

Positive obligations and privatisation

DR CATHERINE DONNELLY*

Trinity College Dublin

Introduction

The aim of this short article is to examine the impact, if any, of the positive obligations jurisprudence of the European Court of Human Rights (ECtHR) on private provision of public services in the United Kingdom. In order to explore this question properly, the following issues will be considered: first, different forms of privatisation, which must be understood in order properly to appreciate the impact of positive obligations; second, the theoretical underpinnings of a discussion of positive obligations and privatisation; third, the effect of positive obligations on the remedies available for human rights violations where privatisation has occurred; and, fourth, the potential impact of positive obligations on the government's privatisation decisions.

Overall, it will be seen that, on a theoretical level, positive obligations create tensions with privatisation. On a practical level, those tensions translate into a modest twofold interaction with privatisation. First, where provision of public services has been privatised, positive obligations may result in unexpected distinctions in the scope of remedial protection for breaches of positive and negative obligations in the European Convention on Human Rights (ECHR). Second, and perhaps more interestingly, it may be possible to develop limited constraints on the government's privatisation decisions from the positive obligations jurisprudence, both in terms of the government's capacity to privatise and, more particularly, in terms of the manner in which it privatises.

Privatisation in context

Although often narrowly interpreted as transfer of state assets, in fact, there are many forms of privatisation¹ and the term is used more broadly here to describe private performance of what are usually thought to be governmental functions. Private performance can generally arise in a twofold way. The first is probably more easily recognisable as privatisation as it involves outsourcing by government – whether through legislation, contract or grant – such that the government no longer performs certain functions itself, although it maintains overall responsibility for the delivery of the functions. This involves

* Lecturer in Law, Trinity College Dublin; Barrister, Blackstone Chambers, London and Law Library, Dublin.

1 See e.g. J J Hansen, "Limits of competition: accountability in government contracting" (2003) 112 *Yale LJ* 2465, p. 2466, n. 6 (noting that privatisation can include divestiture of government assets, deregulation, vouchers, tax reductions or user fees, quasi-private corporations, and contracting out).

the classic understanding of privatisation as entailing a move from “rowing to steering”.² By contrast, what has sometimes been described as “bottom-up” privatisation can also arise, usually involving withdrawal from service provision by government or fostering of private sector service provision.³

Starting with outsourcing, in the UK, this form of privatisation is generally associated most strongly with the Thatcher period, which has been described as having a “pathological . . . antipathy to the public sector *per se*” and an “ideologically driven obsession” with constraining it.⁴ However, although driven by Thatcherite policies, outsourcing did not abate in the Labour era. For example, private prisons were inaugurated under Thatcher, yet withstood the election of the supposedly centre-left Blair governments, even though the Labour Party had actually gone on record in the mid-1990s vowing to re-nationalise all prisons on the termination of contracts.⁵ Outsourcing is commonplace now in the UK, with private actors exercising discretionary authority in a wide variety of circumstances including residential care for the elderly,⁶ welfare accommodation,⁷ foster placements and adoption agencies,⁸ crime and justice,⁹ prison privatisation,¹⁰ and military and defence activities.¹¹ In the context of crime and justice, the Crime and Disorder Act 1998 enabled local authorities to contract out functions relating to the bringing of applications for anti-social behaviour orders,¹² while s. 25 of the Police and Justice Act 2006 created a power for local authorities to contract out their powers to enter into parenting contracts and to apply for parenting orders. Meanwhile, the Police Reform Act 2002 offers significant scope for use of private actors to perform policing functions, such as serving as “detention officers” or “escort officers”.¹³

Bottom-up privatisation differs from outsourcing in that “governmental” activities¹⁴ – perhaps most notably in the fields of security and regulation – are performed by private actors, without any instrument of transferral of the function from public to private. The “massive consumer demand for security”¹⁵ has coincided with the development of mass private property such as shopping centres and gated communities. “[V]acuum theory”, whereby communities regard the public police as inadequate to safeguard their lives and

2 D Osborne and T Gaebler, *Reinventing Government: How the entrepreneurial spirit is transforming the public sector* (Reading: Addison-Wesley 1992), pp. 25–48.

3 See e.g. D Gordon, “Privatization in Eastern Europe: the Polish experience” (1994) 25 *L. and Policy in International Bus* 517, p. 552.

4 A Barron and C Scott, “The Citizen’s Charter programme” (1992) 55 *MLR* 526, p. 526.

5 D E Pozen, “Managing a correctional marketplace: prison privatization in the United States and the United Kingdom” (2003) 19 *J of L and Politics* 253, p. 256.

6 J Teal, “Sustainable procurement: spending it wisely” (2005) 30 *Scots L Times* 167.

7 *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936, paras 2, 4, 11–16.

8 Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act*, 7th Report (London: Joint Committee on Human Rights 2003–04), para. 53.

9 Crime and Disorder Act 1998, s. 1F.

10 See, generally, Pozen, “Managing a correctional marketplace”, n. 5 above.

11 C Walker and D Whyte, “Contracting out war?: Private military companies, law and regulation in the United Kingdom” (2005) 54 *ICLQ* 651, p. 652.

12 S. 1F.

13 S. 39.

14 It is beyond the scope of this article to give a detailed treatment of the question of when an activity will be regarded as “governmental” in nature and for present purposes it is simply assumed that the type of coercive powers involved in policing and regulation can be regarded as such. See also C Donnelly, *Delegation of Governmental Power to Private Parties: A comparative perspective* (Oxford: OUP 2007), p. 6.

15 L Zedner, “The concept of security: an agenda for comparative analysis” (2003) 23 *Legal Studies* 153, p. 160; see also Private Security Industry Act 2001.

property, has encouraged the rise of hiring of private security forces.¹⁶ Meanwhile, the phenomenon of self-regulation has been explored in a number of judicial review cases and courts have considered whether or not, if a particular self-regulatory body did not exist, “Parliament would almost inevitably intervene to control the activity in question.”¹⁷ In the case of *R v Advertising Standards Authority, ex p The Insurance Service plc*,¹⁸ the authority was found to be exercising a public law function, in part because, if it did not exist, its function would be exercised by the Director of Fair Trading.¹⁹ In the well-known case of *R v Panel on Take-Overs and Mergers, ex p Datafin*, the self-regulatory panel was found to be performing functions “integral” to the governmental framework of regulation, albeit not established on a statutory or charter basis.²⁰

The theory of positive obligations and privatisation

On a theoretical level, positive obligations produce tensions with privatisation in at least two ways that can only be explored superficially here.²¹ First, positive obligations create responsibilities on the part of the state towards citizens. The types of responsibilities identified in the ECtHR’s jurisprudence are varied and have included: responsibilities to investigate killings;²² responsibilities to protect vulnerable individuals from abuse by others²³ or risks to life;²⁴ responsibilities to create effective criminal sanctions for certain violations of rights;²⁵ responsibilities to provide legal recognition of the new gender of transsexuals;²⁶ responsibilities to regulate environmental harm;²⁷ and responsibilities to provide legal aid.²⁸ The emphasis in these cases is clearly also on requiring the state to take responsibility for monitoring what happens in the context of private relations. As the ECtHR has frequently observed in the Article 8 context, positive obligations may involve adopting measures “even in the sphere of the relations of individuals between themselves”.²⁹ By contrast, privatisation is more usually regarded as involving government divesting itself of responsibility (through outsourcing) or refusing to take on responsibility (as in the context of bottom-up privatisation). It is also often associated with a liberal or neo-liberal attitude to social ordering that emphasises individual liberty, limited government and the entitlement of all citizens to equal respect and consideration.³⁰

Framed in this way, the quest for limited government, which sometimes fuels the privatisation agenda, would appear to run counter to the responsible state that underpins positive obligations. Some qualification of this easy dichotomy is necessary, however.

16 J Gilson, J Millar, N Seitz, J Fisher, E Harshman, M Islam and F Yeager, “The role of private sector organizations in the control and policing of serious financial crime and abuse” (2008) *J of Financial Crime* 111, p. 115.

17 *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex p Wachmann* [1992] 1 WLR 1036 (QBD) 1041.

18 [1990] 2 Admin LR 77 (QBD).

19 [1990] 2 Admin LR 77 (QBD), 86.

20 [1987] QB 815 (CA) 836.

21 The limit on space precludes more expansive examination of this issue.

22 *Kelly v UK* App. No 30054/96, 4 May 2001.

23 *Z v UK* (2001) 34 EHRR 97.

24 *Osman v UK* (1998) 29 EHRR 245.

25 *Siliadin v France* (2005) 20 BHRC 654.

26 *Goodwin v UK* (2002) 35 EHRR 447.

27 See e.g. *Giacomelli v Italy* (2006) 45 EHRR 871.

28 *Airey v Ireland* (1979) 2 EHRR 305.

29 See e.g. *Von Hannover v Germany* (2004) 40 EHRR 1, 25, para. 57.

30 See, e.g., R A Dahl, *Democracy and its Critics* (New Haven; Yale University Press 1989), pp. 83–105.

Privatisation – at least in its outsourcing form – cannot be so easily aligned with liberal divestiture of responsibility on the part of the state. While it could appear that privatisation of governmental functions promotes the objective of limited government, in reality, government is not retracting but evolving, to use the metaphor mentioned above, from rowing to steering.³¹ In this role, it does not necessarily reduce its responsibilities, but it does have reduced visibility, since, rather than operating directly, it operates through the medium of private actors. Nonetheless, while perhaps not directly incompatible, it is possible to identify a tension between the “responsibilisation” of government created by positive obligations and the “de-responsibilisation” of government involved in privatisation, particularly in the context of bottom-up privatisation.

Second, proponents of privatisation are often preoccupied with “the ‘liberal’ element of liberal democracy, or even more narrowly, just the economic element of liberalism”.³² For example, a “consumer” metaphor is sometimes invoked as a replacement for citizenship, perhaps most notably in John Major’s Citizen’s Charter project in the UK in the 1990s.³³ The “consumer” metaphor transforms the state’s role into one of creating and maintaining consumer choice and regulating quality.³⁴ Citizenship has both a political and a sociological dimension,³⁵ suggesting full membership of the society, state or community and implying a claim to participate in the processes of democracy.³⁶ In contrast, “consumer status”, deriving from the neo-liberal philosophical tradition, identifies the individual by reference to the individual’s role in the economy, rather than by reference to his or her role in the political society.³⁷ Positive obligations avoid such reductionist understandings of the individual. They acknowledge the many dimensions of the individual’s personality – the vulnerable witness in need of police protection, the abused child in need of a safe home, the homeowner suffering pollution from the nearby factory, the transsexual concealing his or her birth certificate – and they also require the state to acknowledge and respond to these facets of the individual personality.

Remedies for breaches of Convention rights

(A) THE PUBLIC/PRIVATE DICHOTOMY IN THE HUMAN RIGHTS ACT

The reach of the ECHR obligations given effect by the Human Rights Act 1998 (HRA) is well-known and has been the topic of much discussion. It is determined by s. 6(1) of the HRA, which 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 s. 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 s. 6(1) to act compatibly with the ECHR, whether the act is public or private, and “hybrid” bodies, i.e.

31 Osborne and Gaebler, *Reinventing Government*, n. 2 above, pp. 25–48.

32 M Feintuck, *The Public Interest in Regulation* (Oxford: OUP 2004), p. 184.

33 *Citizen’s Charter: Raising the Standard* Cm 1599 (London: HMSO: 1991); Barron and Scott, “The Citizen’s Charter Programme”, n. 4 above.

34 M Freedland, “Law, public services, and citizenship – new domains, new regimes?” in M Freedland and S Sciarra (eds), *Public Services and Citizenship in European Law* (Florence: European University Institute 1998), pp. 1, 10–11.

35 M Barnes, “Users as citizens: collective action and the local governance of welfare” (1999) 33 *Social Policy and Administration* 73, p. 83.

36 Freedland, “Law, public services, and citizenship”, n. 34 above, pp. 9–10.

37 *Ibid.*

bodies that perform some public functions and are bound by the ECHR to the extent of their public functions. It is the “hybrid” or s. 6(3)(b) public authority that is most relevant for reaching private actors performing governance functions. The effect of a finding that an entity is a “hybrid” public authority is that a direct action for breach of a Convention right will lie against that entity. Where an entity is not found to be a public authority, any person seeking to vindicate a Convention right against it will be confined to pre-existing common law actions, to the extent that any cause of action is available.³⁸

Section 6(3)(b) has been interpreted cautiously by the courts, and this cautious approach has been discussed often and much criticised. It can be said with certainty that a private psychiatric hospital exercising a statutory power of compulsory detention³⁹ and a limited company exercising a power to control access to public markets⁴⁰ are bound directly by human rights obligations. There have also been influential *dicta* to the effect that private prison managers and those exercising regulatory powers will be required to comply with human rights.⁴¹ Beyond these specific examples, it is difficult to make definite claims. The leading authority is *YL v Birmingham City Council*,⁴² in which the House of Lords, by a 3:2 majority, held that a private care-home provider, acting pursuant to a contract with a local authority, could not be deemed to be a s. 6(3)(b) public authority. The local authority was under a duty to ensure provision of accommodation pursuant to s. 21 of the National Assistance Act 1948 (the 1948 Act) and was permitted by s. 26 to use a private contractor’s services to provide the accommodation.⁴³ The care home, Southern Cross, issued notice to YL, pursuant to the termination clause in the contract between it and YL, and the question was whether it was obliged to act compatibly with the Convention in so doing.

The reasoning in the case is complex and only a brief review can be presented here. The majority’s conclusion was driven by a number of factors, including the contractual source of the care provider’s functions that “differentiates them from any ‘function of a public nature’”;⁴⁴ the private contractor’s motivation for providing accommodation, namely “carrying on a socially useful business for profit”⁴⁵ as “a private, profit-earning company”;⁴⁶ and the distinction between using public monies to subsidise an activity and using public monies to pay for a service.⁴⁷ Much can be said about the weaknesses in the reasoning but, for present purposes, it suffices to highlight its restrictiveness. For example, while motivation can be useful for characterising the *actor* as “private” or “public”,⁴⁸ this does not mean that it is as useful a factor for characterising the nature of a *function*. To illustrate, it seemed to be accepted by Lord Mance and Lord Neuberger that private prison managers were self-evidently performing functions of a public nature.⁴⁹ Yet, a private

38 See further Donnelly, *Delegation*, n. 14 above, pp. 329–32, 367–77.

39 *R (A) v Partnerships in Care Ltd* [2002] EWHC 529 (Admin), para. 21.

40 *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers Market* [2003] EWCA Civ 1056, [2004] 1 WLR 233.

41 *Aston Cantlow and Wilmore v Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, para. 9 (Lord Nicholls); *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, paras 7 (Lord Bingham), 63 (Baroness Hale), 91 (Lord Mance), 166 (Lord Neuberger, also mentioning maintaining defence and providing police services).

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

43 *Ibid.* para. 1.

44 *Ibid.* para. 120 (Lord Mance); see also paras 26, 29, 31, 32, 34 (Lord Scott), 133, 168 (Lord Neuberger).

45 *Ibid.* Lord Scott, para. 26.

46 *Ibid.* Lord Mance, para. 116. See also para. 105 (Lord Mance).

47 *Ibid.* paras 26, 27 (Lord Scott), 105 (Lord Mance), 148, 165 (Lord Neuberger).

48 For discussion, see Donnelly, *Delegation*, n. 14 above, pp. 6–10.

49 *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, paras 91 (Lord Mance citing *Aston Cantlow* (n. 41 above)), 166 (Lord Neuberger).

prison manager, very often a “private, profit-earning company”, is regularly also motivated by carrying out a “business for profit”.

For the most part, reaction to the *YL* case was negative,⁵⁰ and on the specific question of residential care homes the case has actually been reversed by legislation.⁵¹ There is also some evidence that the English courts are interpreting and applying the case with at least a degree of circumspection. In a recent Court of Appeal case – *R (Weaver) v London and Quadrant Housing Trust*⁵² – it was held that a registered social landlord (RSL), which served on an assured tenant a notice seeking possession for rent arrears, was bound by the Convention in the performance of that act. To explain, RSLs in the UK are landlords registered under the Housing Act 1996. They provide one half of the social housing in England and Wales,⁵³ pursuant to governmental grants,⁵⁴ and are heavily regulated by the Housing Corporation.⁵⁵ The Court found that a number of factors were present that cumulatively established⁵⁶ a “sufficient public flavour” to make provision of social housing by the landlord “a function of a public nature”, such as: the substantial public subsidy received by the RSLs;⁵⁷ the fact that the RSL worked in close harmony with local government and helped to fulfil the latter’s statutory obligations;⁵⁸ and the fact that provision of subsidised housing, as opposed to the provision of housing itself, was a function that could properly be described as governmental as by definition it was the antithesis of a private commercial activity.⁵⁹ Turning to the s. 6(5) question of whether the act was “private”, the Court concluded that the act of terminating a housing contract, while often a private act, was in this case:

so bound up with the provision of social housing that once the latter is seen, in the context of this particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts.⁶⁰

Viewed from one perspective, the *Weaver* judgment may be helpful in holding private providers accountable for Convention violations and appears to suggest a subtle progression on the *YL* analysis in making it clear that a contractual act will not, for that reason alone, be regarded as “private”. The difficulty is that the uniqueness of the role performed by RSLs and the depth of their entanglement with local authorities may also suggest that this case falls within the strict *YL* criteria, rather than expanding those criteria.

(B) THE IMPACT OF THE HRA’S PUBLIC/PRIVATE DICHOTOMY ON REMEDIES FOR VIOLATIONS OF CONVENTION OBLIGATIONS

The implications of this case law for negative Convention obligations are obvious. If provision of particular services is privatised, there may be no direct right of action against the private service provider for violation of a Convention right unless the private provider can satisfy the restrictive *YL* criteria and is, for instance, in receipt of subsidy (as was the

50 See e.g. S Palmer, “Public functions and private services: a gap in human rights protection” (2008) 6 *Intl J of Constitutional L* 585; Donnelly, *Delegation*, n. 14 above, pp. 262–70.

51 Health and Social Care Act 2008, s. 145(1).

52 [2009] EWCA Civ 587, [2010] 1 WLR 363.

53 *Ibid.* para. 8.

54 *Ibid.* para. 12.

55 *Ibid.* paras 9–11.

56 *Ibid.* para. 72.

57 *Ibid.* para. 67.

58 *Ibid.* para. 69.

59 *Ibid.* para. 70; see also para. 101 (Lord Collins).

60 *Ibid.* para. 76 (Elias LJ); see also para. 101 (Lord Collins).

RSL in *Weaver*) rather than in receipt of contractual payments, or unless the private provider can be regarded as integral to a governmental framework. Moreover, even if the governmental authority responsible for privatising the function retains an obligation to fulfil the primary human rights duty, in the context of negative Convention obligations, the government may not be able to provide an appropriate remedy for the victim. Vindication of the right may involve compelling the private provider to perform a specific task (such as not evicting a tenant) that the government will not be in a position to perform and will not be in a position to compel the private delegate to perform. So, 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.⁶¹ In brief, the impact of privatisation on negative obligations is that direct remedial redress in the form of a claim for breach of a human right may be precluded.

By contrast, it is in the very nature of positive obligations that privatisation has no impact on the remedial obligations of the government and the state can be held accountable for interferences with Convention rights resulting primarily from the actions of private providers. Some examples are useful to illustrate the contrast in the remedial scheme accompanying negative and positive obligations.

Taking one hypothetical, if a private company were engaged, pursuant to a public-private partnership, to build a motorway, it is highly unlikely that this activity would be regarded as a "function of a public nature" on the basis of the *YL* and *Weaver* case law; the private company would therefore not be regarded as an entity bound by Convention obligations. Should the private company, in the course of preparing for the motorway construction, take intrusive photographs of the houses on the motorway route (such as to amount to an invasion of the privacy of the homeowners), there would be no direct human rights action available against the private company. There may be a tort action for breach of confidence, but no free-standing action under the HRA.⁶² There would also be no action against the government department that entered into the contract with the private company, as the department did not breach the right and could not therefore be held responsible for the violation. However, if, in the course of constructing the motorway, the private company were to cause pollution (such as to amount to an interference with the homeowner's enjoyment of their home), a remedy would be available against the state if it has not ensured a balancing between the community and the right of the individual to respect for his or her home⁶³ or if it has not conducted appropriate investigations and studies into possible environmental effects.⁶⁴ A further example might arise in an immigration detention centre. It may be that, given its function, such a detention centre could be found to constitute a private actor, similar to a private prison. If not, if such a centre were systematically to open the letters of asylum seekers in breach of Article 8, there would be no remedy;⁶⁵ yet if they were to house dangerous detainees such as to cause risks to other asylum seekers, there would be a remedy.⁶⁶

The point made here is very modest: privatisation produces remedial distinctions between negative obligations and positive obligations. Given current interpretations of the

61 *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936, para. 33.

62 See e.g. *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

63 See e.g. *Giacomelli v Italy* (2006) 45 EHRR 871, para. 82.

64 *Ibid.* para. 83.

65 See e.g. *Ostrovár v Moldova* (2007) 44 EHRR 19, para. 100.

66 *Edwards v UK* (2002) 35 EHRR 487.

reach of the HRA, breaches of negative obligations may often result in the absence of a direct remedy against privatised service providers and the unavailability of a remedy against the state. In contrast, it is in the nature of positive obligations that they bind the state and that obligation cannot be sidestepped by privatisation. While limited, this distinction does merit some consideration: at the very least, it must provide further justification for encouraging judicial reconsideration of the s. 6(3)(b) case law in the UK. It seems anomalous that the core negative (and arguably less onerous) obligations of the Convention should be protected to a lesser degree than its judicially created positive obligations.

Potential for limitations on privatisation

(A) CONSTITUTIONAL AND LEGISLATIVE LIMITATIONS ON PRIVATISING BY GOVERNMENT

In the UK, there are effectively no constitutional limitations on the government's ability to privatise or outsource. Such legal constraints as exist often seem to promote freedom of governmental action to privatise rather than control it. For example, the Deregulation and Contracting Out Act 1994 (the 1994 Act)⁶⁷ grants a general licence to ministers to transfer statutory ministerial functions to private actors at the Minister's discretion.⁶⁸ It provides the executive with an unusually broad privatising power and creates the opportunity for a wide range of governmental activities to be transferred to private parties, thereby facilitating, rather than limiting, the externalisation capacity of governmental actors.⁶⁹ A Minister may provide by order for any statutory function currently performed by the Minister or an office-holder to be performed by any person or the employee of any person authorised by the Minister.⁷⁰ The list of functions excluded from this order power is narrow: apart from a few specific exceptions,⁷¹ the excluded category only extends to judicial power;⁷² functions affecting the liberty of the individual;⁷³ powers of entry, search or seizure;⁷⁴ powers to make subordinate legislation;⁷⁵ and functions that must be exercised personally by a Minister or office-holder.⁷⁶ This list of externalisation exceptions fails to recognise the importance of many other powers at the government's disposal, such as discretionary administrative powers deciding on the individual's eligibility for welfare benefits. There are even exceptions to the coercive powers excluded from the 1994 Act: enforcement for non-payment of rates and taxes is a function that may be privatised, in spite of its clear potential to entail coercion.⁷⁷ Ultimately, perhaps the only constraint on privatisation in the UK is a political or social one: as Freedland puts it, "even today one shrinks from accepting that a total freedom of contracting out could validly be asserted".⁷⁸ One might hope that political

67 The order-making provisions of Part I of the 1994 Act were amended by the Regulatory Reform Act 2001. However, the contracting out provisions of Part II of the Act continue in force as originally enacted, apart from minor amendments which are not relevant for present purposes.

68 S. 69. For discussion, see M Freedland, "Privatising *Carltona*: Part II of the Deregulation and Contracting Out Act 1994" (1995) *PL* 21; and Donnelly, *Deregulation*, n. 14 above, pp. 158, 197–9.

69 T Daintith, "Regulation by contract: the new prerogative" (1979) *CLP* 41, p. 48.

70 1994 Act, s. 69(1)–(2).

71 *Ibid.* s. 79(1) excluding functions of the Comptroller and Auditor General, Parliamentary Ombudsman, Health Service Ombudsman.

72 *Ibid.* s. 71(1)(a).

73 *Ibid.* s. 71(1)(b).

74 *Ibid.* s. 71(1)(c).

75 *Ibid.* s. 71(1)(d).

76 *Ibid.* s. 69(1).

77 *Ibid.* s. 71(3); Freedland, "Privatising *Carltona*", n. 68 above, p. 23.

78 M Freedland, "Government by contract and public law" (1994) *PL* 86, p. 93.

or social outrage would help to control the most far-reaching privatisations. Overall, though, the UK governmental actor has a relatively free hand in respect of privatisation.

To date, attempts to invoke human rights to restrain that freedom have failed before the courts.⁷⁹ An effort to construct a strong non-privatisation doctrine using the ECHR and the HRA was rejected by the Court of Appeal in the *YL* case, discussed above.⁸⁰ One of the claimants, who was a resident in a care home operated by the local authority, sought to prevent the transfer of the care home (and other care homes) to private sector control, which was permitted under s. 26 of the 1948 Act.⁸¹ The claimant argued that the transfer itself would result in a breach of her Article 3 right (to be free from inhuman or degrading treatment) and her Article 8 right (to respect for her home) because she would not be able to enforce these rights against the private carers, which would constitute a “fundamental and material diminution (and, indeed, in certain cases, negation)” of her existing rights.⁸²

In respect of Article 3, Buxton LJ, giving judgment for the court, concluded that there was no lacuna in protection because, if a private care home subjected a resident to inhuman and degrading treatment, breaches of the criminal law would be involved with the result that legal protection of the resident would not be diminished by the transfer.⁸³ The claimant’s case on Article 8 was also rejected. Buxton LJ noted that loss of a direct remedy against the care home operator would only entail a diminution in Article 8 protection if it could be assumed that Article 8 placed the state under an obligation to make welfare provision of the type provided by the 1948 Act.⁸⁴ Making a more general point, Buxton LJ observed that accepting the claimant’s argument would “place very far-reaching and surprising inhibitions on national policy”,⁸⁵ which the court indicated was a relevant consideration where the reach of an article, as in this context with Article 8, was unclear.⁸⁶ His Lordship expressed concern that the implications of accepting the claimant’s argument would be that *every* example of privatisation would result in a breach of Convention responsibilities, as in every case there would be a loss of direct action,⁸⁷ and concluded that views on privatisation were “more appropriately adjudicated upon by the national democratic process” and that this was an area where the ECHR should only enter with “considerable diffidence”.⁸⁸ This particular claimant did not pursue her case to the House of Lords. However, in adjudicating upon the arguments of the remaining claimant, Lord Neuberger expressed concern that a generous interpretation of s. 6(3)(b) would obstruct the privatisation policy of the state, and, even though he observed that a justification for privatisation based on avoiding legal constraints applicable to public actors might be considered “unattractive”, he noted that this matter was for the legislature.⁸⁹

(B) USING POSITIVE OBLIGATIONS TO LIMIT PRIVATISATION

Given the potentially very far-reaching consequences of the argument made by the claimant in *YL* – that the loss of direct HRA action produced by every privatisation breaches the

79 Contrast *Academic Center of Law & Business, Human Rights Program v Minister of Finance, HCJ (Israel)* 2605/05.

80 [2007] EWCA Civ 26, [2008] QB 1. The issue was not argued before the House of Lords.

81 Ibid. para. 1.

82 Ibid. para. 8.

83 Ibid. para. 11.

84 Ibid. paras 15–16.

85 Ibid. para. 20.

86 Ibid.

87 Ibid. para. 21.

88 Ibid.

89 *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, para. 152.

HRA – the position adopted by the Court of Appeal is hardly surprising. However, it may be possible to envisage a more limited restraint on governmental privatisation emerging from the positive obligations jurisprudence. This jurisprudence is likely to have only very limited impact on the determination of the *types* of functions that can be privatised; it does, however, have the potential to have a more interesting impact on the *manner* of governmental privatisation.

Positive obligations and the types of functions privatised

Starting with the types of functions that can be privatised, positive obligations may have an impact on bottom-up privatisation, i.e. privatisation that results from state withdrawal of service provision or, alternatively, from state refusal to provide the service in the first instance. This is because, as noted above, positive obligations create responsibilities from which the state cannot extract itself; or at least, if the state decides not to provide the service itself, it will still retain liability as a matter of human rights law. Taking the example of private security, while the state can withdraw or refuse to provide certain security services and while private security can flourish, as a matter of compliance with Article 2, a minimum core of provision must be maintained by the state. State authorities can never withdraw responsibility for doing “all that could reasonably be expected of them, to avoid a real and immediate risk to life of which they have or ought to have knowledge”.⁹⁰ Similarly, to comply with Article 3, when privatising adoption and foster placement services, states can never withdraw responsibility for taking reasonable steps to protect children “from ill-treatment of which the authorities had or ought to have had knowledge”.⁹¹

While these examples suggest very minimal constraints on privatisation by the state, they are not without significance, as can be demonstrated by the situation which pertains in the absence of recognition of positive obligations. Describing the position in US constitutional law, Sullivan and Bitter have commented that, following the decision of the Supreme Court in *DeShaney v Winnebago County Department of Social Services*⁹² refusing to find an affirmative Fourteenth Amendment duty on the state to intervene to protect a child from abuse by a private actor:

American children have been murdered, sexually molested, and physically abused in private homes and schools across the country, at rates courts recognize as epidemic, while the states are able to do very little. And, while the courts recognize that it is tragic and traumatic, and are “not unmoved by natural sympathy”, under *DeShaney* it is all constitutional.⁹³

Positive obligations in the jurisprudence of the ECtHR prevent European states from using privatisation to withdraw responsibility from service provision which coincides in substance with those positive obligations.

Positive obligations and the manner of privatisation

The more interesting impact of positive obligations on privatisation decisions may be on the manner in which the government privatises, as can be illustrated by the following

⁹⁰ *Osman v UK* (1998) 29 EHRR 245, para. 116

⁹¹ *Z v UK* (2001) 34 EHRR 97, para. 73.

⁹² 489 US 189 (1989).

⁹³ T J Sullivan and R L Bitter Jr, “Abused children, schools, and the affirmative duty to protect: how the *DeShaney* decision cast children into a constitutional void” (2003) 13 *George Mason U Civil Rights LJ* 243, p. 243.

examples: the requirements for independence and impartiality in Articles 5(4) and 6 of the Convention⁹⁴ and a sampling of the range of positive obligations identified by the ECtHR.

Article 6

As has been discussed, the 1994 Act grants sweeping power to the executive to contract out and privatisation could involve transfer of decisions in respect of citizens' civil rights to a private company without violating the Act. One example is the Contracting Out (Functions relating to Social Security) Order 2000,⁹⁵ under which it is possible to contract out functions relating to "work-focused interviews", as conferred by regulations under s. 2A of the Social Security Administration Act 1992.⁹⁶ Certain benefits, such as incapacity benefits,⁹⁷ are conditional upon the applicant attending a "work-focused interview" and functions relating to the holding of such interviews, including applying regulations concerning the determination of whether applicants have "good cause" for failure to attend are considered suitable for private delegation.⁹⁸ Failure to attend an interview without good cause will result in the applicant being deemed not to have applied for a benefit or, if the applicant is in receipt of a benefit, having the benefit terminated.⁹⁹ Given that non-attendance at interviews may result in termination of or a rejected application for benefits, and given that it seems that private actors may decide on whether or not the applicant has "good cause" for non-attendance, albeit that the exercise of discretion is confined by the criteria set out in the relevant regulations,¹⁰⁰ it seems possible for private actors to decide effectively whether or not applicants are entitled to benefits. Although not without some jurisprudential wrangling, the ECtHR has held that such benefits may give rise to "civil rights",¹⁰¹ thereby triggering the Article 6 independence and impartiality requirements.

Article 6 concerns could arise as follows: the private actor may not be independent if the government department exercises excessive control over it or its funding; or the private actor may not be impartial if the payment structure of the arrangement encourages it to operate in a particular way. For instance, it is well documented that a flat fee for the contract in this type of scenario has encouraged contractors to "dump" incoming files or cases or engage in "churning" in which applicants are handled selectively depending on their resource requirements and expected payoffs.¹⁰² Thus, Article 6 may require careful attention to the privatisation terms to ensure that no incentive is created which may conflict with the public service task being performed by the private service provider.

That Article 6 may have the potential to influence governmental outsourcing decisions has been given tacit recognition by the courts in the context of the application of Article 6 to review of local authorities' decisions regarding homelessness. Pursuant to Part VII of the Housing Act 1996 (the 1996 Act), a local authority is under a duty to ensure that

94 The requirements of independence and impartiality are explicit in the text of Article 6; they are implicit in Article 5(4)'s reference to a "court". See e.g. *R (Brooke) v Parole Board* [2008] EWCA Civ 29, [2008] All ER (D) 21, paras 13, 21.

95 SI 2000/898.

96 This was inserted by the Welfare Reform and Pensions Act 1999, s. 57.

97 Social Security Administration Act 1992, s. 2A(2)(e).

98 See Social Security Administration Act 1992, s. 2A(3)(e)(ii)–(f); Social Security (Incapacity Benefit Work-focused Interviews) Regulations 2003, regs 3, 4 11.

99 Social Security Administration Act 1992 s. 2A(4)(i)–(ii).

100 Social Security (Incapacity Benefit Work-focused Interviews) Regulations 2003, reg. 11.

101 *Feldbrugge v Netherlands* (1986) 8 EHRR 149, paras 26–40; *Salesi v Italy* (1998) 26 EHRR 187, para. 19; *Mennitto v Italy* (2000) 34 EHRR 1122, paras 25–8; *Tsfayo v UK* (2009) 48 EHRR 18, para. 39.

102 D Stevenson, "Privatization of welfare services: delegation by commercial contract" (2003) 45 *Arizona L. Rev* 83, pp. 107–8.

accommodation is provided to any person it is satisfied is in priority need and not homeless intentionally. By s. 202, an applicant has the right to request a review of, inter alia, any decision of a local housing authority as to his or her eligibility for assistance. The local authority's conduct of the review process is regulated by the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999. However, pursuant to s. 70 of the 1994 Act discussed above, the Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (the 1996 Order) provided that the local authority's functions relating to homelessness (apart from specific excepted functions) could be performed by any person, or the employees of any person, authorised by the local authority. At present, some local authorities have availed themselves of this provision to contract out the s. 202 review function; while other authorities have retained it in-house.

In *Runa Begum v Tower Hamlets London Borough Council*¹⁰³ – a case in which the local authority had retained the function in-house – the alleged problem was that the reviewing officer worked for the same local authority that made the initial decision.¹⁰⁴ One of Begum's arguments was that the local authority should have used its power under Article 3 of the 1996 Order to contract out the review decision and achieve independence¹⁰⁵ – an argument which had been regarded favourably in an earlier Court of Appeal judgment.¹⁰⁶ The House of Lords rejected this option, however, with Lord Hoffmann citing a number of objections,¹⁰⁷ including that he was: “by no means confident that Strasbourg would regard a contracted fact finder, whose services could be dispensed with, as more independent than an established local government employee”.¹⁰⁸ Lord Millett expressed similar reservations about whether a person “appointed ad hoc by the authority directly concerned and lacking any kind of security of tenure could constitute an ‘independent . . . tribunal established by law’”.¹⁰⁹

The issue arose again in *De-Winter Heald v Brent London Borough Council*,¹¹⁰ although this time the local authority had contracted out the s. 202 review function. The applicants contended that Article 6 of the ECHR required a reading down of the 1996 Order to exclude s. 202 functions, on the basis that the private contractor in this case was not sufficiently independent and that he was not democratically elected.¹¹¹ In particular, it was argued that the contract conferred no security on the company, such that he lacked the independence necessary to perform s. 202 reviews. Accepting that the outsourcing was permissible pursuant to the 1994 Act and the 1996 Order,¹¹² Stanley Burnton LJ considered the Article 6 challenge. He did not regard the *Begum* comments as determining the matter,¹¹³ although he used as his “starting point” *Begum*'s holding that review by an employee of a local housing authority did not infringe Article 6¹¹⁴ and considered it necessary to compare the independence and impartiality of a private contractor with those of an employee. His Lordship commented that he did not see that a third party should necessarily be any less

103 [2003] UKHL 5, [2003] 2 AC 430.

104 Ibid. para. 16.

105 *Begum* [2003] UKHL 5, [2003] 2 AC 430, para. 23.

106 *Adan v Newham LBC* [2001] EWCA Civ 1916, [2002] 1 WLR 2120, paras 9, 43–45, 76, 94.

107 *Begum* [2003] UKHL 5, [2003] 2 AC 430, [46].

108 Ibid.

109 Ibid. para. 97.

110 [2009] EWCA Civ 930, [2010] 1 WLR 990.

111 Ibid. para. 40.

112 Ibid. paras 44–50.

113 Ibid. para. 50.

114 Ibid. para. 51.

impartial than an employee,¹¹⁵ but, importantly, he noted that whether or not the third party should be regarded as less independent “may depend on the particular facts, and in particular the terms of the contract between the authority and the third party”.¹¹⁶ On the facts of this case, the Court did not find any violation of Article 6: although the contractor only had a one-year contract and a longer contractual term may have assisted in building a high degree of independence,¹¹⁷ the contractor should not be “more concerned to reject an application than the local authority that instructs him”.¹¹⁸ Given that the local authority was primarily interested in *correct* decisions that would withstand legal challenge, it could not be concluded that the private contractor lacked independence or impartiality.¹¹⁹ While the recognition that Article 6 may have repercussions for privatisation is welcome, it does appear that a closer examination of the contractual terms to test for compromised independence would have been merited in this case. For example, it does not appear that the contract’s payment structure was considered by the Court to ascertain whether any incentives might have been created that would have undermined the contractor’s independence and impartiality.

Article 5

With regard to Article 5, a constraint on privatisation could potentially emerge in the private prison context. Article 5(4) provides that everyone deprived of liberty by arrest or detention shall be entitled to “take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”. The role of parole boards in the English criminal justice system has evolved over time, from being one of advising the Secretary of State in relation to his or her discretion to release prisoners who have not yet served the full term of their sentences, to that of a judicial body assessing whether continued deprivation of a prisoner’s liberty is justified because of the risk that he or she will re-offend if released.¹²⁰ In *R (Brooke) v Parole Board*,¹²¹ the Court of Appeal reasoned that this change in function resulted in a greater need for the board to be, and to be seen to be, free of influence in relation to the performance of its judicial functions.¹²² Consequently, in breach of Article 5(4), a number of features of the parole board system could be regarded as undermining its appearance of independence: both by directions and by the use of the Secretary of State’s control over the appointment of members of the board, the Secretary of State had sought to influence the manner in which the board carried out its risk assessment and the close working relationship between the board and the Ministry of Justice had tended to blur the distinction between the board’s judicial function of deciding whether prisoners qualified for release on licence and the executive functions of the department.¹²³ Restriction of the board’s funding, while not threatening its impartiality, constituted excessive interference with the board’s work by the department.¹²⁴

Although not directly comparable, the *Brooke* decision could have potential implications for private governance. To transfer to a private prison manager the parole

115 [2009] EWCA Civ 930, [2010] 1 WLR 990, para. 52.

116 Ibid.

117 Ibid.

118 Ibid. para. 57.

119 Ibid.

120 *R (Brooke) v Parole Board* [2008] EWCA Civ 29, [2008] All ER (D) 21, paras 13–16, 43–53, 78.

121 Ibid.

122 Ibid. para. 79.

123 Ibid.

124 Ibid. para. 80.

board's task of determining whether an individual should be detained due to risk of re-offence could be questionable from the perspective of independence and impartiality. A risk of lack of independence could derive from close relationships with the relevant governmental department, as in the *Brooke* case; but more significantly, even in the absence of such relationships, a risk of partiality could arise due to the private operator's pecuniary interest in the outcome of the decision. If a private actor is paid according to the length of detention, clearly, prolonging detention of prisoners could increase the private actor's profit-maximising potential; this is an issue that has raised concerns in the US.¹²⁵ It may be, therefore, that legislation transferring the parole board function, or similar functions, to a private prison manager would contravene Article 5(4). At the very least, such legislation would have to be interpreted to require a particular pay structure that did not jeopardise impartiality.

Overall, where Convention rights require an independent and impartial decision maker, instruments of privatisation need to ensure that the independence and impartiality of the private service provider is not compromised by reason of a pay incentive, profit motivation or other promotion of self-interest.

Positive obligations more generally

Moving beyond requirements of independence and impartiality, one issue that has been mooted by UK courts is that it is possible in the context of contracting out for recipients of privatised public services to require governmental authorities to include Convention obligations in their contracts with private service providers. As Lord Woolf noted in the *Leonard Cheshire* case, 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".¹²⁶ For many reasons, not least the fact that service recipients are very rarely party to contractual negotiations between the state body and the private provider, this is an unrealistic proposal.¹²⁷ In addition, as has been shown above, given the narrowness in the reach of application of the HRA, the reality is that in so far as negative Convention obligations are concerned, there is no incentive on the government to ensure that outsourcing instruments, such as contracts, require compliance on the part of private contractors with Convention obligations. The government will not be held accountable for the breach as it is not the perpetrator of the breach; in many situations, the private actor will also not be held accountable as, on the strict YL criteria, it will either not be regarded as performing a public function or else it will be regarded as carrying out a private act. The situation changes with positive obligations, however: because the state retains responsibility for its failure to fulfil the positive obligation, there is an incentive to draft outsourcing instruments, such as contracts, so as to ensure private provider compliance, or at least, to secure a remedy for the state against the private provider in the event of non-compliance.

A number of examples demonstrate the point. Contracts with those operating privatised detention should be drafted in a way which contains obligations requiring minimisation of risks to the safety of inmates,¹²⁸ or risks to healthcare of inmates;¹²⁹ likewise contracts for the management of privatised immigration detention centres.¹³⁰ In contracts for privatised

125 For discussion, see Donnelly, *Delegation*, n. 14 above, pp. 110–11.

126 *R (Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366, [2002] 2 All ER 936, para. 34.

127 See further Donnelly, *Delegation*, n. 14 above, pp. 350–64.

128 *Dougoz v Greece* (2002) 34 EHRR 330; *Peers v Greece* (2001) 33 EHRR 1192.

129 *Rohde v Denmark* (2006) 43 EHRR 325; *McGlinchey v UK* (2003) 37 EHRR 41.

130 *Slimani v France* (2004) 43 EHRR 1068.

child placement or foster services, the government may be interested in imposing obligations to minimise risks of abuse of children.¹³¹ As for privatised healthcare, the state will wish to compel private providers to adopt appropriate measures for the protection of their patients' lives and ensure an independent investigation into any death.¹³² In the context of private policing, it is in the state's interest to impose obligations on private service providers to ensure access to timely medical care for any person who is detained.¹³³

Again, it may be said that these obligations appear relatively modest. Two points can be made. First, perhaps surprisingly, even these basic obligations have not always been imposed on private contractors as a matter of practice.¹³⁴ Second, the range of positive obligations emerging in the Court's jurisprudence is ever-expanding. As such, while perhaps tentative at this point, it must surely be the case that the potential of positive obligations to have an impact in this context can increase. Of course, imposing such obligations on private service providers does have cost implications and, to an extent, will undermine the cost-cutting rationale underpinning privatisation. However, the state may conclude that it is in its own interest to impose these obligations on private service providers as it will, itself, ultimately bear responsibility for ensuring their fulfilment.

Conclusion

This article has sought to explore the intersection of positive obligations and privatisation. It has been shown that, from a theoretical perspective, there is potential for tension between positive obligations and privatisation: between the state responsabilisation of positive obligations and the state de-responsibilisation associated with privatisation; and between the citizen of positive obligations and the consumer of privatisation. In practice, these tensions manifest themselves in two modest ways. First, privatisation can reduce the remedial protection of negative Convention obligations but not positive Convention obligations. It was suggested that this observation should provide an additional reason for UK courts to reconsider their s. 6(3)(b) HRA case law, on the basis that it seems anomalous that core negative Convention obligations should receive less remedial protection than their judicially created positive counterparts. Second, positive obligations have the potential to have an impact on both the range of functions privatised by the state and on the manner in which the state privatises. Affecting the manner of privatisation may, in turn, produce costs which, to an extent, undermine the efficiency rationale for privatisation. The ECtHR's positive obligations jurisprudence is also ever-evolving and although described repeatedly in this article as "modest", the impact of positive obligations on privatisation may become more marked over time.

131 *Z v UK* (2001) 34 EHRR 97.

132 *Calvelli v Italy* App. No 32967/96, 17 January 2002.

133 *Angelova v Bulgaria* (2004) 38 EHRR 31.

134 See e.g. L. Sossin, "The criminalization and administration of the homeless: notes on the possibilities and limits of bureaucratic engagement" (1996) 22 *NYU Rev of L and Social Change* 623, p. 691.

