

PUBLIC AUTHORITIES AND PRIVATE BODIES

RICHARD GORDON Q.C.

Pt 1: Introduction

1. The categorisation of a *public authority* within the meaning of the Human Rights Act 1998 ('HRA') has aroused controversy. This is because, in general terms at least, the broader the definition the wider the 'reach' of the HRA.
2. In this Paper I advocate a **selectively broad** definition. I do so for 3 principal reasons. They are that:
 - (i) The HRA purports to bring rights home. A broad definition of the term *public authority* achieves this objective; a narrow one does not.
 - (ii) In an era of increasing privatisation and contracting-out there is a real risk of erosion of fundamental rights protection unless a broad meaning is given to the term *public authority*.
 - (iii) A narrow approach to *public authority* stems from policy and syntactical concerns that are misplaced.
3. Before seeking to support my approach and to arrive at a suggested meaning I will outline the statutory provisions and relevant case-law to date.

Pt 2: HRA and Caselaw

4. HRA s. 6(1) makes it unlawful for *public authorities* to act in a way that is incompatible with the ECHR. The expression *public authority* is left undefined.

5. The effect of HRA s. 6 is that ‘*core*’ public authorities (such as government departments, local authorities or the police) are required to comply with ‘*Convention rights*’ in *all* their activities whether (in ordinary language) ‘*public*’ or ‘*private*.’
6. The expression ‘*core public authority*’ does not find its way into HRA. But in *Aston Cantlow and Wilmcote Parochial Church Council [2003] 3 W.L.R. 283* (‘*Aston Cantlow*’) the House of Lords (see, especially the speech of Lord Nicholls) considered that such an authority was ‘*an authority falling within section 6 without reference to section 6(3)*’ (see para 8). Importantly, a core public authority could not, in the view of the House of Lords, ‘*ever claim to be a victim of an infringement of Convention rights*’ (*ibid*). This is because, in substance, a ‘*core*’ authority is, effectively, a governmental organisation.
7. The reference to HRA s. 6(3) is significant. By virtue of HRA s. 6(3)(b), *other* public authorities – sometimes called ‘*hybrid*’ authorities – are required to comply with Convention rights only when exercising a *public* function. The rationale for having ‘*hybrid*’ authorities is that such bodies may, from time to time, exercise functions of a governmental nature even though they are non-governmental bodies and, therefore, capable of themselves being the victim of an infringement of Convention rights.
8. The dichotomy between ‘*core*’ and ‘*hybrid*’ public authorities is highly significant. Although it was a dichotomy recognised at the time that the HRA was drafted, at least as various Ministerial statements at the time suggest, its significance has only recently emerged as a result of the decision in *Aston Cantlow*.
9. In *Aston Cantlow* the House of Lords held (overruling the Court of Appeal) that a parochial church council was not a ‘*core*’ public authority. The majority (Lord Scott dissenting) held that the function of enforcing a landowner’s liability to contribute to chancel repairs was not a public function so that, in respect of that function, the pcc was not a hybrid authority either.

10. The importance of *Aston Cantlow* is, I believe, that it highlighted the policy reasons for giving a restrictive interpretation to the meaning of a ‘core’ authority but giving a more generous interpretation to the meaning of a ‘hybrid’ authority.

11. In essence, a ‘core’ authority should be interpreted relatively narrowly. As Lord Nicholls said (at para 8):

‘ ... This feature, that a core public authority is incapable of having Convention rights of its own, is a matter to be borne in mind when considering whether or not a particular body is a core public authority. In itself this feature throws some light on how the expression “public authority” should be understood and applied. It must always be relevant to consider whether Parliament can have intended that the body in question should have no Convention rights.’

12. On the other hand (see Lord Nicholls at para 11):

‘Unlike a core public authority, a “hybrid” public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights. A hybrid public authority is not a public authority in respect of an act of a private nature. Here again, as with section 6(1), this feature throws some light on the approach to be adopted when interpreting section 6(3)(b). Giving a generously wide scope to the expression “public function” in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary.’¹

13. Earlier cases, whilst referring to the distinction between ‘core’ and ‘hybrid’ authorities had simply failed to recognise its significance.² Once one understands

¹ Factors that Lord Nicholls considered to be relevant touchstones (see para 12) are the existence or otherwise of public funding, the exercise of statutory powers, whether the authority is taking the place of central government or a local authority or is providing a public service.

² See, most notably, *Poplar Housing and Regeneration Community Association v. Donoghue* [2002] Q.B. 48 (held: housing association, providing rented accommodation, was a hybrid public authority exercising on the facts of that case public functions largely because in that case the role of the housing association was so closely assimilated to that of the local authority that it was performing public and

that there are policy reasons for adopting both a broad or a narrow approach the question ‘*what is a public authority?*’ ceases to be monolithic. It is capable of being answered flexibly *and as a matter of policy*.

What is the problem?

14. Professor Dawn Oliver, at University College London, is perhaps the strongest proponent of a narrow definition of ‘public authority.’ Her article ‘*The frontiers of the state – Public authorities and public functions under the Human Rights Act*’ [2000] *Public Law* 476 was rightly described in *Aston Cantlow* as ‘valuable.’ It is, indeed, a valuable source for the various indicia that go towards recognition of a body exercising public functions.

15. However, the thesis advanced by Professor Oliver and others for a narrow definition of ‘public authority’ appears to argue for a narrow definition *across the board*. The argument is (no doubt crudely paraphrased) as follows:

- (i) There is a difference between an *institutional* and a *functional* definition of that which constitutes a public authority. Much confusion has arisen by the Courts accepting the proposition that an institutional relationship between an authority and the State characterises, in some fashion, whether the authority should be regarded as a public authority. The simple point is that the definition in HRA is functional rather than institutional.
- (ii) The case-law to date (including *Aston Cantlow*) has also focussed on the nature of the body (i.e. whether it is ‘hybrid’) as opposed to examining the nature of the functions – functions cannot be hybrid; they are either one thing or the other.

not private functions: see para 66); *R (Heather) v. Leonard Cheshire Foundation* [2002] 2 All E.R. 936 (held: a charity managing a care home for the elderly was not exercising public functions albeit that it was doing so under a statutory arrangement); *R (A) v. Partnerships in Care Ltd* [2002] 1 W.L.R. 2610 (held: a private provider of mental health care was a hybrid authority exercising public functions because its function was similar to that of running a prison); *R (Beer) v. Hampshire Farmers Markets Ltd* (2003) 31 EG 67 (held: the fact that a private company owed its existence to a county council and was set up by that council and that the company stepped into the shoes of the county council and was assisted by the council in a number of ways was sufficient to justify the conclusion that the company was acting as a “hybrid” public authority).

- (iii) There is a '*transferred epithet*'³ in calling a function a 'public function': the HRA refers to '*functions of a public nature.*' The latter clearly means the intrinsic nature of a particular activity whereas the former can mean acts performed by a public body and, therefore, heightens the syntactical confusion whereby institution rather than function is emphasised.
- (iv) If one focusses on the terminology used in HRA and approaches the problem of definition from a constitutional perspective it is apparent that whether or not functions of a public nature are being exercised must be construed restrictively because: (a) it will be the activity rather than the nature of the body driving the definition (this will restrict the effect of Court decisions to date which have focussed on the body in question) and (b) the constitutional dimension of exercising public functions is that they are provided selflessly, and for the public benefit – this is not true of a large number of private providers.

What is the solution?

16. The solution is, surely, hinted at by *Aston Cantlow*. Underlying the reasoning there is a twin-track approach to policy. There is a sound basis for restricting the number of 'core' authorities who are restricted in all that they do by the overarching supervision of the HRA. But there is no such basis for limiting the 'reach' of the HRA to 'hybrid' authorities and so extending the type of function that may be controlled by the Courts.

17. As Lord Nicholls said in *Aston Cantlow* (at para 6)

' ... the broad purpose sought to be achieved by section 6(1) is not in doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights. If they act in

³ This is a phrase deployed by Professor Oliver in a draft article on the subject of public authorities.

breach of this legal obligation victims may henceforth obtain redress from the courts of this country. In future victims should not need to travel to Strasbourg. [Emphasis added].

18. It is, therefore, the practical protection of fundamental rights that should inform the Court's approach. What is in question is not (or should not be) an arid dispute as to the theoretical indicia that make up an institutional '*public authority*': rather, what is in question is the practical and effective protection of fundamental rights in a given case.

Conclusion

19. I am unclear as to why it matters whether an authority is a 'core' or a 'hybrid' authority. But I agree that the concept of core authorities should be restricted for, essentially, the same reasons advanced in *Aston Cantlow*. However, to say that one should examine only the intrinsic function exercised by a "hybrid" authority and divorce it from its institutional context is, I suggest, to elevate form over substance.

20. The need to restrict the definition of a 'core' public authority is to recognise the constitutional dimension that a true public authority does not itself enjoy fundamental rights. But the same concerns do not affect 'hybrid' authorities. I tend to agree that the concept of a 'hybrid' authority is slightly confusing but that is, I suggest, unimportant. In examining whether or not the function being exercised is or is not a function of a public nature the Court *must* examine the institutional relationship between the exercise of the function and the proximity of exercise of that function to violation of a Convention right if the State were exercising that function. If the position were otherwise it would mean that 'core' authorities could simply transfer responsibility to the private sector.