to verticality.

6.3.2 England

At the time of writing, and despite extremely recent guidance from the House of Lords in the case of YL v Birmingham City Council,¹⁴⁵ English law on the reach of human rights obligations is in a state of evolution. It can be said with certainty that a private psychiatric hospital exercising a statutory power of compulsory detention,¹⁴⁶ and a limited company exercising a power to control access to public markets,¹⁴⁷ are bound directly by human rights obligations. There have also been influential dicta to the effect that private prison managers and those

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¹³⁹ Robins v Pruneyard Shopping Center 592 P2d 341 (Cal 1979); see also Pruneyard Shopping Center (n 128) (noting that state constitutions could provide greater protection of rights than the federal Constitution).

¹⁴⁰ Hudgens (n 70).

¹⁴¹ Chadderdon (n 74); PruneYard Shopping Center (n 128); Guttenberg Taxpayers v Galaxy Towers Condominium Association 688 A2d 156 (NJ Super Ct Ch Div 1996).

¹⁴² See LJ Wharton, 'State Equal Rights Amendments Revisited: Evaluating their Effectiveness in Advancing Protection against Sex Discrimination' (2005) 36 Rutgers L J 1201, 1227–37. Wharton notes that these Equal Rights Amendments have also been used in some states to influence development of the common law: 1237–8.

¹⁴³ Mont Const Art II s 4 (‘Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.’).

¹⁴⁴ RI Const Art I s 2.

¹⁴⁵ Note 13.

¹⁴⁶ R (A) v Partnerships in Care Ltd [2002] EWHC 529 (Admin), 2002 1 WLR 2610. This was on the basis that the Nursing Homes and Mental Nursing Homes Regulations 1984 cast a statutory duty directly on the hospital to provide adequate professional staff and adequate treatment facilities; that there was a public interest in the hospital’s patients receiving care and treatment which might result in their living in the community again; and that patients admitted to the hospital under s 3 of the Mental Health 1983 were detained compulsorily: ibid [24]–[25].

¹⁴⁷ R (Beer (trading as Hammer Trout Farm) v Hampshire Farmers Market [2003] EWCA Civ 1056, 2004 1 WLR 233.
exercising regulatory powers will be required to comply with human rights.¹⁴⁸ By contrast, neither of the following is a ‘public authority’: a Church of England parish council enforcing the obligation of a lay rector to meet the cost of chancel repairs,¹⁴⁹ and a private care home, housing publicly funded residents pursuant to a contract with a local authority, where the local authority is statutorily obliged to make arrangements to provide accommodation for the residents.¹⁵⁰ Beyond these specific examples, it is difficult to make definite claims. The issue has been the subject of public debate, with two reports of the Joint Committee on Human Rights published on the issue in the last three years,¹⁵¹ and the position is further unsettled by the possibility of legislation in the form of a Private Members’ Bill, which is currently being considered in the House of Commons.¹⁵²

Turning to the HRA, section 6(1) provides that ‘[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right’ and the term ‘public authority’ includes, by virtue of section 6(3)(b), ‘any person certain of whose functions are functions of a public nature’. Section 6(5) adds to this by stating that ‘[i]n 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 Act thus establishes a dichotomy between ‘core’ public authorities, bound by section 6(1) to act compatibly with the ECHR, whether the act is public or private, and ‘hybrid’ bodies, ie, bodies that perform some public functions and are bound by the ECHR to the extent of their public functions. Furthermore, while full public authorities do not enjoy Convention rights,¹⁵³ hybrid authorities can enjoy such rights.¹⁵⁴ It is the ‘hybrid’ or section 6(3)(b) public authority that is most relevant for reaching private delegates.

That said, it is important to note two additional mechanisms in the HRA which provide potential to extend human rights obligations to private actors, although both are more limited in their potential to regulate private actors than section 6(3)(b). The first mechanism is the inclusion of the judiciary in the list of ‘core’ public authorities in section 6(1)¹⁵⁵; and the second is the section 3 duty on

¹⁴⁸ Aston Cantlow (n 15) [9] (Lord Nicholls); YL (n 13) [7] (Lord Bingham), [63] (Baroness Hale), [91] (Lord Mance), [166] (Lord Neuberger, also mentioning maintaining defence and providing police services).
¹⁴⁹ Aston Cantlow (n 15).
¹⁵⁰ YL (n 13).
¹⁵² The Human Rights Act 1998 (Meaning of Public Authority) Bill was introduced by Andrew Dismore, a Labour MP, and Chair of the Joint Committee on Human Rights: Hansard HC Vol 455 Cols 150-54 (9 January 2007) and Vol 461 Cols 1036-47 (15 June 2007).
¹⁵³ HRA s 7(7).
¹⁵⁴ Aston Cantlow (n 15) [11].
¹⁵⁵ Certain commentators had thought that the inclusion of courts within the definition of ‘public authority’ in s 6(1) would mean that the Act would be given full horizontal application and ‘the problems of the definition may be bypassed’, but this did not come to pass: HWR Wade and CF Forsyth, Administrative Law (9th edn, OUP, Oxford 2004) 168.
courts to interpret legislation ‘so far as it is possible to do so’ in compliance with the ECHR. The designation of the judiciary as a ‘core’ public authority has been interpreted to mean, not that the courts must create direct common law causes of action against private individuals for breach of human rights, but rather that the courts must develop existing common law causes of action in accordance with the demands of Convention rights.\textsuperscript{156} Obviously, such indirect horizontal effect, although invaluable in developing a general human rights culture, will be a much less effective mechanism for enforcing human rights obligations against private delegates than use of section 6(3)(b): it requires the victim to have recourse to a pre-existing common law cause of action which will not necessarily be available. As for section 3, this interpretive obligation is engaged irrespective of whether the legislation in question applies to the relationship between the government and a private actor, or whether the regulated relationship is between two private parties.\textsuperscript{157} Although this mechanism may result in the direct imposition of human rights obligations on private actors, naturally, it only applies where there is relevant legislation regulating the relationship between the victim of the ECHR violation and the private delegate.

Consequently, the focus here is on section 6(3)(b) and a complex jurisprudence has developed around this provision. Aside from lack of clarity on the general question of the reach of human rights obligations, as will be seen,\textsuperscript{158} difficulties have also been created as a result of the wording of the human rights obligations in the ECHR and the position adopted in Article 34 of the Convention, that only a person, non-governmental organization or a group of individuals can be considered to be ‘victims’ of ECHR violations.\textsuperscript{159} As noted above, the leading authority on the interpretation of section 6(3)(b) is now the \textit{YL} case, which has just been decided by the House of Lords. As will be recalled from Chapter Four, the \textit{YL} case raised the possibility of developing a non-delegation doctrine in English law, which was rejected by the Court of Appeal.\textsuperscript{160} This argument was not pursued in the House of Lords and the only question for decision on appeal was the reach of section 6(3)(b). By a majority of 3–2, their Lordships held that private care homes acting pursuant to government contracts are not section 6(3)(b) public authorities. Even given that \textit{YL} is now the most important statement on the issue, it is worth exploring a number of important cases preceding \textit{YL}, and the Court of Appeal decision in \textit{YL} itself. This is for four reasons. First, the \textit{YL} judgment reiterates and develops approaches taken in earlier Court of Appeal and House of Lords cases, and, as such, is probably easier understood when presented in chronological context. Second, in \textit{YL}, as Lord Neuberger described it, the issue ‘resulted


\textsuperscript{158} Below 6.3.2.3.

\textsuperscript{159} ECHR Art 34.

\textsuperscript{160} [2007] EWCA Civ 26 and see above 4.4.1.1.
in a sharp difference of opinion in this House'.¹⁶¹ The decision also deliberately left ‘entirely open the position of those operating in the different areas of health and education services’.¹⁶² Thus, although YL represents the definitive judicial position on private care homes, themes underpinning the jurisprudence generally will be relevant to future discussion in other contexts. Third, an important issue considered obiter by Buxton LJ in the Court of Appeal decision in YL—the ability of private actors found to have interfered with Convention rights, to justify their actions—was only addressed in passing in the judgments of the House of Lords and will no doubt require re-visiting in the future. Fourth, if proposals for new legislation on this issue are to be debated seriously, a comprehensive appreciation of the jurisprudence will be crucial.

Consequently, the following decisions will be considered in turn: first, the two seminal cases on this issue, Poplar Housing and Regeneration Community Association Ltd v Donoghue¹⁶³ and R (Heather) v Leonard Cheshire Foundation¹⁶⁴; second, a House of Lords case, Aston Cantlow v Wallbank¹⁶⁵; third the Court of Appeal decision in YL¹⁶⁶; and fourth, the House of Lords decision in YL. This will be followed by a comment on the possibility of legislative intervention.

6.3.2.1 Court of Appeal: Poplar Housing and Leonard Cheshire

The issue of private delegates and the HRA first arose in the Poplar Housing case,¹⁶⁷ which involved an appeal by a tenant against a possession order granted under section 21(4) of the Housing Act 1988 in favour of her landlord, Poplar Housing, a housing association, which had been created by the local authority to take over a substantial proportion of the local authority’s housing stock. The facts of the second Court of Appeal case, Leonard Cheshire¹⁶⁸ were slightly different: section 21(1) of the National Assistance Act 1948 required the local authority to arrange provision of accommodation for the claimants, but section 26(1) of the Act made it clear that the accommodation could be provided either ‘in house’ by the local authority itself or it could be contracted out to third parties. Pursuant to its section 26 power, the local authority made arrangements for accommodation to be provided, at public expense, by the Leonard Cheshire Foundation (‘Leonard Cheshire’), a charitable organization, and when the claimants had been patients in a home operated by the foundation for over seventeen years, the foundation decided to close the home. In both cases, the claimants contended that the housing association’s actions were in violation of Article 8 of the ECHR

¹⁶¹ YL (n 13) [126]; see also [128].
¹⁶² Ibid [123] (Lord Mance).
¹⁶⁴ Above n 13.
¹⁶⁵ Aston Cantlow (n 15).
¹⁶⁶ Note 160.
¹⁶⁷ Above n 163.
¹⁶⁸ Above n 13.
and their right to respect for their home. In the first case the housing association was found to be a hybrid public authority, and in the latter case it was not. Lord Woolf gave judgment in both cases and, in reaching his conclusions, he considered four criteria: first, public function; second, assimilation or nexus with government; third, although much less pronounced, the victim’s expectations; and fourth, and more obviously in *Leonard Cheshire* than in *Poplar Housing*, the source of the delegated power.

Starting with public function, from a private delegation perspective, there are three problems with the public function assessment applied by Lord Woolf in these two cases. The first problem is one of characterization method: Lord Woolf characterized function without reference to context. Describing the function in both cases as the act of providing accommodation to rent, which, of course, is not ‘without more, a public function’, Lord Woolf then added that ‘that is true irrespective of the section of society for whom the accommodation is provided’.

However, what was at issue in *Poplar Housing* and *Leonard Cheshire* was not the provision of accommodation to rent ‘without more’—but the provision of accommodation to rent to enable the local authority to fulfil its statutory obligation. As Craig has put it, this function:

was public in the classic, social welfare sense. Parliament decided that certain members of society should be cared for and imposed the relevant duty on the local authority. This was the public function.

Second, Lord Woolf’s public function analysis could be described as negative, rather than positive. That is to say, he seemed to seek to identify what could not be considered a public function, rather than to attempt any determination of what might actually constitute a public function. In so doing, Lord Woolf ruled out two very useful criteria for identifying a public function—namely, whether a public authority is under a duty to perform the function and whether the function is being performed in the public interest. Indeed, the central tenet, or ‘major premise’, of Lord Woolf’s public function analysis holds that the purpose of section 6(3)(b), is not to make a body, which does not have responsibilities to the public, a public body merely because it performs acts on behalf of a public body which would constitute public functions were such acts to be performed by the public body itself.

Similarly, acting in the public interest ‘does not point to the body being a public authority’.

Yet both of these are criteria that critics have long accepted as very useful indicators of ‘publicness’. Surely, if a governmental actor is under a

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169 Poplar Housing (n 163) 69; Leonard Cheshire (n 13) [20].
170 Craig (n 23) 557.
171 Ibid 556.
172 Poplar Housing (n 163) 67; Leonard Cheshire (n 13) [18].
173 Poplar Housing (n 163) 69; Leonard Cheshire (n 13) [20].
Delegation of Governmental Power to Private Parties

...statutory or constitutional duty to perform a function, this must be the paradigmatic example of a ‘function of a public nature’? Moreover, arguably, if there is a public interest in the function being performed, this should at least be a factor to be considered in the determination of whether the function is a function of a public nature.¹⁷⁵

Third, in his functional analysis, Lord Woolf seemed to be driven by a concern not to subject small hotel owners to the HRA.¹⁷⁶ This is a manifestation of the problem discussed above, whereby judicial suspicion of full horizontal human rights application colours consideration of human rights in the private delegation context.¹⁷⁷ What Lord Woolf overlooked was that where a small hotel is enabling a local authority to fulfil its statutory duty, for that limited purpose it should be expected to comply with human rights. As Markus has noted, these small hotels ‘undertake the activities freely and for their own profit or self-interest; they are capable of assessing whether they can deliver services in a Convention compliant manner’.¹⁷⁸

As for the nexus test invoked by Lord Woolf, his Lordship seemed to understand this test as cumulative, rather than sequential: what he sought was ‘a feature or a combination of features which impose a public character or stamp on the act’.¹⁷⁹ Thus, he considered a number of factors. Governmental supervision of a private actor will not in itself suffice to make a private body public, and so ‘a regulatory body may be deemed public but the activities of the body which is regulated may be categorized private’.¹⁸⁰ However, the ‘extent of control over the function exercised by another body which is a public authority’ is relevant.¹⁸¹ In the Leonard Cheshire case the specific issue of public funding arose, and was considered to be ‘certainly relevant’ but ‘by itself... not determinative of whether the functions are public or private’.¹⁸² Importantly, in the Poplar Housing case, source of power seemed to form part of the nexus analysis, Lord Woolf noting that if there is statutory authority for the act, this will ‘at least help to mark the act as being public’.¹⁸³ The decision in Poplar Housing actually turned on this nexus analysis: a very close relationship could be found between Tower Hamlets and Poplar, because of the transfer of housing stock, and five of Poplar’s board members were also members of Tower Hamlets,¹⁸⁴ leading Lord Woolf to conclude that ‘the role of Poplar [was] so closely assimilated to that of Tower Hamlets that it was performing public and not private functions’.¹⁸⁵

¹⁷⁵ See further 6.4 below.
¹⁷⁶ Poplar Housing (n 163) 67; Leonard Cheshire (n 13) [18].
¹⁷⁷ Above 6.1.
¹⁷⁹ Poplar Housing (n 163) 65(v); Leonard Cheshire (n 13) [20].
¹⁸⁰ Ibid. ¹⁸¹ Ibid.
¹⁸² Leonard Cheshire (n 13) [35].
¹⁸³ Poplar Housing (n 163) 69. ¹⁸⁴ Ibid 70.
¹⁸⁵ Ibid 70.
Turning to the third factor considered—public expectations—in *Poplar Housing* Lord Woolf seemed slightly persuaded by the fact that, for the social welfare tenant, ‘Poplar . . . stood in relation to her in very much the position previously occupied by Tower Hamlets’.¹⁸⁶ As will be discussed below, this criterion was given some weight by Buxton LJ in the Court of Appeal in the *YL* case,¹⁸⁷ but was not considered to be persuasive by the House of Lords in *YL*.¹⁸⁸

Finally, in *Leonard Cheshire*, Lord Woolf seemed to be persuaded not to find the housing association to be subject to the HRA due to the existence of a contract between the local authority and Leonard Cheshire. Lord Woolf noted that residents could require the local authority ‘to enter into a contract with its provider which fully protected the residents’ Article 8 rights and if this was done, this would provide additional protection’.¹⁸⁹ He also noted the contrast with the *Poplar Housing* case, commenting that in that case the function had been transferred from the local authority to Poplar through a housing stock transfer.¹⁹⁰ Moreover, Lord Woolf was clearly influenced by the fact that:

Section 26 of the 1948 Act provides statutory authority for the actions of the local authorities but it provides LCF [Leonard Cheshire Foundation] with no powers. LCF is not exercising statutory powers in performing functions for the appellants.¹⁹¹

This helped him to conclude that there was ‘no other evidence of there being a public flavour to the functions of LCF or LCF itself’.¹⁹² Thus, for Lord Woolf, the particular technique of delegation—housing stock transfer or contract—was relevant to the determination of the controls on the private delegate, even though *Poplar Housing* and *Leonard Cheshire* were effectively performing the same function.

### 6.3.2.2 House of Lords: Aston Cantlow

At issue in the *Aston Cantlow* case was whether a parochial church council was subject to the HRA in the course of its enforcement of a lay rector’s obligation to meet the cost of chancel repairs. The House of Lords found that the council was neither a core nor a hybrid public authority, although Lord Scott dissented on the latter finding. On the hybrid public authority question, four points can be made. First, the Law Lords seemed to equate ‘public’ with ‘governmental’.¹⁹³ This derived from the fact that, for the Court, at least as far as a core public

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¹⁸⁶ *Ibid* 65(y).
¹⁸⁷ See below 6.3.2.3.
¹⁸⁸ The argument was not pressed by counsel in the House of Lords, a strategy deemed appropriate by Lord Mance; see *YL* (n 13) [104]. See also 6.3.2.4 below.
¹⁸⁹ *Leonard Cheshire* (n 13) [34].
¹⁹⁰ *Ibid* [20].
¹⁹¹ *Ibid* [35].
¹⁹² *Ibid* [35].
¹⁹³ *Aston Cantlow* (n 15) [7], [10] (Lord Nicholls), [46], [47], [59] (Lord Hope), [87]–[90] (Lord Hobhouse), [156], [166], [170] (Lord Rodger).
authority was concerned, it was important that the scope of the HRA be interpreted consistently with the state’s liability in international law under the ECHR itself.¹⁹⁴ Since only ‘non-governmental organizations’ can claim human rights violations under the ECHR, the state can only be liable for the actions of governmental organizations.¹⁹⁵ The ‘governmental’ consideration was then extended to the hybrid public authority category, with Lord Nicholls, for instance, accepting that the ‘phrase used in the Act is public function, not governmental function’ but noting that the phrase of ‘a governmental nature’ may be a ‘useful guide’ for section 6(3)(b).¹⁹⁶

The effect of this equation of ‘public’ with ‘governmental’ is not necessarily insignificant. For this book, the term ‘governmental’ is construed very widely.¹⁹⁷ It is possible, however—even though Lord Nicholls noted that ‘governmental’ functions were ‘wide ranging’¹⁹⁸—that ‘governmental’ could be construed as being narrower than ‘public’. As will be seen in Chapter Seven, in the corresponding judicial review jurisprudence, the use of the term ‘governmental’ has been used by English courts to narrow the reach of judicial review, with the development of a ‘but for’ test which requires consideration of whether or not, if an organization did not exist, ‘Parliament would almost inevitably intervene to control the activity in question’.¹⁹⁹ Indeed, in Aston Cantlow, Lord Hope noted in passing that none of the functions of the Church would have to be performed by the state, if the Church were to abdicate its responsibility²⁰⁰—echoing this very ‘but for’ analysis. Moreover, the only Law Lord not to overtly make the equation between ‘public’ and ‘governmental’, Lord Scott, found that the church council was actually performing a public function. Similarly, as will be seen in discussion of the YL House of Lords judgment, Lord Mance and Lord Neuberger, although not applying a ‘but for’ test, used the term ‘governmental’ with narrowing effect on the reach of section 6(3)(b).²⁰¹

Second, by focusing on the Convention standard, what is being accepted, as was argued by counsel for the lay rectors, is a ‘minimum’ international standard, rather than the independent higher domestic standard suggested by the wording of the Act.²⁰² The Strasbourg court has held that where the state has obligations pursuant to the Convention, it cannot evade its responsibility to safeguard Convention rights by delegating the obligation to private bodies or individuals.²⁰³

¹⁹⁴ Ibid [7]–[8] (Lord Nicholls), [46]–[55] (Lord Hope), [87] (Lord Hobhouse), [157]–[160] (Lord Rodger).
¹⁹⁵ Ibid [46]–[48] (Lord Hope), [163]–[165] (Lord Rodger).
¹⁹⁶ Ibid [10], [88]–[90] (Lord Hobhouse), [90] (Lord Hope), [170] (Lord Rodger).
¹⁹⁷ Above 1.1.2.¹⁹⁸ Aston Cantlow (n 15) [9].
²⁰⁰ Aston Cantlow (n 15) [62].
²⁰¹ See below 6.3.2.4.²⁰² Ibid [161].
The European Court of Human Rights has also made it clear that the state may have positive obligations which ‘involve the adoption of measures designed to secure respect for [a Convention right] even in the sphere of the relations of individuals between themselves’.²⁰⁴ Where this positive duty exists ‘a state that is party to the Convention is obliged to ensure a practical and effective system for the protection of the right in question’.²⁰⁵ For instance, in the case of X and Y v Netherlands²⁰⁶ the Strasbourg Court found that the state’s failure to provide a procedure to effect a criminal prosecution for sexual assault amounted to a violation of Article 8, even though the sexual assault was clearly committed by a non-state actor. Similarly, in the case of Airey v Ireland, the state was held responsible for a violation of Article 6, for failing to ensure that a woman, separated from her husband, had available to her an accessible legal procedure to vindicate her Article 8 rights.²⁰⁷ In addition, in Wós v Poland, it was held that the state’s responsibility was engaged where a state function—the task of allocating compensation received from the German Government after World War II—had been delegated to a non-governmental foundation, and the state had the ability to influence that foundation.²⁰⁸

As was held in the Court of Appeal in YL, and discussed in Chapter Four, that Article 8 places a positive obligation on states to provide welfare residential care of the sort considered in Leonard Cheshire is highly unlikely.²⁰⁹ However, where the ECHR imposes a positive obligation on the state (such as in education)²¹⁰ and the state contracts out the performance of the obligation, the Leonard Cheshire standard is unlikely to satisfy international standards. But for the state’s decision to contract out, the individual would have had redress for the violation of her rights. Not only is this a case where the state has failed to take positive steps to prevent this situation from arising, such as including human rights obligations in the contract or clearly extending the HRA to private actors, but the state itself is responsible for creating the situation in which rights of citizens can be violated without redress, since it has made the decision to contract out.²¹¹ This situation could well give rise to a violation of Article 1 of the Convention, regarding the state’s obligations to secure the rights and freedoms of the Convention,²¹² or of Article 13, which requires the right to an effective remedy before the national court. In particular, with regard to Article 13, one can complain either that there

²⁰⁶ Above n 204.
²⁰⁷ (1979) 2 EHRR 305 [31]–[32].
²⁰⁸ Application No 22860/02 (unreported) 1 March 2005 [51]–[54].
²⁰⁹ YL (n 160) [16]. See also above 4.4.1.1.
²¹⁰ Costello-Roberts (n 203); Quane (n 203) 112.
²¹¹ Clapham (1993) (n 4) 21 (suggesting a ‘but for’ test).
²¹² For discussion, see Clapham (2006) (n 4) 352–7.
is no mechanism by which to effectively review the governmental policy which has led to interference with the right by the non-state actor or that the absence of an effective remedy in private law against the non-state actor may result in a violation of Article 13.²¹³

Third, as with Lord Woolf’s characterization method in *Poplar Housing* and *Leonard Cheshire*, the House of Lords seemed to characterize the function in isolation from its context—or, as Cane has put it, the focus is on the specific *act* rather than the *function*.²¹⁴ Their Lordships decided that there was no public function being performed here, because the *act* in question, enforcement of liability of the lay rectors, was not a public function, but merely an action to enforce a civil debt.²¹⁵ For three of the Law Lords, although they acknowledged the public element of the function and the impact of the church’s state of repair on parishioners, this did not suffice²¹⁶ while for Lord Rodger the function at issue was simply furthering the mission of the Church, unlike the performing of a marriage ceremony by a priest which could be ‘a governmental function in a broad sense’.²¹⁷ Lord Scott, on the other hand, placed weight on the context in which the civil liability was being enforced: he was influenced by the fact that the parish church was of the established Church of England; and the church was a ‘public building,’ used for baptisms, funerals, and marriage by Anglicans, and by members of other denominations for burial in the churchyard; that the church council’s members were charitable trustees; and that the decision to enforce the civil liability was ‘taken in the interest of the parishioners as a whole’ and not ‘in pursuit of any private interests’.²¹⁸ By focusing on the context of the act, Lord Scott was able to appreciate its ‘publicness’ in a way that the other Law Lords were not.

As a general comment, a characterization method which seeks to distinguish sharply between act and function is problematic: if every task is characterized in isolation from its context, this has the potential to completely eliminate the very concept of a ‘function of a public nature’. If the statutory duty is ignored, payment of unemployment benefits could be equated with payment of charitable donations to the needy and completely disassociated from a government’s welfare policies²¹⁹—even though most of us would agree instinctively that payment of unemployment benefits sounds like a function ‘of a public nature’. This is because there is nothing in the nature of any act that renders it clearly of a public nature or clearly of a private nature.

²¹³ Ibid 420 citing *Hatton v UK* (2003) 37 EHRR 28 [131]–[142] and *Costello-Roberts* (n 203) [40]. See also JCHR Second Report (n 42) [81].
²¹⁴ P Cane, ‘Church, State and Human Rights: Are Parish Councils Public Authorities?’ (2004) 120 LQR 41, 43; *Aston Cantlow* (n 15) [16] (Lord Nicholls), [89] (Lord Hobhouse).
²¹⁵ *Aston Cantlow* (n 15) [16] (Lord Nicholls), [64] (Lord Hope), [89] (Lord Hobhouse).
²¹⁶ Ibid [16] (Lord Nicholls), [64] (Lord Hope), [86] (Lord Hobhouse).
²¹⁷ Ibid [170], see also [86] (Lord Hobhouse).
²¹⁸ Ibid [130].
²¹⁹ Tasks relating to welfare benefits may be contracted out under, for example, the *Contracting Out (Functions relating to Social Security) Order 2000* (SI 2000/898).
Oliver, who strongly supports ‘the act-function distinction’, considers there to be only two types of activity which are of a public nature: physically coercive powers, such as detaining prisoners and restraining psychiatric patients either for the protection of the coerced person or in the public interest; and special authority, such as licensing professional and other activities and exercising non-consensual disciplinary powers in the public interest over those with whom the relevant body deals which would be unlawful unless specifically authorized by statute or exercised in accordance with special common law requirements. To take one of Oliver’s examples, the power to restrain psychiatric patients, however, it is not clear what it is in the ‘nature’ of this function that renders it of a ‘public nature’. In many ways, it could constitute both too broad and too narrow a definition. On the one hand, there is no automatic consensus that restraint of psychiatric patients should be considered to be ‘of a public nature’. As we have seen, at the US federal level, it has been decided that commitment of patients to psychiatric hospitals has been performed for so long by private actors that it should not be considered to be a public function capable of triggering a finding of state action. On the other hand, could the eviction of Ms Heather by Leonard Cheshire constitute physically coercive conduct? It seems logical that physical coercion could include exclusion of an individual from a place just as much as forcing an individual to remain in a place.

Thus, ‘the act-function’ distinction, set out in section 6(5), if applied expansively, has the potential to severely restrict the scope of section 6(3)(b). This will be of particular importance where private contractors are at issue, given that, by definition, any acts performed by such actors will be capable of performance by private actors and, as such, will potentially be considered to be of a private ‘nature’. One possibility will be for the judiciary to distinguish between those acts performed by private contractors under their government contracts, and those acts performed as part of the contractor’s own private economic activities, with only the latter deemed to be acts whose nature is private. This would appear to fit well with parliamentary intention, with the Lord Chancellor giving examples in parliamentary debates of doctors with National Health Service patients and private patients being ‘public authorities’ in respect of the former but not the latter, and Railtrack having public functions in relation to railway safety but private functions as a property developer. It also mirrors a solution adopted elsewhere, in the Freedom of Information Act 2000, which provides an option for the Secretary of State to order disclosure in respect of any person who appears to the Secretary of State to exercise functions of a public nature or who is providing under a contract with a public authority any service whose provision is a function

220 Oliver (n 58) 345.
221 Above 6.3.1.1(c); Spencer v Lee 864 F2d 1376, 1380–81 (7th Cir 1989).
222 583 HL Deb 811 (24 November 1997).
223 Section 5(a).
of that authority. The Act only applies in relation to those services and not the contractor’s other functions. By adopting such an approach, the potential of section 6(5) to eliminate the possibility of section 6(3)(b) reaching private contractors might be reduced.

Fourth and finally, one positive feature of the Aston Cantlow case is that it acknowledged the importance of using a ‘public function’ analysis. Much emphasis has been placed on the judgment of Lord Hope, who noted that ‘[i]t is the function that the person is performing that is determinate of the question whether it is, for the purposes of the case, a “hybrid” public authority.’ However, perhaps it is Lord Nicholls’ judgment that is even more interesting in this respect. His Lordship started by rejecting the possibility of a test of ‘universal application . . . given the diverse nature of governmental functions and the variety of means by which these functions are discharged today’, but then listed four relevant factors: the extent of public funding of the body for performance of the particular function, the exercise of statutory powers, the extent to which the body is taking the place of local or central authorities, and the provision of a public service.

In terms of specific functions, two were suggested as definitely being ‘public’—privatized prison operation and regulatory functions such as those exercised by the Law Society. It was added by Lord Rodger that if a Church of England body was entrusted with running a school, it may be found ‘that it had stepped over into the sphere of governmental functions’. Lord Nicholls also acknowledged that the manner in which the function is delegated is less important than the function itself, recognizing that governmental functions are performed by non-governmental actors and that sometimes ‘this will be a consequence of privatization, sometimes not’. Unfortunately, though, this did not seem to lead Lord Nicholls to recognize contract as a method of delegation and his Lordship cited, as an obvious example of a private act, the entering into a contract for repair of the church.

Lord Nicholls’ first criterion of public funding relates directly to the justification offered above for compelling private contractors to comply with human rights obligations—namely, the symbolic importance of how public funds are spent. Application of the second criterion, of ‘exercise of statutory powers’ may be useful, provided, first, that a direct link between the statute and the power is mandatory and, second, that the term ‘power’ is not defined too restrictively. To illustrate, in Leonard Cheshire the housing association was fulfilling a statutory function by enabling the local authority to fulfil its statutory duty to

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224 Section 5(b).  
225 Section 7(6).  
226 JCHR First Report (n 151) [42].  
227 Aston Cantlow (n 15) [12].  
228 Ibid [12].  
230 Aston Cantlow (n 15) [168].  
231 Ibid [9].  
232 Ibid [26].
arrange provision of accommodation. However, there was no statute conferring that function on Leonard Cheshire in particular, and indeed, as has already been noted, as far as Lord Woolf was concerned, this severed the link between the statute and the performance of the function. Thus, this criterion will only be successful in reaching private contractors where the statute-function connection need not be immediate.

That Lord Nicholls did not intend the term ‘powers’ to be interpreted too restrictively may be implicit in his third criterion, which clearly aims to address the central issue of contracting out: the replacement of government with a private actor. This is exactly what private contractors do: they take the place of government—regardless of whether what is at issue is a function, power, or duty. In Leonard Cheshire, through the contract, the housing association assumed the duties of the local authority, as far as the housing recipients were concerned, and stepped into the local authority’s shoes—hence engendering a reasonable expectation that they would be required to act similarly to the local authorities.

As for the fourth criterion, and definition of a ‘public service’, at a minimum, a service should be considered to be ‘public’ where the government has a legislative or constitutional duty to provide the particular service.²³³ If the government is under a statutory or constitutional obligation to perform a function, and performance of that function would be subject to human rights constraints if performed by government, it should be subject to such constraints when performed by private contractors. Otherwise, as was held in the EU Meroni decision, discussed above in Chapter Four, the governmental actor is actually transferring more power than it has at its own disposal. Thus, in the Poplar Housing and Leonard Cheshire cases, it should have sufficed that the local authorities were under a statutory duty to provide the accommodation in question. Had private housing associations not performed the task on behalf of the local authorities, the authorities would have been obliged themselves to provide the accommodation and to comply with human rights protections in the course of providing that accommodation. Moreover, it would also be helpful to consider whether the particular service is being performed in the ‘public interest’, when deciding whether the service is a ‘public service’. There is an element of this thinking in the analysis of Lord Scott in Aston Cantlow, since for Lord Scott, because the civil liability was being enforced to improve the state of repair of the church which was ultimately in the interests of the public, the function could be described as ‘public’.

6.3.2.3 Court of Appeal: YL

Even after the Aston Cantlow judgment, the Leonard Cheshire judgment was still considered by the English judiciary to be the leading authority on the

²³³ See also R v Panel on Take-overs and Mergers, ex p Datafin [1987] QB 815 (CA) 848 (Lord Justice Lloyd noting that ‘[i]f the duty is a public duty, then the body in question is subject to public law’).
interpretation of section 6(3)(b). In R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers Market Ltd it was concluded that the power to determine access to a public market was ‘a function of a public nature’. This was based on the fact that what was at issue was access to a public market; but it was also based, equally importantly, on the institutional links between the public authority and the private actor, namely, that the private actor had been established by the council, the private actor had stepped into the shoes of the council, and that, from the date of incorporation of the private actor until the time when it started operating the markets, and to some extent thereafter, the council had assisted it in a number of respects.

In YL, although the Court of Appeal accepted that Leonard Cheshire was binding, Buxton LJ indicated how he would have determined the section 6(3)(b) question in the absence of Leonard Cheshire. YL hinged on the question of whether a private provider of care home services, similar to Leonard Cheshire, could be deemed to be performing a function of a ‘public nature’, and, notably, the Secretary of State for Constitutional Affairs intervened in support of the position that the private care home providers should be found to fall within the scope of section 6(3)(b). In all relevant respects, the facts of the YL case were the same as those which arose in Leonard Cheshire: Southern Cross, a private care home provider, provided accommodation to YL, pursuant to an agreement with Birmingham City Council (and with YL), and gave 28 days notice to terminate YL’s right to remain in the home. It was argued that this action was in breach of Article 8 of the ECHR.

In his obiter comments on how he would have decided the case in the absence of Leonard Cheshire, Buxton LJ made a number of important points. First, his Lordship began by noting that in drafting section 6 of the HRA, the government ‘sought to provide as much protection as possible for the rights of the individual against the misuse of power by the state’, although he noted that there was little authority in Convention jurisprudence for finding private homes to be public authorities. Second, Buxton LJ was persuaded by the fact that private care homes were crucial to the government’s performance of its section 21 duty to provide welfare accommodation pursuant to the National Assistance Act 1948.

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234 See also JCHR Second Report (n 42) [22].
236 Ibid [34].
237 Ibid [36].
238 Ibid [37].
239 Ibid [38].
240 Ibid [42]–[66]. The Court rejected the argument that Aston Cantlow had overruled Leonard Cheshire.
241 Ibid [4] and as had been recommended by the Joint Committee on Human Rights in its 2004 Report: JCHR First Report (n 151) [30].
242 YL (n 13) [24].
243 YL (n 160) [68].
244 Ibid [68].
On the evidence that the vast majority of placements in private care homes were publicly funded by local authorities, Buxton LJ noted that private care homes ‘can only continue, whether as viable charities or as profitable businesses, because they are accepted . . . as acceptable providers of a public obligation’. This degree of ‘close integration into, and dependence on, the work of local authorities in discharging their section 21 duties’ was deemed to be a ‘strong indicator’ that the care of persons placed with private providers should be characterized as a ‘public function’. Third, and very importantly, Buxton LJ rejected the strong act-function dichotomy which was so pronounced in Leonard Cheshire and present in Aston Cantlow, and commented that Lord Woolf’s characterization of the operation of care homes as provision of ‘accommodation’ ‘undervalues what the care home does’. For his Lordship, it sufficed that these homes could ‘indeed be argued to stand in the shoes of the local authority as it discharges its public duties under section 21’. Fourth, Buxton LJ did not appear to regard the contractual source of power of the private care home provider as relevant or determinative.

In terms of the application of section 6(3)(b) itself, the criteria applied by Buxton LJ—namely, assistance in enabling a core public authority to perform duties and standing in the shoes of the local authority—would have resulted in a finding that the private care home provider was a public authority. These criteria also reflect the justifications put forward in the opening part of this chapter for holding private delegates liable for human rights violations. However, Buxton LJ was concerned about the implications of this reasoning, on the basis that the assumptions underpinning the justifications for interfering with the qualified rights in the ECHR are ‘all redolent of the powers and discretions of public authorities in the full sense of the expression’. The tenor of the justifications—such as national security or public safety—would be irrelevant for a private care home seeking to evict a resident in order, for instance, to avoid liquidation. Without the option of relying on Article 8(2), for the private delegates, a qualified right would then be ‘translated into the domestic jurisdiction as conferring not conditional but absolute rights’. Buxton LJ noted that since core public authorities could not be victims according to the Strasbourg jurisprudence, this must also be so of ‘hybrid public authorities in relation to the activities that confer on them their public status’. Consequently, overall, Buxton LJ would prefer an instrumental approach which considered ‘whether it is necessary for the protection of the claimant’s Convention rights that the body concerned should be held to be a public authority against which those rights can be directly asserted’. This would mean that a hybrid body could be directly impleaded in the protection of some Convention rights, but not of others.

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245 Ibid [71].
246 Ibid [71].
247 Ibid [72].
248 Ibid.
249 Ibid [74].
250 Ibid.
251 Ibid [75].
252 Ibid [76].
253 Ibid [78].
The approach of Buxton LJ is subtle and has the merit of acknowledging the importance of not over-burdening private actors who are performing governmental functions or providing important public services. However, it is doubtful whether this approach is either satisfactory or workable. First, it is not a necessary conclusion that functional public authorities should be deprived of ECHR rights, even when performing the very functions which render them ‘public’. As noted above, Article 34 of the ECHR presents a dichotomy between governmental and non-governmental entities, with only the latter entitled to ‘victim’ status; but this dichotomy is used to assess the state’s liability in international law. By contrast, for domestic purposes, the HRA adopts a threefold categorization: ‘core’ public authority, ‘functional’ public authority, and victim. It is not self-evident that a ‘functional’ public authority for the HRA should be categorized as a ‘governmental’, as opposed to a ‘non-governmental’, entity for Article 34, even when performing the function which makes it ‘public’.²⁵⁴ To repeat a point made above, Lord Nicholls in Aston Cantlow noted that the ‘phrase used in the Act is public function, not governmental function’.²⁵⁵ As such, it would certainly be open to national courts to permit functional public authorities to assert their own rights. As will be seen below, this issue was not decided by the House of Lords in YL, but sympathy with this position was expressed.²⁵⁶

Second, it is clear that the Act is intended to reach those private actors ‘performing functions of a public nature’. This expression must have an independent meaning and, clearly, Buxton LJ thought that relevant criteria included the dependence of the core public authority on the private actor to perform its statutory duty and the fact that the private actor was standing in the shoes of the public authority.²⁵⁷ It is then difficult to qualify the application of these criteria by reference to a consideration, which is neither express nor implied in the statutory language, to the necessity of protecting the right in question. Third, it is difficult to see how Buxton LJ’s requirement of necessity for the protection of the Convention right would operate in practice. If there is no direct remedy against a public authority, as will occur in most of these cases,²⁵⁸ it will be necessary, to protect the right, for there to be a direct action against the private service provider. In other words, if Buxton LJ’s requirement is to operate effectively as a limitation on the ECHR obligations of section 6(3)(b) public authorities, additional conditions will be required, such as criteria to assess the adequacy of alternative causes of action—tort perhaps—which can be used to vindicate the right. Fourth, as Buxton LJ accepted, his solution would create enormous uncertainty and constitute an ‘unattractive invitation to further litigation’.²⁵⁹ It would

²⁵⁴ See also JCHR Second Report (n 42) [99]–[100].
²⁵⁵ Aston Cantlow (n 15) [10] (emphasis added). Although, as was discussed above, the Law Lords accepted that there may be a connection between ‘governmental’ and ‘public’.
²⁵⁶ See below 6.3.2.4(c).
²⁵⁷ Note 160 [71]–[72].
²⁵⁸ See above 6.3.2.1.
²⁵⁹ Note 160 [79].
also create significant anomalies: the same private prison operator may be categorized as a section 6(3)(b) authority in respect of certain Convention rights but not others.

Fifth, in any event, the Convention language will not invariably leave the private delegate without a justification for interfering with a right. At first glance, it may seem that a private actor is not well-placed to make a claim to be acting in the interests of ‘national security,’ ‘public safety,’ or the ‘economic well-being of the country’. However, where a private delegate is fulfilling a public function, such as operating a prison, it may be just as well-placed to plead such a justification (for example, public safety) as a governmental counterpart. When exercising governmental power, private delegates should be expected to act in the public interest and could be expected to justify their actions accordingly. Furthermore, it is likely that in most cases, if no other justification applies, the private delegate would be able to plead the Article 8(2) justification of ‘rights and freedoms of others’ to justify any interference. For instance, the avoidance of liquidation example, given by Buxton LJ,²⁶⁰ may be re-characterized as the necessity to make choices between closure of different homes in order to maintain the service and keep other homes open, thereby protecting the Article 8 rights of other residents. Similarly, where the defendant is a sole trader, the return of a son or daughter to take up the room where the care provider is operating the service would implicate the Article 8 rights of the son or daughter.

Sixth, of course, in certain circumstances, it may be, as Buxton LJ suggests, that there are no rights of others at stake and no relevant justifications for interfering with Convention rights available for the private delegate. For example, the defendant may simply be a sole trader, operating a care home in one or two rooms of his or her own home and who simply wishes to retire from the operation. This is the type of situation about which Buxton LJ was concerned—based on his assumption that Article 8(2) will not be available, the rights of other persons will not be at issue, and the sole trader, if found to be a ‘public authority’, will not be entitled to assert his or her own rights. In theory, if this assumption is correct, Article 8 will indeed be absolute insofar as that sole trader is concerned. In practice, though, even if the sole trader is prevented from asserting his or her own rights and is found to be in violation of Article 8, although this may appear to be a harsh result, section 8 of the HRA, which permits the court to award a remedy which it considers to be a ‘just and appropriate’ remedy, can be used by the courts to avoid onerous consequences for sole traders. In this way, any injustice which might be created by including private contractors within the scope of section 6(3)(b), where they cannot plead Article 8(2) justifications, is alleviated.

It is accepted that this is far from a satisfactory solution and it would be preferable if the courts opted for permitting functional public authorities to assert their rights. However, the alternatives to the section 8 HRA option are even

²⁶⁰ Ibid [74].
more troublesome. One alternative is to adopt an artificially narrow definition of section 6(3)(b) to avoid the difficulty, with all of the unsatisfactory consequences that would entail. A second alternative would be to adopt Buxton LJ’s approach, but it is not at all clear that Buxton LJ’s suggestion would even avoid the conversion of qualified Convention obligations into absolute Convention obligations for private actors. If it was ‘necessary for the protection of the right’ that a direct remedy be available against the private actor, then that will remain so, regardless of whether or not the private actor is in a position to plead an Article 8(2) justification. As such, while Buxton LJ’s concern about the lack of availability of Article 8(2) is a real and justified concern, it is better dealt with through section 8 of the HRA than through a narrow interpretation of section 6(3)(b).

In sum, this aspect of the YL case, balancing rights of the section 6(3)(b) authority with those of the victim, exemplifies a sharp tension between the HRA and the Convention. The HRA implements a novel structure for human rights protections, which is tailored to the particular needs of modern UK constitution-second era, in which the dichotomy of public and private was more pronounced. This is one example of what some commentators consider to be the disadvantages of incorporating the Convention directly, rather than drafting a bill of rights specifically reflective of the needs of the modern UK. In terms of determining whether functional public authorities should be permitted to assert their own rights as justification for interfering with the rights of another, it is to be hoped that the Courts will opt for the solution which best reflects what the HRA was intended to achieve.

### 6.3.2.4 House of Lords: YL

Turning to the House of Lords judgment in YL, the Court of Appeal outcome was upheld, and by a 3–2 majority, the ultimate holding of Leonard Cheshire was confirmed—namely that a private care home provider, acting pursuant to a contract with a local authority, could not be deemed to be a section 6(3)(b) public authority. The judgment explores arguments considered both in the normative discussion at the start of this chapter, and in the preceding English cases. As was suggested above in section 6.3.2.2, the reasoning of the House of Lords in the Aston Cantlow case, and in particular, the judgment of Lord Nicholls, had appeared to offer hope of a generous application of section 6(3)(b). Regrettably though, the majority in the YL case opted for a restrictive understanding of this provision, and in many respects, reverted to the Leonard Cheshire approach.

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261 Clapham (2006) (n 4) 481.
(a) Points of Consensus

Given that the House was strongly divided—with Lord Scott, Lord Mance and Lord Neuberger in the majority, and Lord Bingham and Baroness Hale in the minority—it is perhaps worth first noting those issues on which there was agreement. One important aspect of the *Aston Cantlow* case was affirmed, namely, the need to apply a *functional* test to interpret section 6(3)(b), rather than the nexus or institutional test applied in *Poplar Housing* and *Leonard Cheshire*.²⁶³ Moreover, their Lordships, as Lord Nicholls had done in *Aston Cantlow*, eschewed attempting to formulate a ‘single test of universal application’,²⁶⁴ preferring instead to adopt a ‘factor-based approach’.²⁶⁵ Their Lordships were also agreed as to the meaning (although as will be seen, not the implications) of the relevant Strasbourg jurisprudence regarding positive obligations and delegated State functions.²⁶⁶ Beyond these limited points of agreement, however, there were crucial points of distinction between the majority and the minority.

(b) Points of Division

First and foremost, the majority and minority had very different policy perspectives on the question before them. This affected the analysis, and as Lord Neuberger candidly put it:

> The centrally relevant words, ‘functions of a public nature’, are so imprecise in their meaning that one searches for a policy as an aid to interpretation. The identification of the policy is almost inevitably governed, at least to some extent, by one’s notions of what the policy should be, and the policy so identified is then used to justify one’s conclusion.²⁶⁷

The majority identified a number of concerns. Echoing Lord Woolf’s reluctance in *Poplar Housing* and *Leonard Cheshire* to impose ECHR obligations on small hotels,²⁶⁸ Lord Scott was perturbed by the possibility that every private contractor—performing a function that a local authority could, in exercise of a statutory power or discharge of a statutory duty, have performed itself—might be a section 6(3)(b) authority, and asked ‘where does this end?’²⁶⁹ Drawing on the equality argument, presented in the normative discussion at the outset of this chapter,²⁷⁰ Lord Mance and Lord Neuberger were anxious to avoid anomalous distinctions in Convention protection between publicly-and-privately funded residents in the *same* private care home, which they found to be more incongruous

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²⁶³ *YL* (n 13) [61] (Baroness Hale), [105] (Lord Mance). See also above 6.3.2.1.


²⁶⁵ Ibid [91] (Lord Mance). See also [5], [13] (Lord Bingham), [26] (Lord Scott), [64] (Baroness Hale, citing the factors identified by Lord Nicholls in *Aston Cantlow*), [103], [105] (Lord Mance), and [132], [154]-[160] (Lord Neuberger).

²⁶⁶ See above 6.3.2.2; see also *YL* (n 13) [56]-[57] (Baroness Hale), [92]-[99] Lord Mance, [161] (Lord Neuberger concurring with the analysis of the Strasbourg jurisprudence of Lord Mance).

²⁶⁷ *YL* (n 13) [128].

²⁶⁸ *Poplar Housing* (n 163) 67; *Leonard Cheshire* (n 13) [18]; and above 6.3.2.1.

²⁶⁹ *YL* (n 13) [30]; see also [153] (Lord Neuberger).

²⁷⁰ Above 6.2.2.
than distinctions drawn between residents in local authority homes and residents in private homes.\textsuperscript{271} As noted above, this position overlooks the fact that those who are publicly-funded will regard themselves as being in a relationship with the state and have an expectation of human rights protection.\textsuperscript{272} Additionally, Lord Neuberger was concerned that a generous interpretation of section 6(3)(b) would obstruct the privatization policy of the State; and even though he observed that a justification for privatization based on avoiding legal constraints applicable to public actors might be considered ‘unattractive’, he noted that this matter was for the legislature.\textsuperscript{273} By contrast, Baroness Hale conducted her analysis within a different framework, and observed that the question in the case was of great importance, precisely because many services which used to be provided by agencies of the state are now provided by voluntary organisations or private enterprise under contract with central or local government.\textsuperscript{274}

Second, the relevance of the context in which the HRA was enacted provoked different responses from the majority and minority. Lord Scott, Lord Mance, and Lord Neuberger, preferring the ‘minimum’ international standard adopted in \textit{Aston Cantlow},\textsuperscript{275} stressed that the purpose of the HRA had not been to enlarge rights or remedies, but rather to enable rights and remedies, already available in Strasbourg jurisprudence, to be enforced at the domestic level.\textsuperscript{276} Their Lordships rejected the relevance of Hansard to illuminate the purpose of section 6(3)(b).\textsuperscript{277} For the minority, however, the context in which section 6(3)(b) had been enacted was important. Lord Bingham observed that the term ‘public function’ should be given a ‘generously wide scope’, since its meaning was not to be found in the Convention, but rather, it was an instrument intended to give effective domestic protection to Convention rights.\textsuperscript{278} For Lord Bingham also, section 6(3)(b) had been drafted with the ‘well-known fact in mind’ that private actors increasingly performed governmental functions.\textsuperscript{279} Even more emphatically, Baroness Hale cited a number of governmental papers and Hansard debates\textsuperscript{280} to conclude, first

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\item 271 \textit{YL} (n 13) [117], [119] (Lord Mance), [151], [169] (Lord Neuberger).
\item 272 Above 6.2.2.
\item 273 \textit{YL} (n 13) [152].
\item 274 Ibid [36].
\item 275 Above 6.3.2.2.
\item 276 \textit{YL} (n 13) [87], [102] (Lord Mance), [157], [161] (Lord Neuberger). On this issue, Lord Neuberger also cited statements made in earlier cases such as \textit{R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs} [2005] UKHL 57, [2006] 1 AC 529 and \textit{R (SB) v Governors of Denbigh High School} [2006] UKHL 15, [2007] 1 AC 100.
\item 277 \textit{YL} (n 13) [89]-[90] (Lord Mance). Neither Lord Scott nor Lord Neuberger referred to Hansard.
\item 278 Ibid [4].
\item 279 Ibid [20].
\end{footnotes}
\end{footnotesize}
that it was envisaged that private bodies providing services which had previously been provided by the state would be included within the scope of section 6(3)(b); and second, that the government was anxious that any acts for which the UK might later be held responsible in Strasbourg would be covered.²⁸¹

Third, and reverting to the discussion of the Leonard Cheshire and Aston Cantlow reasoning,²⁸² the majority and minority were divided on the relevance of the context in which the function of the private care homes was being performed. The majority’s characterisation of the function performed by Southern Cross is reminiscent of Lord Woolf’s reference to ‘the act of providing accommodation to rent without more’²⁸³; and, like Lord Woolf, the majority was unwilling to place any weight on the ‘classic, social welfare’ context,²⁸⁴ in which the care was being provided.²⁸⁵ In particular, Lord Neuberger stressed that there would be no performance of a public function where an individual had independently entered into a contract with a proprietor for the provision to her of care and accommodation in a privately owned care home, and his Lordship was not persuaded that the statutory involvement of Birmingham City Council should change that conclusion.²⁸⁶ Lord Neuberger also noted, joined by Lord Mance, that while the function of making arrangements for provision of accommodation constituted a ‘public function’, the actual provision of the care could not be deemed to be a public function²⁸⁷—a distinction criticised by Baroness Hale as ‘artificial and legalistic’.²⁸⁸ For the minority, the context in which the care and accommodation were provided was hugely significant, since what was at issue was the assumption of responsibility by the state.²⁸⁹ Moreover, for Baroness Hale, the fact that private arrangements could be made for provision of care and accommodation, did not prevent this function from being public when ‘performed pursuant to statutory arrangements and at public expense’²⁹⁰; while an act ‘in relation to the person for whom the public function is being put forward’ could not be a ‘private’ act for the purpose of section 6(5).²⁹¹

Fourth, while it was agreed by both the majority and the minority that the nature and extent of any statutory power or duty in relation to the function was of importance,²⁹² for the majority this factor was extremely significant.²⁹³

²⁸¹ YL (n 13) [55]. ²⁸² Above 6.3.2.1 and 6.3.2.2.
²⁸³ Poplar Housing (n 163) 69; Leonard Cheshire (n 13) [20]; and above 6.3.2.1.
²⁸⁴ To return to Craig’s expression: above 6.3.2.1.
²⁸⁵ See, eg, YL (n 13) [34] (Lord Scott), [133]-[138], [162] (Lord Neuberger). Lord Mance did note the importance of considering the ‘context in which and basis on which contractor acts’: [102].
²⁸⁶ Ibid [133]-[144].
²⁸⁷ Ibid [115] (Lord Mance), [141] (Lord Neuberger).
²⁸⁸ Ibid [66]. See also [16] (Lord Bingham noting that this distinction was ‘correct, but not . . . significant’).
²⁸⁹ Ibid [7], [14]-[16] (Lord Bingham), [66]-[68] (Baroness Hale).
²⁹⁰ Ibid [72]. ²⁹¹ Ibid [73].
²⁹² Ibid [8] (Lord Bingham), [69] (Baroness Hale).
²⁹³ Ibid [26], [28], [29], [31] (Lord Scott), [102], (Lord Mance) (noting that the source of the private actor’s power is ‘a very relevant factor’), [150], [160d], [166]-[168] (Lord Neuberger).
It was noted above that in *Leonard Cheshire*, the existence of a contract between Leonard Cheshire and the local authority persuaded Lord Woolf not to insist upon a direct right of action against the private care homes.²⁹⁴ In *YL*, the relevance of the contractual source of the care provider’s functions was emphasised to an even greater extent by the majority, and while Lord Neuberger and Lord Mance accepted that the ‘source of powers need not always be statutory’,²⁹⁵ the majority stressed repeatedly that ‘the essentially contractual source and nature of Southern Cross’s activities differentiates them from any “function of a public nature”’.²⁹⁶ For Lord Neuberger, the liability of the private care home provider ‘“arises as a matter of private law”’²⁹⁷; while Lord Scott stressed that when providing care pursuant to the National Assistance Act 1948, ‘a local authority is doing so pursuant to public law obligations. A private person, including local authority employees, is doing so pursuant to private law contractual obligations.’²⁹⁸ Additionally for Lord Neuberger, the statutory arrangement established by the Act provided only a ‘public connection’, which did not suffice to give rise to a public function.²⁹⁹

As such, their Lordships did not adopt the possibility left open in *Aston Cantlow*, that the statute-function connection need not be immediate, such that a statutory scheme permitting outsourcing could be sufficient to place the function in a statutory and public context.³⁰⁰ This possibility was adopted by the minority, and for Baroness Hale, it sufficed that the function was being performed ‘pursuant to statutory arrangements’.³⁰¹ Similarly, for Lord Bingham, the detailed contractual arrangements were less relevant than the fact that Parliament intended for residential care to be provided, and ‘the means of doing so is treated as, in itself, unimportant.’³⁰² Given that, as has been demonstrated throughout this book, so many functions are transferred to private actors using contract, it is regrettable that the majority deemed the contractual setting to be such a strong indicator of the absence of a public nature.

Fifth, on a related point, it was important for the majority that the local authority remained under a statutory duty to provide or arrange accommodation,³⁰³ and that rights could still be enforced against the public authority.³⁰⁴ For

²⁹⁴ Above 6.3.2.1.
²⁹⁵ *YL* (n 13) [101] (Lord Mance), [167] (Lord Neuberger).
²⁹⁶ Ibid [120] (Lord Mance); see also [26], [29], [31], [32], [34] (Lord Scott), [133] (Lord Neuberger).
²⁹⁷ Ibid [168] (Lord Neuberger).
²⁹⁸ Ibid [31]. For Lord Scott, it was also relevant that the contract between Southern Cross and *YL* provided an alternative means of protection for *YL*: [32]. Lord Mance accepted however that there would often not be a contract between the contractor and the service recipient: [118].
²⁹⁹ Ibid [140].
³⁰⁰ Above 6.3.2.2.
³⁰¹ Ibid [73].
³⁰² Ibid [16].
³⁰³ Ibid [104], [113]-[114] (Lord Mance), [147] (Lord Neuberger).
³⁰⁴ Ibid [149], [160b] (Lord Neuberger).
the minority, these were not relevant considerations.³⁰⁵ Again, the position of the minority is preferable, since even though a public actor is compelled by human rights obligations, as was discussed earlier in this chapter, the public actor will not always be in a position to vindicate the right.³⁰⁶

Sixth, the majority adopted the distinction drawn by Lord Woolf between a function being ‘public’ when performed by a public body, but not necessarily being ‘public’ when performed by a private body, the reason being that, when performed by a public body, ECHR compliance is necessary since the body is classified as a ‘core’ section 6(1) public authority and bound by the ECHR in all its activities.³⁰⁷ Baroness Hale accepted this point; but added that the fact that a function is or has been performed by a core public authority for the benefit of the public must be a ‘relevant consideration’.³⁰⁸

Seventh, in pursuing a ‘factor-based approach’, there was division between the majority and minority on both the general relevance and the specific application of particular factors. Lord Mance and Lord Neuberger cast doubt on the usefulness of regulation of the activity as an indicator of its ‘public nature’, with Lord Mance noting that it was ‘no real pointer’,³⁰⁹ and Lord Neuberger adding that there was ‘no identity between the public interest in a particular service being provided properly and the service itself being a public service’.³¹⁰ Lord Neuberger was also unpersuaded that the risk of Convention violations to such a vulnerable section of the population as publicly-funded care home residents should be a relevant factor.³¹¹ For his Lordship also, the fact that a function is performed in the public interest ‘does something, but relatively little’ to suggest engagement of section 6(3)(b).³¹² Again, this type of reasoning re-asserts shortcomings evident in the Leonard Cheshire and Poplar Housing reasoning—the use of a negative characterisation method, which excludes important factors as relevant, without providing positive indicators as to what might indicate ‘public nature’. The minority, however, did adopt a ‘positive’ characterisation method, with all these factors—regulation, risk of Convention violations and public interest—being deemed significant and contributory to a conclusion that private care home providers acting pursuant to local authority contract, were section 6(3)(b) authorities.³¹³

Eighth, on the implications of the Strasbourg jurisprudence, Baroness Hale suggested that a right of action against a private provider would be the most effective means of ensuring that the State’s positive obligations under the ECHR

³⁰⁵ Ibid [12], [16] (Lord Bingham).
³⁰⁶ Above 6.2.1.
³⁰⁷ YL (n. 13) [110] (Lord Mance), [141]-[142], [144] (Lord Neuberger).
³⁰⁸ Ibid [72].
³⁰⁹ Ibid [116].
³¹⁰ Ibid [134].
³¹¹ Ibid [136].
³¹² Ibid [135]; but see Lord Mance at [103].
³¹³ Ibid [7], [15]-[16] (public interest) [9], [17] (regulation), [11], [19] (vulnerability) (Lord Bingham); [58], [71] (vulnerability) [62], [66]-[67] (public interest) (Baroness Hale).
were fulfilled.³¹⁴ By contrast, Lord Neuberger relied on the Strasbourg juris-
prudence to conclude that Southern Cross would not have been susceptible
to YL’s claim in the Strasbourg court, such that the granting of a direct action
against Southern Cross under the HRA would have been to expand the scope
of YL’s rights.³¹⁵

c) Additional Issues
Most of this analysis re-visits themes raised in earlier judgments and in earlier
discussion in this chapter. However, a number of additional issues emerged in the
judgment which will undoubtedly render it yet more difficult to conclude that a
private contractor is a section 6(3)(b) public authority. The first is the emphasis
placed by the majority on the private contractor’s motivation for engaging in the
function. Lord Scott noted that, in operating the care home, Southern Cross
was ‘carrying on a socially useful business for profit’³¹⁶; while for Lord Mance,
‘[i]n providing care and accommodation, Southern Cross acts as a private, profit-
earning company’.³¹⁷ As was argued in Chapter One of this book, motivation is
useful for characterising the actor as ‘private’ or ‘public’³¹⁸; this does not mean,
however, that it is as useful a factor for characterising the nature of a function. To
give an example, it seemed to be accepted by Lord Mance and Lord Neuberger
that private prison managers were self-evidently performing functions of a public
nature.³¹⁹ Yet a private prison manager, very often a ‘private, profit-earning company’, is regularly also motivated by carrying out a ‘business for profit’. Given
that, again as was noted in Chapter One, private actors can be distinguishable
from public actors by their motivations, if applied rigorously, this criterion of
‘motivation’ could result in Convention obligations rarely, if ever, being extended
to private contractors.

The second limiting development emerging from the YL analysis is the distinc-
tion drawn by the majority between using public monies to subsidize an activity,
and using public monies to pay for a service.³²⁰ With respect, this distinction is
artificial. As was argued above, the award of government contracts and expend-
iture of public monies have a politically symbolic character, since the funding is
awarded by government on behalf of the community. It should suffice, as it did
for Lord Bingham and Baroness Hale, that public monies are being spent to fund
the provision of a service to individual members of the public—a service which
the state had deemed it important to provide.³²¹

³¹⁴ Ibid [60]; and see above 6.3.2.2.
³¹⁵ YL (n 13) [161].
³¹⁶ Ibid [26].
³¹⁷ Ibid [116]. See also [105] (Lord Mance).
³¹⁸ Above 1.1.3.
³¹⁹ YL (n 13) [91] (Lord Mance citing Aston Cantlow), [166] (Lord Neuberger).
³²⁰ Ibid [26], [27] (Lord Scott), [105] (Lord Mance); [148], [165] (Lord Neuberger).
³²¹ Ibid [10] (Lord Bingham), [68] (Baroness Hale).
Third, and drawing on a comment made earlier in respect of the *Aston Cantlow* case, it appears that Lord Mance and Lord Neuberger found the description ‘governmental’, rather than ‘public’ to be helpful, and appeared to apply the term to have a narrowing effect on the scope of section 6(3)(b).³²² As noted above, it is to be hoped that the term ‘governmental’ will not evolve in this context similarly to how it has evolved in the judicial review context, and, once again, the words of Lord Nicholls in *Aston Cantlow*—cited by Baroness Hale in *YL*—should be heeded: ‘the phrase used in the Act is public function, not governmental function’.³²³

Finally, as noted above, the issue which had concerned Buxton LJ in the Court of Appeal, namely the balancing of the rights of the private actor with the person whose rights had been interfered with, did not receive attention in the House of Lords. However, in obiter, both Baroness Hale and Lord Mance appeared to accept that should Southern Cross have been found to be a section 6(3)(b) authority, it could have asserted its own rights in justification of any interference with a right of a resident³²⁴—thereby casting doubt on the concerns raised by Buxton LJ in the Court of Appeal. This issue will, however, require further consideration by the courts.

(d) Summary

YL will not necessarily be the last judicial word on section 6(3)(b), given the issues left open, and given also that, as Lord Neuberger observed, ‘the relative weight to be accorded to each factor in a particular case is inevitably a somewhat subjective decision.’³²⁵ In light of the normative arguments made at the outset of this chapter regarding new definitions of the public sphere, the decision of the House of Lords in *YL* is disappointing. At the moment, the reach of section 6(3)(b) has been tightly circumscribed, and the section only clearly encompasses regulatory or physically coercive powers.³²⁶ For all the reasons already set out, and returned to below in section 6.4 of this chapter, this position is regrettable. In particular, even though the *Leonard Cheshire* case has been subjected to significant criticism, including from Buxton LJ in the Court of Appeal,³²⁷ not only did the majority in *YL* not redress the concerns raised about that case, but the majority actually adopted and affirmed many of the weaknesses identified in the reasoning of the earlier case. This includes the characterisation of function in isolation from context; a negative characterisation method involving dismissal of factors normally deemed relevant as indicators of ‘public nature’, such as public funding, regulation and public interest; a concern not to extend the scope of human rights

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³²² Ibid [102] (Lord Mance), [159], [160c], [162] (Lord Neuberger).
³²³ Ibid [63] citing *Aston Cantlow* (n 15) [10].
³²⁴ YL (n 13) [74] (Baroness Hale), [116] (Lord Mance).
³²⁵ Ibid [128].
³²⁶ Ibid [63] (Baroness Hale).
³²⁷ Above 6.3.2.3.
obligations too far; and indeed an even greater emphasis on the contractual setting for performance of the function than is found in *Leonard Cheshire*. The majority also adopted tests that are likely to further limit the scope of section 6(3)(b): such as, the presence of a self-interested motivation, which will inevitably be the case where private actors are involved; and an artificial distinction between public subsidy and public funding. It is also especially unfortunate that Lord Neuberger could be so sanguine about the fact that privatisation is regularly used by government to evade legal constraints, which of course, includes human rights constraints.

### 6.3.2.5 Legislative intervention?

In the aftermath of *YL*, attention may now turn to the legislature. Currently, very far-reaching legislation is being proposed in the House of Commons, the Human Rights Act 1998 (Meaning of Public Authority) Bill. Section 1 of the Bill adopts the formulation endorsed by the Joint Committee on Human Rights,³²⁸ and would define a ‘function of a public nature’ as including ‘a function performed pursuant to a contract or other arrangement with a public authority which is under a duty to perform that function’.³²⁹ Given the pressing need for a clear solution, and, given the complexity of the case law, at this stage, legislative intervention may be the only effective solution in this context. How likely it is that this legislation will be enacted is difficult to assess; and it will certainly face significant opposition. Nonetheless, what is certain is that in England, the public debate on this issue will continue.

### 6.3.3 European Union

Holding private delegates liable for human rights violations in the EU is quite complicated. For a start, the Union has two different human rights schema: Community rights and fundamental rights. It may also acquire a third scheme in the future—the Charter.³³⁰ At the moment, the Charter is not legally binding, although it is legally relevant, constituting ‘the expression at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order’.³³¹ It has been cited by Advocates-General,³³² the Court of First Instance,³³³

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³²⁸ JCHR Second Report (n 42) [150].
³²⁹ Section 1.
³³⁰ Above n 6.
³³¹ Opinion of AG Mischo in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v Scottish Ministers* [2003] ECR I-7411 [126].
³³² Ibid and see also, eg, Opinion of AG Kokott in C-105/04 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] ECR I-8725 [107] fn 58 (noting that the Charter does ‘as a legal reference, provide information on the fundamental rights guaranteed by the Community legal order’).
³³³ Case T-177/01 *Jégo-Quéré v Commission* [2002] ECR II-2365 [42].
and the ECJ itself.³³⁴ Community rights consist of rights contained in Treaty articles and Community legislation, while fundamental rights are found in the general principles of law developed by the ECJ.³³⁵

As to content, there is no strict division between the three schemes—just sometimes different emphases. Community rights include such rights as the freedoms of movement of goods,³³⁷ capital,³³⁸ and workers,³³⁹ the freedom of establishment and services,³⁴⁰ and the right not to be discriminated against on grounds of nationality.³⁴¹ Although primarily economic in focus, many Community rights have a ‘social and moral dimension in addition to their market-integrating thrust’.³⁴² For instance, as de Búrca points out, the freedom of movement of workers and their families, or the right to equal pay for equal work, can be understood as social rather than ‘market-integrating’.³⁴³ Similarly, the right not to be discriminated against on grounds of nationality has also been used with far-reaching effect by the ECJ to bolster the citizenship provisions of the EC Treaty³⁴⁴ and to expand, in particular, the rights of the non-economic migrant in the EU.³⁴⁵ The more classical civil and political rights, such as dignity,³⁴⁶ freedom of expression,³⁴⁷ or the right to family life,³⁴⁸ are derived from national traditions and the ECHR and are found in the fundamental rights jurisprudence of the ECJ. Indeed, it was been said that for ‘practical purposes the [ECHR] can be regarded as Community law and can be invoked as such both in this court and in national courts where Community law is in issue’.³⁴⁹

Finally, the Charter, as the latest Union innovation in human rights, has been described as containing ‘classic civil and political rights in the ECHR, citizenship rights deriving from the EU and EC Treaties, and social and economic rights’.³⁵⁰ The Charter is often said not to protect any rights that were not already protected

³³⁴ See, eg, Case C-540/03 Parliament v Council [2006] ECR I-5769 [38]; Case C-303/05 Advocaten voor de wereld VZW v Leden van de Ministerraad Judgment of 3 May 2007 nyr (ECJ).
³³⁸ Ibid Arts 56–60.
³³⁹ Ibid Art 39.
³⁴¹ Ibid Art 12.
³⁴² de Búrca (n 342) 47. See EC Treaty Arts 39 and 141.
³⁴³ EC Treaty Arts 17–21.
³⁴⁵ Case 29/69 Stauder v City of Ulm [1969] ECR 419 [7].
by Community law and to have a merely declaratory purpose. However, it is clear that the Charter reformulates existing rights, with potential for different interpretations; while it also recognizes as ‘fundamental’ rights which would not previously have been described as such. It provides a combination of classic, political, civil, economic, and social rights, which are found in six chapters: dignity, freedoms, equality, solidarity, citizens’ rights, and justice.

In terms of applicability, the three categories of rights are different. Community rights are often capable of horizontal enforcement, and will potentially bind all private actors, including, of course, the private delegate of governmental power. Fundamental rights apply to acts of Union institutions, and to Member States in the course of implementing their Community obligations, when derogating from Community obligations, or acting within the scope of Community law or according to a more expansive example, where there is even a remote interference with the exercise of a Community right. Although the Charter frames its scope of application more narrowly, stating expressly that it applies to EU institutions and Member States ‘only when they are implementing Union law’, the Charter’s scope would not be interpreted more narrowly than the ECJ’s current formulation in respect of fundamental rights.

Although primarily directed at Member States, however, this does not necessarily mean that private delegates would not be bound by the fundamental rights

352 For example, while ECHR Art 8(1) refers to the right to ‘respect . . . for correspondence’, Art 7 of the Charter refers to right to ‘respect . . . for communications’ which takes into account the growth of electronic communications.
353 Eeckhout (n 351) 951.
354 Charter Arts 1–5.
355 Ibid Arts 6–19.
357 Ibid Arts 27–38.
363 Case C-60/00 Carpenter v Secretary of State for the Home Department [2002] ECR I-6279.
364 Charter Art 51(1).
365 Article II-112(7) of the Draft Treaty on a Constitution for Europe [(2004) OJ C310, 16 December 2004] notes that ‘explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States’. The Declaration concerning the Explanations relating to the Charter of Fundamental Rights interprets Art 51(1) to mean that the Charter is binding on Member States when they ‘act in the context of Community law’ and refers specifically to the existing ECJ jurisprudence and such cases as Case 5/88 Wachauf v Germany [1989] ECR 2609 and Case C-260/89 ERT v DEP and Sotirios Kouvelas [1991] ECR 2925.
Human Rights Controls on the Delegate

or the Charter. In Chapter Two it was explained that, in the EU context, private delegation is possible either from an EU institution or a Member State, in furtherance of EU tasks.³⁶⁶ Where such delegation occurs, the Court’s Meroni jurisprudence, discussed above in Chapter Four, may become relevant.³⁶⁷ It will be recalled that three important principles were identified in the Meroni reasoning. The second Meroni principle required that discretionary tasks not be delegated and the third principle required a clear delineation of the delegation, while, more relevantly for present purposes, according to the first Meroni principle, even if a task is not discretionary and, therefore, capable of delegation, an institution still cannot delegate more power than it enjoys itself. If the institution’s powers are subject to human rights obligations, then the delegated powers must also be subject to human rights obligations.

In Meroni, the ECJ’s remedy was to invalidate the delegation rather than to extend the relevant obligations to the private delegate. However, it would be possible for the ECJ to use Meroni to extend the human rights obligation to the private delegate—rather than to invalidate the delegation. For a start, the remedy sought in Meroni was annulment of the delegate’s decision and the Court was not asked to consider extending obligations of the High Authority to its delegate.³⁶⁸ As will be seen, since Meroni was decided in 1958, the extension of EU obligations—whether in the Treaty, regulations, decisions, and even to a certain extent, directives—to private actors has become commonplace. As was indicated in Chapter Two, the ECJ has also emphasized the need for effectiveness and uniform application of EC law, which would bolster the argument for extending human rights obligations to private delegates.³⁶⁹ Moreover, given the ECJ’s reluctance to invalidate delegations under the Meroni doctrine, seen in Chapter Four, it may also prefer to uphold a delegation by extending the rights obligation to the private delegate, rather than to invalidate the delegation. In short, if deciding Meroni again today, the ECJ might be persuaded to extend the reach of the obligation, rather than invalidate.

Three issues will be considered here: first, the mechanics of bringing an EU rights action against a private delegate; second, the ability of Community rights to bind private delegates of Member States, where the private delegate will be bound by virtue of the inherent horizontal reach of the right and not by virtue of the delegation; and third, the reach of the ECJ’s fundamental rights jurisprudence and the Charter, where there has been a private delegation by either a Union institution or a Member State, in the implementation of EU objectives, and the Meroni doctrine could apply. It is very important to understand the distinction between the second and third categories. With the former category, the private delegate may be performing a function which is not in furtherance of the

³⁶⁶ Above 2.4.3.3.
³⁶⁸ Meroni (n 367) 139.
³⁶⁹ Above 2.3.3.1.
Member State’s EU duties, such as the welfare housing function of the YL case, yet may still be bound by Community rights, such as the right to equal pay for equal work\textsuperscript{370}—because these rights bind all private actors, regardless of whether or not the actor is a governmental delegate. With the latter category, however, the private delegate may end up being bound, not only by Community rights which apply horizontally, but also by the ECJ’s fundamental rights jurisprudence or the Charter, precisely because it is a delegate of the Union or a Member State.

6.3.3.1 Bringing an action before the ECJ

In terms of a private delegation problem arising before the ECJ, the direct action procedure, found in Article 230 EC, would only be of potential relevance where there is delegation from a Union institution to a private actor. Even then, it seems that the procedure could not be used. The wording of Article 230 clearly refers to ‘acts’ of the EU institutions—the Commission, Council, European Parliament, and European Central Bank. Thus, while this may well facilitate a challenge to the legality of an institution’s decision to contract out, as discussed in Chapter Five,\textsuperscript{371} it is unlikely to be useful as a mechanism of control of the acts of the private delegate.\textsuperscript{372} Of course, it would be possible for the Court to attribute the act of the private delegate to the EU institution, and in this way the act of a private contractor could be deemed to be the ‘act’ of the Union institution. This would be a difficult case to make though—particularly if the function has been explicitly contracted out. The private contractor is usually considered to be a delegate of the governmental actor, and not an agent with the authority to bind its principal.\textsuperscript{373} More likely, therefore, the way in which this issue of control of private actors would come before the Court would be through an Article 234 EC reference from a national court, which is equally relevant to both delegation situations. The private delegate, whether of the Union or of the Member State, might have an action taken against it before the national court, and a preliminary reference would then be made to the ECJ to determine whether or not human rights obligations apply to it.

6.3.3.2 The reach of Community rights

Broadly speaking, private delegates will often be bound by Community rights due to the judicially developed doctrine of direct effect. As is well-known, to say that EU law has direct effect means that individuals can invoke their EU rights before national courts.\textsuperscript{374} The concept derives from the EU’s role as a ‘new legal order of international law’ which ‘not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal

\textsuperscript{370} EC Treaty Art 141.
\textsuperscript{371} Above 5.2.5.
\textsuperscript{372} TK Hervey, ‘The European Union and the Governance of Health Care’ in G de Búrca and J Scott (eds), Law and New Governance in the EU and the US (Hart, Oxford 2006) 179, 200 fn 90.
\textsuperscript{374} Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1, 12.
Vertical direct effect refers to enforceability against state actors, while having horizontal direct effect means that the measure in question is enforceable against non-state actors. Rights found in decisions, regulations, and Treaty provisions are capable of direct effect, both vertically and horizontally. Directives have primarily vertical direct effect, yet are also capable of limited horizontal effect. Although the Court has held that directives are capable of vertical direct effect—in spite of the wording of Article 249 EC, stating that directives are only binding as to the result to be achieved and leaving to national authorities the choice of form and methods of implementation—it has resisted horizontal direct effect. This position is based, at least in part, on an estoppel argument that the state ‘may not plead, as against individuals, its own failure to perform the obligations which the directive entails’, although, as will be seen below, the ECJ’s subsequent case law has undermined this rationale.

In the Van Gend en Loos case, the Court set out certain conditions for direct effect: the provision in question should be ‘clear, negative, unconditional, containing no reservation on the part of the Member State, and not dependent on any national implementing measure’. However, as Craig and de Búrca have noted, these conditions are sometimes treated as ‘little more than conditions of justiciability’, in the case of Defrenne v Sabena for instance, the ECJ found that Article 141 EC, requiring Member States to ensure ‘the application of the principle that men and women should receive equal pay for equal work’ should have horizontal direct effect, even though this obligation was hardly clear or negative. Whether a Treaty provision will have horizontal effect, however, will depend on the specific objective and context of the particular provision. The question of the horizontal application of free movement rules is a ‘highly vexed question’, since the obligations of the free movement provisions are addressed to Member States. The free movement of workers obligations can apply to a body with power to regulate ‘in a collective manner gainful employment and the provision of services’ or to a body that ‘exercises a certain power over individuals and is in a

375 Ibid.
378 Case C-188/89 Foster v British Gas [1990] ECR I-3313 [16].
380 Ibid 186.
381 Ibid 188.
384 Walrave (n 377) [17]; Case C-415/93 Union Royale Belge des Societes de Football Association v Bosman [1995] ECR I-4921 [82].
position to impose on them conditions which adversely affect the exercise of the fundamental freedoms guaranteed by the Treaty—and even, in the light of more recent jurisprudence, to the conditions established by a private undertaking for an employment competition. Wyatt and Dashwood also note that the right to establishment in Article 43 must be construed to prohibit discrimination by private parties Whether this jurisprudence extends to the other freedoms is uncertain though—and it has been held that Article 28 is unsuitable for enforceability against private actors. It has also been argued that the provisions regarding workers are simply ‘different’ and that discrimination against workers is regarded as ‘graver’ than discriminating against goods for instance.

Even if certain Treaty provisions have horizontal direct effect, the usefulness of this can be undermined where the rights are ‘developed in more detail in secondary legislation’ such as directives, which do not have horizontal enforceability. For example, legal provisions on sex discrimination are to be found in the directly effective Treaty provision, Article 141 EC, but there are a number of directives giving substance and detail to that Treaty provision. The ECJ has used three techniques, however, to extend the reach of directives.

First, national law must be interpreted ‘in conformity with’ relevant directives to create ‘indirect effect’ and this interpretive obligation applies to actions between individuals, as well as to actions between the individual and the state. Thus, if a private delegate of governmental power and an individual are in litigation, neither may rely on provisions of domestic legislation which conflict with the requirements of a Community directive. The interpretive method can result in obligations being imposed directly on private actors, as in the case, where the German Red Cross was obliged to modify its employment practices in order to comply with an EC Directive. Second, through a technique used by the Court known as ‘incidental horizontal effect’, directives may be invoked to have what Craig and de Búrca describe as ‘exclusionary’ effect. That is, a directive removes the applicability of a national law that is not in compliance with

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385 Case C-411/98 Ferlini v Centre Hospitalier de Luxembourg [2000] ECR I-8081 [50].
386 Angonese (n 377) [36].
387 Wyatt and Dashwood (n 382) 777 [19-020].
388 Case C-159/00 Sapod Audic v Eco-Emballages SA [2002] ECR I-5031 [74]; see also Wyatt and Dashwood (n 382) 155 [5-019].
389 Cruz (n 383) 115; see also W van Gerven, ‘The Recent Case Law of the Court of Justice Concerning Articles 30 and 36 of the EEC Treaty’ (1977) 14 CML Rev 5, 24 (suggesting that the Court considers the ‘fundamental character’ of the relevant provision before applying it horizontally).
390 de Búrca (n 342) 33.
394 Craig and de Búrca (n 379) 220–21.
it, but does not, as such, substitute substantive EC obligations for either party.\footnote{395} The effect will usually be, however, that one party will lose the benefit of the non-complying national law or, as the ECJ itself has put it, suffer ‘mere adverse repercussions’\footnote{396}—such that the effects of the directive will in fact be borne by a private party. This technique is unlikely, however, to result in the imposition of a rights obligation on a private actor.

Third, and most interesting from the perspective of the present task of redefining the public sphere, the ECJ adopts a fairly generous understanding of the state ‘as including all organs of the State’\footnote{397} and ‘decentralized authorities such as municipalities’.\footnote{398} A person’s role and powers which mean that he does not act ‘as a private individual’ are relevant.\footnote{399} According to the Foster v British Gas formula, the provisions of a directive capable of direct effect are enforced against a body, ‘whatever its legal form’ which has been (i) made responsible pursuant to a measure adopted by the state, (ii) for providing a public service under the control of the state and (iii) for that purpose has special powers beyond those which result from the normal rules applicable in relations between individuals.\footnote{400} This test has been effective in reaching beyond strictly national bodies to local or regional authorities,\footnote{401} public authorities providing health services,\footnote{402} constitutionally independent authorities such as the police,\footnote{403} and a local land consolidation committee.\footnote{404} In reaching private delegates in the sense being discussed here, though, a few issues arise.\footnote{405}

The first criterion clearly fits well in the delegation context.\footnote{406} However, while a statute will no doubt constitute a ‘measure adopted by the State’,\footnote{407} can a contract constitute a ‘measure adopted by the State’? Advocate-General van Gerven in Foster encouraged a generous scope for this criterion, indicating that it should


\footnote{396} Wells (n 395) [57].

\footnote{397} Opinion of AG Slynn in Case 152/84 Marshall v Southampton and South West Hampshire Area Health Authority [1986] ECR 723, 735.

\footnote{398} Case 103/88 Fratelli Costanzo SpA v Comune di Milano [1989] ECR 1839 [31].

\footnote{399} Case 222/84 Johnston v Chief Constable of the RUC [1986] ECR 1651 [56].

\footnote{400} Foster (n 378) [20].

\footnote{401} Fratelli Costanzo (n 398) [31].

\footnote{402} Marshall (n 397) [49]–[50].

\footnote{403} Johnston (n 399) [56].


\footnote{405} See generally Clapham (1993) (n 4) 266–8.

\footnote{406} See above 1.1.1.

\footnote{407} Cross v Highlands and Islands Enterprise 2001 SLT 1060 (OH) [112].
not be necessary for a service to have been specifically delegated for the private actor to have been made responsible.¹⁴⁸ In the English courts, this criterion has been given quite a narrow interpretation, however. In the case of Doughty v Rolls Royce plc, a distinction was drawn between providing services to the state and providing them ‘to the public for purposes…of benefit to the state’.¹⁴⁹ Thus Rolls Royce, which provided defence equipment to the government, could not be said to have been made responsible for a ‘public service’, even though its services were ‘of importance to the defence of the realm, an activity peculiar to the state, and…liable to become even more so in time of war’.¹⁵⁰ While accepting that a provider of goods to government should not automatically be deemed to be a private delegate, this distinction between providing goods directly to the public and indirectly to the public, through the intermediary of the state, should not be taken too far.¹⁵¹ As suggested above in Chapter One, private delegation may involve purely bilateral arrangements between the government and the private delegate; and there are times when investigatory or advisory services, procured from private delegates for government, will ultimately determine final government policy.¹⁵² Such actors should not necessarily be excluded from rights obligations because of the fact of the governmental intermediary. Furthermore, the search for a ‘measure adopted by the state’ can also be complicated. In the English National Union case, involving a public school, the requirement was fulfilled because a predecessor of the school had derived its authority from an amendment to a statutory order made by the local education authority pursuant to statutory powers granted to it.¹⁵³ Direct statutory authorization does not seem to be necessary, but the judge made it clear that he was finding a statutory link.

The second criterion is quite helpful, because it focuses on the function being performed, rather than the body performing it. As emphasized by Mr Justice Blackburne in the case of Griffin v South West Water Services Ltd, ‘[t]he question is not whether the body in question is under the control of the State but whether the public service in question is under the control of the State’.¹⁵⁴ Consequently, the learned judge was able to conclude that a privatized utility was an emanation of the state. The problem is, though, that delegation will often mean that the state retains little or no control over the performance of the function in question. With the English housing association cases, for instance, the local authority did not seem to retain significant control over the provision of accommodation by Leonard Cheshire, Poplar Housing or Southern Cross, and certainly not enough to compel Leonard Cheshire or Southern Cross to continue to provide

⁴⁰⁸ Foster (n 378) Advocate-General Opinion [8], [18].
⁴⁰⁹ [1992] 1 CMLR 1045 (CA) [25].
⁴¹⁰ Ibid.
⁴¹¹ The distinction has been propounded in subsequent case law: see, eg, Cross (n 407) [111].
⁴¹² Above 1.1.1.
⁴¹³ National Union of Teachers v Governing Body of St Mary’s Church of England (Aided) Junior School [1997] 3 CMLR 630 (CA) [42].
⁴¹⁴ [1995] IRLR 15 (Ch) [94] (emphasis in original).
the service. The third criterion, the ‘special powers’ requirement, is potentially limiting, and, as Clapham has pointed out, a professional association may expel a member without relying on special powers.⁴¹⁵

6.3.3.3 The Court’s fundamental rights and the Charter

As noted above, the Court’s fundamental rights principles are only applicable to acts of EU institutions or Member States where the Member State is implementing its Union obligations, acting in derogation of Community law, or acting within the scope of Community law; and it is likely that the Charter, should it become legally binding, would have similar effect. The reasoning governing the reach of fundamental and Charter rights where a private delegation has taken place, in turn, depends on whether the delegation has been made by an EU institution acting within the sphere of its competences, or whether it has been made by a Member State ‘implementing Union law’.

(a) Delegation by an EU institution

The question of whether the private delegate of an EU institution would be subject to fundamental and Charter rights obligations depends on how the Meroni non-delegation doctrine is applied. As already stated, the Meroni doctrine requires that no more power be delegated than that which the delegating authority enjoys itself. Accordingly, to hold that private delegates of EU functions are not bound by human rights would undermine the spirit of Meroni, which seeks to ensure the legitimacy of delegation—a goal that would be defeated if a private delegate, exercising a data collection purpose, was able to violate the privacy rights of EU citizens with impunity. To hold private delegates not bound by human rights would also seem to undermine the spirit of the Financial Regulation, which, as was seen in Chapter Five, demonstrates an acute awareness of the potential risks of private delegation. Of course, as was shown in Chapter Four, the extent to which the Meroni doctrine is rigorously applied is often debatable.⁴¹⁶ Nonetheless, if the Court were to find a private Union delegate free to violate human rights while implementing EU tasks, this would create not only a tension but a direct conflict with the Meroni principle. A coherent application of the Meroni principle therefore demands that private delegates of the Union are subjected to the human rights principles found in the Court’s jurisprudence—or that the delegation is invalidated.

(b) Delegation by a Member State

If a Member State were to delegate duties it was to perform on behalf of the Union, the question of whether the general principles of the Court’s fundamental rights jurisprudence would apply to that private delegate may be more complex.

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⁴¹⁵ Clapham (1993) (n 4) 268.
⁴¹⁶ Above 4.3.1.3.
Although such a case does not seem to have arisen, the likely answer would seem to be that the Court’s principles would bind the private actor. For a start, the Meroni principle would seem to compel the conclusion that the Member State’s private delegate is bound by either the fundamental rights jurisprudence or the Charter, since the Member State itself would be—although there is no evidence as to whether Meroni would be applied to Member States acting within the scope of EU law and the principle of institutional balance on which Meroni is based clearly does not apply to Member State delegation.⁴¹⁷ More relevantly, perhaps, it is likely that the ECJ might adopt a generous understanding of the ‘state’, similar to what happened in the Foster case, in order to ensure the effective application of EU law. At the EU level, the question of whether or not a private actor should be bound by the Court’s fundamental rights jurisprudence is not driven by the same concerns that underpin the question of human rights enforceability at the national level. At the national level, the dialogue is based largely on the abstract question of the extent to which ‘public’ and ‘private’ should be treated differently. In the EU context, however, as was discussed above in Chapter Two,⁴¹⁸ the public-private distinction is ‘mutating’⁴¹⁹ and the dialogue is often based primarily on the need to secure the effectiveness of EU law—or the ‘eff et utile’ principle. This would give the ECJ an incentive, which has no equivalent at the national level, to find private delegates bound by ECJ or Charter human rights obligations.

The implications of this principle of effectiveness in the private delegation context are interesting. It is built on a desire to ensure the ‘simultaneous and uniform application in the whole of the Community’ of EC law.⁴²⁰ Furthermore, the Member States may neither adopt nor allow national organizations having legislative power to adopt any measure which would conceal the Community nature and effects of any legal provision from the person to whom it applies.⁴²¹

If a Member State is not able to adopt a measure that would conceal a Community right from the person to whom it applies, then it seems, by analogy, that a Member State should not be able to adopt a method of service delivery that would conceal a Community right from the person to whom it applies. A lack of uniformity would be created in the application of EU law if, for example, in one Member State a citizen’s right to privacy was protected because the government performed its Common Agricultural Policy (‘CAP’) duties in-house, yet a citizen in another Member State, in the exact same situation, had no protection of the right to privacy because the second Member State had chosen to fulfill its CAP duties

⁴¹⁷ See above Ch Four (4.3.1.3) and Case C-301/02 Tralli v European Central Bank [2005] ECR I-4071 [46].
⁴¹⁸ Above 2.3.3.1.
⁴²⁰ Commission v Italy (n 376) [17].
⁴²¹ Case 50/76 Amsterdam Bulb BV v Produktschap voor Siergewassen [1977] ECR 137 [7].
through contracting-out. Quite simply, unless the ECJ adopted a generous definition of the ‘state’, citizens would have different levels of protection depending on their state’s chosen method of service provision. This is certainly the reasoning that the Court seems to have adopted in the past, and it has made it clear that national understandings of ‘public’ and ‘private’ are irrelevant in the Community context, and that national rules ‘must be reconciled with the need to apply Community law uniformly so as to avoid unequal treatment’. A quick perusal of the reach of the ‘state’ in other areas of the ECJ’s jurisprudence also indicates that the ‘effet utile’ principle has led to the adoption of a functional, rather than an institutional, approach by the ECJ.

Thus, for example, for the purposes of the Article 39(4) exception to unrestricted movement of workers within the Community for ‘employment in the public service’, the definition of ‘public service’ has been narrow, only referring to those employment positions where there is responsibility for ‘safeguarding the general interests of the State’. A narrow interpretation of ‘public service’ in this context enables a wide application of the Treaty article. Similarly, in the competition law realm, where a company is charged with management of ‘services of general economic interest’, Articles 81, 82, and 87 EC only apply to the extent that they do not interfere with the fulfilment of the specific mission assigned. Here, where some relief from Community law is given to public companies, there is a wide understanding of a private company, thereby reducing the scope of exemptions from Community law. ‘The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed’.

In other contexts, however, the concept of ‘state’ or ‘public’ is given broad reach, if this would assist the application of Community law. For the state aid rules, (Articles 87 et seq), the term ‘state’ has included all aid granted by a Member State, whether that aid is ‘granted directly by the state or by public or private bodies established or appointed by it to administer the aid’—thereby clearly covering delegation to a private party. Similarly, in the public procurement context, the Court has urged that the notion of a ‘contracting authority’ be given ‘an interpretation as functional as it is broad’, in light of the aims of competition and transparency. In the Beentjes case the Court reasoned that ‘the term “the

422 See, eg, Case C-35/96 Commission v Italy [1998] ECR I-3851 [40].
426 EC Treaty Art 86; see also Chiti (n 424) 477.
427 Commission v Italy (n 422) [36].
429 Case C-283/00 Commission v Spain [2003] ECR I-11697 [73].
430 Beentjes BV (n 404).
Delegation of Governmental Power to Private Parties

State” must be interpreted in functional terms’ as otherwise the purpose of the Directive 71/305/EEC on public works procurement would be ‘jeopardized’ if it was held inapplicable just because a body was ‘not formally a part of the State administration’.⁴³¹ Accordingly, it was held that a local land consolidation committee was a body subject to the directive because its composition and functions were laid down by legislation and because it depended on the authorities for the appointment of its members, the observance of the obligations arising out of its measures and the financing of the public works contracts it awarded.⁴³² Although the land consolidation committee happened to have a legislative source, there is no sense in which the ECJ’s listing of the criteria represented an absolute definition of ‘the state’. What is important to take from the judgment is the ‘functional’ interpretation applied by the Court, and its concern to interpret the meaning of the term ‘state’ in such a way as to ensure the broadest possible application of the Directive.

Of course, the ECJ is not the only court that varies its understandings of ‘public’ according to context: national courts also have different definitions of ‘public’ for different contexts. Interestingly, the US courts adopt quite a generous interpretation of ‘sovereign’ functions where such characterization results in immunity from liability for ultra vires representations.⁴³³ And, clearly, the ECJ applies some of the same criteria that are considered important at the national level—as shown in the Foster analysis. However, the Court is usually persuaded by the approach that will result in furthering the reach of EU law and, in this way, none of the criteria assumes excessive importance. In the private delegation context, finding the private delegate bound by human rights obligations would most likely enhance the application of EC law and would therefore most likely be the Court’s preferred option.

6.4 Private Delegates and Human Rights: An Appropriate Test

As a point of principle, it is the Meroni test which is the most appealing, and the merits of this test have already been discussed in detail in Chapter Four.⁴³⁴ Following the interpretation of Meroni suggested here, the test for

⁴³² Ibid [12].
⁴³³ It is generally held that, aside from situations of affirmative misconduct, estoppel cannot bind the government in the exercise of its sovereign functions, which has included where governmental actors are enforcing health and safety regulations (Pacific Shrimp Co v US Department of Transport 375 FSupp 1036 (WD Wash 1974)) and administering the dictates of social security legislation (Schweiker v Hansen 450 US 785 (1981)). See VM Movshovich, ‘Ultra Vires Representations and Unlawful Decisions in English Administrative Law, in Comparative Perspective’ (MLitt thesis, University of Oxford 2006) 49–50. Yet the power of deprivation of liberty does not constitute ‘state action’ for the purpose of constitutional obligations: see above 6.3.1.1(c).
⁴³⁴ Above 4.3.1.1–4.3.1.2.
extending human rights obligations to private delegates would simply be proof of delegation. The very fact that a private actor is performing a function previously undertaken by a governmental actor would suffice to subject that private actor to human rights duties. Unfortunately, however, this principle only really seems to be potentially applicable in the EU context—and so it is also necessary to consider the alternative possibilities for an appropriate test to determine the reach of human rights in the absence of such a non-delegation doctrine.

As has been seen, many different factors have been considered by the courts for the purpose of holding (or not holding) private actors liable for human rights violations. Joint participation, nexus, public function, source of power, provision of public services, special powers, and state control have all been considered. The US joint participation test is of limited usefulness, since delegation intends that the task will be performed by the delegate and not the state. A nexus test to the private delegate is also unhelpful, as often, when a task is delegated, there will be very few convincing connections between the state and the private delegate. The English emphasis on contract, as applied in Leonard Cheshire and the House of Lords YL case, is particularly unhelpful: in the modern era of delegation, it is contract and not statute that is the most commonly used mechanism for transfer of power from government to the private actor. If power delegated by contract is to be removed from the scope of the HRA, the courts will send a signal to government that all it has to do to avoid human rights obligations is to delegate using contract, rather than a transfer of stock as in the Poplar case or a statutory underpinning. It is regrettable therefore that the majority in the House of Lords in YL did not follow Buxton LJ’s analysis in the Court of Appeal, which placed no emphasis at all on the presence of contract. Similarly, for US federal courts, if the function is considered to be a public function, the manner in which it is delegated to the private delegate is unimportant. Unfortunately, though, the US analysis of what counts as a ‘public function’ renders it exceptionally difficult to find a ‘public function’. The likelihood of demonstrating that any task is the exclusive and traditional responsibility of government is slim. The EU Foster test is potentially more helpful but, as already noted, has its limitations in the state control and state measure criteria.

Of course, in all of this, what must also be remembered is that all the tests are infinitely malleable and ‘subjective’, as Lord Neuberger described it in YL. Apart from the source of power test, every test could actually be interpreted to reach private delegates. A generous understanding of ‘public function’, a less stringent nexus test, and the inclusion of contract as a ‘measure adopted by the State’ would all lead to enforcement of rights obligations against private delegates. In the end, as Cane has noted,

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435 Above 6.3.3.2.
436 YL (n 13) [128].
the only way of deciding whether a function is public or private . . . is to apply norma-
tive criteria about the desirable reach of human-rights norms. Functions are ‘public’ or
‘private’ only because we make them so for particular and varied purposes. ⁴³⁷

Given that it has been argued here that private delegates should be held liable
for human rights violations, this author would have no difficulty applying the
various tests in such a way as to reach private delegates. Returning to the facts of
Leonard Cheshire and YL, the housing association could, for instance, be found
to fulfil the Foster criteria and be part of the state for the purpose of enforcing an
EU directive: Leonard Cheshire and Southern Cross were made responsible for
provision of welfare accommodation pursuant to a measure adopted by the state,
a contract; the provision of this accommodation was a public service under the
control of the state and regulated by statute; and Leonard Cheshire and Southern
Cross exercised authority over the recipient of welfare housing, enjoying a power
of eviction. However, a proponent of narrow verticality would argue that a con-
tract is not a measure adopted by the state; that, adopting the analysis of Lord
Woolf and the majority in YL, the function was merely provision of accommoda-
tion which is not public; and that the authority enjoyed by Leonard Cheshire and
Southern Cross was not ‘special’ since it was just a power to evict—a power that is
shared with every landlord.

Clearly, therefore, it is necessary to turn to a normative perspective to provide
guidance on which type of test may potentially be the most useful. The primary
reason suggested above for holding private delegates liable for human rights vio-
lations was because they exercise governmental power. ⁴³⁸ The test that derives
most naturally from this normative position is a test that considers what it is
that the private delegate does: a ‘public function’ test. A ‘test of public function
should be overriding’⁴³⁹ or, to return to Justice Stevens, it is the nature of the
power, rather than the identity of the holder that matters. A public function test,
rather than a nexus or source of power test, most closely maps the justification for
holding private delegates liable for human rights violations. However, a different
formulation of the ‘public function’ test, from that currently used by the courts in
all three jurisdictions, is urgently required.

While accepting that YL now constitutes the leading case in England, as a
general point of principle, it is actually the analysis of Lord Nicholls in the Aston
Cantlow case which provides the most useful starting point for achieving a ‘new
definition of the public sphere’. To recap, Lord Nicholls suggested that four cri-
teria be considered: the extent of public funding of the body for performance
of the particular function, the exercise of statutory powers, the extent to which
the body is taking the place of local or central authorities, and the provision of

⁴³⁷ Cane (n 214) 45.
⁴³⁸ Above 6.2.1.
⁴³⁹ Sir Harry Woolf, JL Jowell and AP Le Sueur, De Smith, Woolf and Jowell: Judicial Review of
Human Rights Controls on the Delegate

Application of the ‘public funding’ criterion could mean that recipients of grants may be liable for human rights violations. As was considered in Chapter Five, grants can constitute a mechanism of delegation of governmental power and, accordingly, it will often be appropriate to hold grant recipients liable for human rights violations. Application of a criterion of ‘exercise of statutory powers’ is also very relevant—but, as noted above and as was demonstrated by YL, would only be successful in reaching private delegates if a direct link between the statute and the function is not mandatory. Application of the third criterion clearly aims to address the central issue of delegation: the replacement of government with a private actor. This is exactly what private delegates do: they take the place of government. As for the final criterion, definition of a ‘public service’, again as was noted above, at a minimum, a service should be considered to be ‘public’ where the government has a legislative or constitutional duty to provide a particular service—a formulation proposed by Schneider in the US context. It should also be relevant in defining ‘public service’, as was implicit from the judgment of Lord Scott in Aston Cantlow and explicit in the judgments of Baroness Hale and Lord Bingham in YL, that it is being performed in the ‘public interest’. If the government is under a statutory or constitutional obligation to perform a function, and performance of that function would be subject to human rights constraints if performed by government, it should be subject to such constraints when performed by private delegates. This echoes the reasoning of the US federal West v Atkins jurisprudence, regarding the state’s Eighth Amendment duty to provide health care to those in prison or committed to state hospitals. It also reflects the position taken in section 1 of the English Human Rights Act 1998 (Meaning of Public Authority) Bill. Thus, in the US Rendell-Baker case, as argued by counsel for Rendell-Baker in the petition for certiorari, the question should have been,

whether an ostensibly private school becomes subject to any constitutional constraints when it accepts the delegation of a major portion of the State’s statutory obligation to provide public education.

In the same vein, in the Court of Appeal in YL, Buxton LJ was persuaded by the fact that private care homes were crucial to the government’s performance of its section 21 duty to provide welfare accommodation pursuant to the National Assistance Act 1948. Likewise, the minority in the House of Lords in YL stressed the assumption of responsibility by the state for the activity in question. In Poplar Housing, Leonard Cheshire and YL, it should have sufficed that the local authorities were under a statutory duty to provide the accommodation in question. Had housing associations not performed the task on behalf of the local authorities, the

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440 Aston Cantlow (n 15) [12].
441 Schneider (n 48) 1167–8.
442 Above 6.3.1.1(c).
443 Petition for Certiorari (n 11) 18.
authorities would have been obliged to provide the accommodation themselves. In all these cases the associations took over the duties of the local authorities and, as far as the victims were concerned, stepped into their shoes—hence engendering a reasonable expectation that they would be required to act similarly to the local authorities.

One advantage with this analysis is that it removes some of the normative and political dispute surrounding whether or not a function is ‘public’—a debate charged with ideological conflict. For Hayek, for instance, the only goods that are truly ‘public’ are those that cannot, or will not, be provided through the market, but which are necessary for its functioning.⁴⁴⁴ Meanwhile, from a social welfare perspective, the state should have responsibility for a much wider range of functions, including re-distributive activities, all of which are ‘public’. A formulation which considers whether government is currently under an obligation to perform a function, or whether a function is currently being performed for the public interest, is useful because it replaces a difficult political debate with a factual inquiry. Another advantage with this formulation is that it protects reasonable public expectations. If government is under a duty to provide a particular service, or if a service is being performed in the public interest, this provides a strong basis for public expectations that the performance of that function, whether by a public or a private actor, will be constrained by human rights obligations.

Three final issues require mention. The first concerns whether the standard of review should vary if it is the action of a private delegate, rather than a governmental actor, which is the cause of the interference with the human right. As was discussed above, this creates a peculiar difficulty in the English context when allied with the issue of ‘victim’ status under Article 34 of the ECHR and with the government-centred focus of the justifications for interference with the qualified rights.⁴⁴⁵ This is not insurmountable, as was also outlined above, but it does create difficulties. Similarly in the US, an interference with rights is often justified on the basis of either a ‘compelling’ or a ‘legitimate’ state or governmental interest.⁴⁴⁶ In the EU, interference with fundamental rights is justified if in the ‘public interest’ or in furtherance of the ‘overall objectives pursued by the Community’,⁴⁴⁷ and with Charter rights if the interference is ‘necessary and genuinely meet[s] objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others’.⁴⁴⁸ As noted above, where private delegates are performing governmental functions, they can be expected to justify their actions by reference to the types of justification available to governmental actors. In the US, the text of the state and federal constitutions usually

⁴⁴⁵ Above 6.3.2.3.
⁴⁴⁸ Charter Art 52(1).
do not provide specific justifications, and so it would be open to the courts to balance the interests of the private delegate against those of the victim. Moreover, it is well-accepted that courts can apply different levels of intensity of review according to the circumstances.⁴⁴⁹

Second, it is also important to recall the interaction between controls on the delegator and controls on the delegate. A strong non-delegation doctrine can, in turn, influence the question of how delegates are controlled. Thus, the Meroni doctrine has the potential to influence the scope of the application of the Union’s human rights schema. In the US context, a similar development has been called for, and Metzger has urged modification of the delegation doctrine, to include a requirement that a delegation be invalidated if proper provision is not made for constitutional rights observance by the private delegate.⁴⁵⁰ Given the current state of both the delegation and state action doctrines in the US, though, this development seems unlikely to happen soon.

Finally, it is regrettable that the judiciary, particularly in the English context, continue to place excessive emphasis on the presence of the contract in this context. In Poplar Housing, Lord Woolf noted that the Poplar Housing was ‘no more than the means by which’ Tower Hamlets sought to perform its statutory duty to house the homeless. But surely Leonard Cheshire and Southern Cross were ‘no more than the means by which’ the local authorities performed their statutory duty to provide accommodation for the elderly and infirm. Moreover, as Bailey has observed, it is unsatisfactory for the courts to assume that the applicability of one legal regime, contract, automatically excludes the applicability of another regime.⁴⁵¹ Bailey notes that it is well-established that the existence of a contractual relationship between parties is not a bar to tort liability.⁴⁵² Likewise, the existence of a contractual relationship should not be too readily assumed to exclude human rights liability. Contract is no more and no less than a mechanism for transferring a function from a governmental to a private actor. In this era of contracting-out and privatization, it is unacceptable not to account for this.
