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PUBLIC, PRIVATE AND THE HUMAN RIGHTS ACT 1998: AN IDEOLOGICAL DIVIDE

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THE House of Lords decision in *YL* v. *Birmingham City Council*[1] considers the issue of what is a public authority under the Human Rights Act 1998. The question is a critical one as the Convention rights, contained in the Human Rights Act, are directly enforceable only against public authorities.[2] The issue of whether a body is a public authority has proved highly controversial. The hiving-off of many traditional governmental functions through policies such as privatisation, outsourcing and projects under the Private Finanace Initiative (PFI) has led to a blurring of the traditionally understood public-private distinction.[3] The changed nature in the way that public services are delivered has led to sharply divergent views among the judiciary about which functions are those of a public nature for the purposes of the Human Rights Act. This is evident in the *YL* judgment itself: a split decision, with two dissenting judgements.[4] The division in the House reflects different understandings of the operation of the Human Rights Act, the public-private distinction and, perhaps more fundamentally, competing ideological stances.

The decision also suggests that the ghost of Dicey still haunts the development of public law in our legal tradition. Dicey's premise that the Rule of Law admits of no separation between public and private law and that all people were subject to the ordinary laws of the realm inhibited the development of public law.[5] The first inkling of change occurred during the 1960's.[6] Influenced no doubt by EC and human rights law, gradually the judiciary began to establish substantive public law rules and principles. It is ironic that just as public law became more established and effective in the control of government power, the state began to shrink and the pattern of government to change. The transformation of the delivery of public services poses a serious threat to public law values, to ensuring public accountability and to the

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1 [2007] UKHL 27 (hereinafter referred to as *YL*).
2 Human Rights Act 1998, s.6.
3 See M. Freedland, "Public Law and Private Finance: Placing the Private Finance Initiative in a Public Law Frame" [1998] P.L. 288.
4 Lord Bingham of Cornhill and Baroness Hale of Richmond were the dissenting judges.
5 See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed., London 1959).
6 See *e.g. Ridge* v. *Baldwin* [1964] A.C. 40 and *Conway* v. *Rimmer* [1968] A.C. 910.

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development of a human rights ethos in the exercise of power by private or quasi-public institutions.

This article will first examine the context of the recent House of Lords decision, second the complexities of the meaning of a hybrid or functional "public authority" pursuant to section 6 of the Human Rights Act and finally, the decision in *YL* v. *Birmingham City Council*. This paper argues that the decision in *YL* v. *Birmingham City Council* adopted an unacceptably narrow approach to the meaning of public authority. It is of great concern that the judiciary can avoid dealing with public interest and human rights issues by classifying the contexts in which such cases arise as "private".

I. The Context

The Human Rights Act 1998 was intended to "bring rights home". Although the UK had ratified the European Convention on Human Rights (ECHR) in 1951, which came into force in 1953, individuals had to take their cases to the European Court of Human Rights in Strasbourg in order to vindicate their rights. The Human Rights Act enables individuals to argue for their Convention rights in the United Kingdom's own courts and tribunals and judges are able to adjudicate directly on Convention issues, thus reducing the need for recourse to Strasbourg. According to the Lord Chancellor of the time, Lord Irvine of Lairg, the Human Rights Act would raise awareness of human rights generally in the United Kingdom as well as effectively promoting a rights culture.[7] The overriding purpose of the new legislation was to bring rights home for everyone. The efficacy of this aim depends upon the actual sweep of the legislation.

The application of the Human Rights Act to public authorities and the complex public-private divide set up by the Act has to be understood against the backdrop of two factors.[8] First the rights guaranteed in the ECHR were traditionally conceived as a protection against abuse by a State. The Convention was drafted just after the Second World War at a time when the public-private distinction was understood primarily in institutional terms.[9] Public functions were carried out by traditional government bodies. As an international treaty, the ECHR imposes international law obligations on member states. The obligation includes bringing domestic law into conformity with the Convention guarantees and providing an effective remedy for

[7] HL Deb Vol 582, col 1228 (3 November 1998).
[8] P. Cane, "Accountability and the Public/Private Distinction", in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford 2003), 247.
[9] Ibid., p.254.

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any breach of Convention rights.[10] This international law obligation may relate to relations between private parties as well as dealings between individuals and government.

The Strasbourg jurisprudence shows that there are several ways in which a State has been found responsible for the behaviour of private parties. For example, the state may delegate its duty or rely upon a private body to carry out its obligations under the Convention.[11] In addition, many of the articles of the Convention impose positive obligations upon member states to take steps in order to prevent a breach of an individual's human rights. States have been held responsible by the European Court of Human Rights for a breach of a positive obligation by failing to protect one private individual against interference by others.[12] Positive obligations arise under those articles most likely to be invoked by residents of a care home, Articles 3,5 and 8.[13]

Secondly, as mentioned above, the Human Rights Act was enacted against a background of a shrinking public sector and an increase in the role of the private, voluntary and charitable sectors in the provision of public services.[14] The reality of governance in contemporary society is that the public and private spheres have become inextricably linked owing to the radical changes to our social structures and institutions. Rhodes has aptly described this process as the "hollowing out" of the state.[15] This new "market model" in the delivery of services has had a profound impact on public law.[16]

II. Section 6 of the Human Rights Act

The Human Rights Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.[17] The Act provides no comprehensive definition of public authority but, according to section 6(3), "public authority" includes…"any person

[10] Article 13 ECHR. This Article is not one of the specified articles in the HRA because the Act is designed to ensure an effective remedy for breaches of the Convention.

[11] *YL*, at para. [56] per Baroness Hale, [95] per Lord Mance. See *Van der Mussele* v. *Belgium* (1983) 6 E.H.R.R. 163; *Costello-Roberts* v. *United Kingdom* (1993) 19 E.H.R.R. 112; *WOS* v. *Poland* (unreported) (Application No. 22860/02) 1 March 2005 and *Storck* v. *Germany* (2005) 43 E.H.R.R. 96.

[12] See *e.g. X and Y* v. *The Netherlands* (1985) 8 E.H.R.R. 235 and *Z* v. *United Kingdom* (2001) 34 E.H.R.R. 97.

[13] *YL*, at para. [58] per Baroness Hale. Article 14 may also be relevant.

[14] The Joint Committee on Human Rights, HL 39/HC 382, The Meaning of "Public Authority" under the Human Rights Act (2003–04), [4].

[15] R. Rhodes, "The Hollowing Out of the State: The Changing Nature of the Public Service in Britain" [1994] Political Quarterly 138.

[16] See *e.g. R* v. *Servite Houses, ex parte Goldsmith* (2001) 33 H.L.R. 369. Note the criticism by P. Craig, "Contracting Out, the Human Rights Act and the Scope of Judicial Review" (2002) 118 L.Q.R. 551.

[17] Section 6(1) HRA.

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certain of whose functions are functions of a public nature."[18] Section 6(5) provides, however, that in relation to any 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 effect of section 6 is to create two categories of public authority. The first comprises the "core" or "pure" public authorities, such as government departments, local authorities and the police: all their actions must be compatible with human rights. The second category contains those bodies that perform a mixture of public and private functions. The purpose of section 6 was to include the public functions exercised by hybrid or functional bodies within the definition of public authority while excluding acts of a private nature. According to the then Home Secretary, the concept of a "public function" underlines the distinction set out in this section.[19] In contrast to the institutional approach adopted in the Freedom of Infomation Act 2000,[20] the courts were left to determine which bodies are public authorities. In the course of parliamentary debates on the passsage of the Human Rights Act, it was clear that private bodies delivering privatised or contracted-out public services were intended to be included within the scope of the Act through the "public function" concept.[21] This concept went beyond the obvious governmental agencies to serve, according to the then Home Secretary, as "a realistic and modern definition of the state" and to provide wide protection against human rights abuses.[22]

The term "functions of a public nature" is not defined: it is left to the courts to determine whether any particular person or body qualifies as a public authority for the purposes of section 6(3)(b) HRA. The difficulties raised by this concept became evident in a number of cases concerning the human rights protection of residents in private care homes. The early decisions on the scope of the section 6 duty to act in a compatible manner with Convention rights adopted a narrow approach.[23] One feature of these decisions was the court's emphasis on institutional (the form, legal personality and source of power) rather than functional criteria to indicate whether contracted out governmental responsibilities were of a public nature.[24]

[18] Section 6(3)(b) HRA.
[19] HC Deb vol. 314, col. 409 (17 June 1998).
[20] The FOIA lists which public authorities are subject to the Act in Schedule 1.
[21] HC Deb vol. 314, cols. 409–410.
[22] *Ibid.*, col. 406.
[23] *Poplar Housing & Regeneration Community Association Ltd.* v. *Donoghue* [2001] EWCA Civ 595 [2002] Q.B. 48; *R (Heather)* v. *Leonard Cheshire Foundation* [2002] EWCA [2002] 2 All E.R. 936. See also *R Ltd.* v. *Hampshire Farmers' Market (on applicaion of Bear trading as Hammer Trout Farm)* [2003] EWCA Civ 1056, [2004] 1 W.L.R. 233.
[24] The Joint Committtee on Human Rights, (2003–4), above n.14, para. [39], also criticised the institutional rather than functional approach to the meaning of public authority. See also L. Turano, "Charitable Trusts and the Public Service: The Public Accountability of Private Care Providers, (2007) 18 K.L.J. 427, at 429–430 and 437–441.

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The Joint Committee on Human Rights criticised this "restrictive interpretation of the meaning of public authority" as it has deprived many vulnerable individuals from HRA protection.[25] The Committee favoured the approach adopted by the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council* v. *Wallbank*,[26] which stressed that it was the nature of the function being performed that should determine whether a body was a functional public authority.[27] The issue before the court was whether a Parochial Church Council was either a core or "hybrid" public authority. In Lord Nicholls view, the interpretation of "function of a public nature" should be "generously wide" in order to fulfil the statuory aim of promoting human rights protection.[28] According to Lord Hope, the obligation to secure Convention rights to everyone in the territory was "crucial" to any interpretation of the meaning of public authority under section 6.[29]

The House of Lords in *Aston Cantlow* did not formulate a definitive test to determine when section 6(3)(b) applies. Lord Nicholls concluded that there could be "no single test of universal application", but that relevant factors included the extent to which the function is publicly funded, or is exercising statutory powers, the body is taking the place of central government or local authority in providing the function or is providing a public service.[30]

III. *YL* v. *Birmingham City Council* (2007)

The House of Lords finally had the opportunity to clarify the meaning of "functions of a public nature" in the *YL* decision. The appellant, Mrs. YL, was 84 years old and is suffering from Alzheimer's Disease. Her residence, in the privately owned Southern Cross care home, was primarily funded by the Birmingham City Council.[31] The Council had arranged the placement acting pursuant to its duty under section 21 of the National Assistance Act 1948. In fact, the majority of residents in the Southern Cross home were funded partially or fully by local authorities.[32] Other residents in the care home had arranged their own placement and met the fees through private sources. The litigation

[25] The Joint Committee on Human Rights, Ninth Report of Session 2006–7, HL Paper 77 HC 410 para. [2]. The 2003–4 Joint Committee on Human Rights (2002–3), above n. 14, also criticised the narrow interpretation: para. [26].
[26] [2003] UKHL 37, [2004] 1 A.C. 546.
[27] *Aston Cantlow*, at para. [41], *per* Lord Hope. Joint Committee on Human Rights (2006–7), para. [17].
[28] *Aston Cantlow*, at para. [11].
[29] *Ibid.*, at para. [44].
[30] *Aston Cantlow*, at para. [12].
[31] The NHS and Mrs. YL's daughter also contributed to the cost.
[32] Sixty of the seventy-two residents in the appellant's care home were funded by the local authorities and twelve paid privately. *YL*, at para. [38] (*per* Baroness Hale).

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arose when the care home gave notice to terminate Mrs. YL's right to remain in the home. As a consequence, Mrs. YL claimed that the care home was a public authority pursuant to section 6(3)(b) of the HRA and that article 8 ECHR had been breached.

The judges in the majority, Lords Mance, Neuberger and Scott, concluded that a privately owned care home, operating on a profit basis, in providing care and accommodation for a publicly funded resident, was not delivering "fuctions of public nature" and was therefore not a public authority pursuant to secton 6(3)(b) HRA. The House of Lords reached the same conclusion as the Court of Appeal in the factually similar case of *R (Heather)* v. *Leonard Cheshire Foundation*.[33] Two powerful dissenting judgements were delivered by Lord Bingham and Baroness Hale.

Lord Mance acknowledged that section 6(3)(b) HRA had "no direct parallel in European human rights law or domestic jurisprudence."[34] He concluded that domestic judicial review decisions may be helpful but that section 6 has a "different rationale, linked to the scope of State responsibility in Strasbourg."[35] In considering whether State responsibility is engaged, he found the concept "governmental" helpful, and stated that "the existence and source of any special powers or duties" must be a relevant factor.[36]

After approving of Lord Nicholls' test in *Aston Cantlow*, his Lordship considered whether the Southern Cross care home was exercising functions of a public nature. Providing for the care and accommodation of persons "who by reason of age, illness, disability….are in need of care and attention" pursuant to the National Assistance Act 1948[37] would automatically be a public function if carried out by the local authority because it is a core public authority. The court must still assess whether it is a "function of a public nature" pursuant to section 6 (3)(b) HRA if the same care is delivered by a private company.[38] Relying upon the National Assistance Act, Lord Mance distinguished between the statutory duty of a local authority to arrange care and accommodation and a private company delivering the services on a commercial basis after contracting with the local authority. In Lord Mance's view, "the actual provision, as opposed to the arrangement, of care and accommodation…" is not an inherently governmental function.[39] He stressed institutional criteria: Southern

[33] [2002] EWCA Civ 366; [2002] 2 All E.R. 936.
[34] *YL*, at para. [86]. Lord Neuberger of Abbotsbury agreed with the reasoning and conclusion of Lord Mance.
[35] *YL*, at para. [87].
[36] *YL*, at para. [102].
[37] Section 21 (1) (a).
[38] Thus attempting to answer the point made by Craig that a public function performed by a core public authority is still a public function if delivered by a private company. P. Craig, above n. 16.
[39] *YL*, at para. [115]. Lord Mance was relying on the modern form of the Act.

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Cross "acts as a private, profit-earning company."[40] The commercial motivation of Southern Cross pointed against treating it as carrying out a "function of a public nature".[41]

Lord Scott considered that the fees paid to the care home by the local or health authorities were for a service. "There is no element whatever of subsidy from public funds."[42] He could not find any distinction between paying for the services provided by Southern Cross and paying private contractors for cleaning or catering for which a commercial fee is charged. Southern Cross was simply delivering a service to a customer who happened to be a public authority. [43] According to Lord Scott, there were "very clear and fundamental differences" between the function carried out by a local authority running its own care home and an individual running a privately owned care home.

> The local authority's activities are carried out pursuant to statutory duties and responsibilities imposed by public law. The costs of doing so are met by public funds… In the case of a privately owned care home the manager's duties to its residents are, whether contractual or tortious, duties governed by private law.[44]

For Lord Scott, comparing the nature of the activities being carried out by public or private homes is not enough. It is also necessary to look at the reason why the person in question is carrying out those activities.[45] The focus then is not only on the function but on the institution providing the service or activity and its rationale for doing so.

Lord Mance also highlighted the tension between private and public law in the contracting out of services. In Lord Mance's view, the idea of imposing human rights obligations on this private company fitted uneasily with the private law right to deliver services under agreed contractual terms.[46] Lord Scott commented that Southern Cross was relying on a contractual provision, thus their notice to YL to leave the home affected no one but the parties to the private law agreement.[47] Lord Mance also expressed concern about distinguishing between residents who were self-funding (who would not have human rights protection) and residents whose fees are met by the local

[40] *YL*, at para. [116].
[41] *Ibid.*
[42] *YL*, at para. [27].
[43] *Ibid.*
[44] *YL*, at para. [29].
[45] *YL*, at para. [31].
[46] *YL*, at para. [116].
[47] *YL*, at para. [34].

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authority (who would have such protection). This would place publicly funded residents in a stronger legal position than the self funders.[48]

For Lord Bingham, the nature of the function in question was "the provision of residential accommodation plus care and attention for those who, by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them",[49] thus suggesting that the distinction drawn by Lord Mance, between the provision of care and accommodation and the arranging of it, is a false one. Baroness Hale described the distinction as "artificial and legalisitic" given that the state has assumed responsibility for both meeting needs and arranging the care.[50] In Lord Bingham's view, the National Assistance Act 1948 imposes a duty on local authorities to provide residential care but the means of doing so are not important. As residential care must be provided, the contractual arrangements between the parties are "a matter of little or no moment."[51] Nor was he in any doubt that the British state had accepted the social welfare responsibility to ensure that those in need of care would be "accommodated and looked after through the agency of the state and at its expense", if the need should arise.[52]

Lord Bingham and Lady Hale agreed that there is "no single test" of what is a function of a public nature.[53] It is a domestic law concept and the focus should be on the nature of the function performed and not on the body performing it.[54] After approving of the factors that Lord Nicholls recognised in his opinion in *Aston Cantlow*, Baroness Hale added that the "underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest."[55] After considering the intention of Parliament in enacting the Human Rights Act, Lady Hale stressed that its purpose was to provide an effective domestic remedy in circumstances where Convention rights are breached.[56] She points out that the Strasbourg jurisprudence shows that the state may have to take responsibility for the acts of a private body.[57] In her opinion, section 6 was drafted precisely to cover the circumstances which arise here, where public functions are carried out by private bodies.[58]

[48] *YL*, at para. [117].
[49] *YL*, at para. [14].
[50] *YL*, at para. [66].
[51] *YL*, at para. [16].
[52] *YL*, at para. [15] See also Baroness Hale at paras. [49]–[53].
[53] *YL*, at para. [5], *per* Lord Bingham, para. [65] *per* Baroness Hale.
[54] *YL*, at paras. [61] and [64], *per* Baroness Hale.
[55] *YL*, at para. [65].
[56] *YL*, at para. [54].
[57] *YL*, at paras. [56]–[57].
[58] *YL*, at para. [20], *per* Lord Bingham.

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There was clearly disquiet amongst the majority about public law values potentially interfering with private law contractual rights and the commercial interests of a private company delivering services.[59] Their analysis effectively limits the possibility of invoking human rights protection where private organisations deliver services formerly provided by government.

Unfortunately, the test applied in *YL* by the majority has made the concept of the hybrid or functional public authority conceptually confused. Section 6(3)(b) sets out a functional test, as clearly explained by the House of Lords in *Aston Cantlow*.[60] Yet, in determining the "nature of a public function" the majority have analysed in some depth the nature of the institution; ("a private profit earning company")[61] and the reason for the activity of the institution (a commercial motivation).[62] The contractual source of the arrangement also influenced the determination of the function. Lord Mance concluded that the "essentially contractual source… of Southern Cross's activities" differentiates them from any "function of a public nature",[63] thus sliding back into reliance upon judicial review case law.

The reluctance to allow public law rights to interfere with private contractual arrangements has been evident in judicial review cases. The majority in *YL* was influenced by the case law on the amenability to judicial review. The boundary between public and private law has been inherently unstable since the seminal decision of *R* v. *Panel on Takeover and Mergers, ex parte Datafin*[64] which paved the way for the courts to extend their review of jurisdiction to private bodies. As Hunt observes, *Datafin* was an important decision as it adopted an approach based on the "true nature" of the function being exercised.[65] Prior to 1985, the test to determine the courts' supervisory jurisdiction was based on the source of the power to carry out the function: usually derived from statute but then extended to prerogative powers, notwithstanding their non-statutory source.[66] The *Datafin* shift to the "function test", however, was incomplete. In determining whether a body is performing a public function and amenable to judicial review, the courts will look at a number of different factors, including the source of the power.[67]

[59] See for example Lord Mance's comments at para. [116].
[60] [2003] UKHL 37.
[61] *YL*, at para. [116], *per* Lord Mance.
[62] *YL*, at para. [31], *per* Lord Scott.
[63] *YL*, at para. [120].
[64] [1987] Q.B. 815 (CA).
[65] M. Hunt, "Constitutionalism and Contractualism" in M. Taggart (ed.), *The Province of Administrative Law* (Oxford 1997), p.29.
[66] *Council for Civil Service Unions* v. *Minister for the Civil Service* [1985] A.C. 374.
[67] Hunt, above n. 65. See *Datafin* at p.835, referred to by Lord Mance in *YL* at para. [102].

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As a consequence of retaining this "source of power" test, where the exercise of a particular power is contractual, or other consensual submission, the courts have treated the contractual arrangements as regulated solely by private law.[68] The nature of the function, even if it has a public flavour, will not attract the courts' supervisory jurisdiction. In reality, the only factor of consequence is the source of the power: the absence of statutory or "governmental" element is determinative.[69]

The majority in *YL* is reliant on elements of this reasoning that the courts have developed in judicial review cases. Lord Neuberger found the judicial review case law of real assistance.[70] Lord Mance distinguished the role of HRA and judicial review but suggested that decisions on the susceptibility to review may be helpful. In effect, Lord Mance has relied heavily on a source-based test: "the usual source of the 'functions of a public nature' are legislative or governmental".[71] His rationale for this reliance upon "existence and source of any special powers or duties" to determine a public law jurisdiction is linked to the scope of State responsibility in Strasbourg.[72] In contrast, Lord Bingham, rejected any reliance upon judicial review authorities. In his opinion, whether or not a body is susceptible to review is irrelevant: since section 6(3)(b) extends the definition of public authority, bodies not amenable to review will be included.[73] This conclusion is preferable given the very different rationales of judicial review and human rights. The fragmentation of public law, according to Paul Craig, may pose difficulties. As legal claims do not emerge in isolation, it would be difficult for a court to find that the function of a body is public for the purposes of the Human Rights Act but not for a judicial review claim.[74] As the purpose of judicial review and human rights protection are very different, Lord Bingham's conclusion is preferable. There is no reason why the availability of judicial review and human rights protection should always be identical.

Influenced by the judicial review case law, Lord Neuberger attached particular importance to whether or not individuals running bodies had been given any coercive or other statutory powers over its residents. The existence of such powers would strongly suggest that the function was "public in nature". He gave examples of private prisons, discharging a statutory regulatory regime, maintaining defence and

[68] *R.* v. *Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All E.R. 853 and *R.* v. *Servite Houses, ex parte Goldsmith* [2001] 33 H.L.R. 35.
[69] Hunt, above n.65, p.33.
[70] *YL*, at para. [156].
[71] *YL*, at para. [102].
[72] *Ibid.*
[73] *YL*, at para. [12].
[74] P. Craig, *Administrative Law* (5th edition, London 2003), p.596.

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providing police services as functions falling within section 6(3)(b).[75] These ideas are common ground but it cannot be the case that a body is exercising public functions solely where it is exercising some power. A body may only have duties imposed upon it but could still be a body exercising a "function of a public nature". As David Feldman suggests, the HRA "does not say that a body with public functions is bound by the Convention rights only if it is exercising authority in the sense of power. 'Public authority' is a term of art in the Act. It is not an authority (in common parlance) which is exercising public functions".[76] The issue is not whether the body is a *public* body but whether it is a body exercising a function of a public nature.

Lord Mance was also concerned about the inequality arising from privately and publicly funded residents in the same care home having different legal rights. "[T]he care home should view and treat all such residents with equality."[77] There are, however, fundamental differences between self-funding residents and those residents whose placement is arranged by the local authority. The former are likely to have a choice of residences and to be party to a contract with the care home. Thus such residents are in a good position to protect their interests and enforce them through contract law. In contrast, publicly funded residents may not be parties to the contractual arrangement which has been made between the local authority and the care home. A Local Authority might place service providers under a contractual obligation to respect Convention rights, and provide that this term might be enforced by any resident; but even after the Contracts (Rights of Third Parties) Act 1999 a resident might not be able to obtain a satisfactory remedy. Such a resident would then still have to rely on public law to ensure protection of their rights. The local authority, as a core public authority, is obliged to respect Convention rights but it may not be in a position to provide the remedy sought by the resident. In the *Leonard Cheshire* case, for example, the appellants sought to challenge the closure of the care home pursuant to Article 8. Even if they had sought judicial review against the local authority, it would have no power to force the care home to remain open, thus the judicial review challenge could provide no adequate remedy. As a consequence, whether or not an individual can "effectively enforce their Convention rights against a provider of public services depends upon decisions made by the local authorites over which a service user has little or no influence."[78]

[75] *YL*, at para. [166]. Lord Mance also refers to the existence of special powers or duties: para. [102].
[76] D. Feldman, *English Public Law* (Oxford 2004), para. 7.146.
[77] *YL*, at para. [119].
[78] K. Markus, "Leonard Cheshire Foundation: What is a Public Function?" [2003] E.H.R.L.R. 92, 97, criticising the decision of the Court of Appeal in *R. (Heather)* v. *Leonard Cheshire Foundation*.

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For Lord Mance, it was less incongruous to distinguish between residents in private care homes and residents in local authority homes, than it would be to distinguish between publicly and privately funded residents in the same private home. Yet it is also contrary to principle that residents in local authority care homes have the protection of the HRA but those publicly funded residents placed in private homes do not.[79] Publicly funded residents will now be subject to "post code lottery": if they reside in an area where the local authority provides care, individuals can rely directly on Convention rights. If, however, the service is contracted out, residents will not have this benefit. The difference could be of crucial importance for an individual. For example, the Joint Committee on Human Rights has recently expressed alarm and concern by how little protection care home residents appear to have against eviction.[80]

The breadth of the meaning of "public authority" was of concern to Lord Mance.[81] For Lord Scott, it was a slippery slope.[82] He asks: "Is a contractor engaged by a local authority to provide lifeguard personnel at the municipal swimming pool a section 6(3)(b) public authority?"[83] In Dawn Oliver's view, applying "broad interpretations of 'public authority' and 'public function' would roll forward the frontiers of the state and roll back the frontiers of civil society, not by any means a politically neutral process."[84] This argument is questionable. A system dominated by contractual ideology privileges individualism and freedom of choice (regardless of any status difference between the parties) and can hardly be described as a politically neutral process. The individualistic ethos of the market sits uncomfortably with the needs of vulnerable and elderly residents in private and voluntary care homes. Of course, many doctrines exist in the common law which impose limits on such self-regarding behaviour but the tension between public and private law has not disappeared.

Some of the fears concerning the breadth of a functional public authority may abate if the distinction between functions and acts as required by section 6 was clearly dissected. Lord Scott, for example, considered that there was no difference between the care home providing care and paying private contractors for cleaning or catering.[85] If it is decided that a body is performing a public function, the judge must then decide whether the act in question is a public or

[79] The argument of M. Fordham Q.C.: *YL* at para. [169], *per* Lord Neuberger.
[80] The Joint Committee on Human Rights, "The Human Rights of Older People in Healthcare" (2007) HL 156 and HC 378, para. [241].
[81] *YL*, at para. [105].
[82] *YL*, at para. [30].
[83] *Ibid.*
[84] D. Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" [2000] P.L. 477.
[85] *YL*, at para. [27].

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private one. Section 6(5) reduces the scope of section 6(3)(b) by providing that a person is not a public authority "if the nature of the act is private." It would be very surprising if catering and cleaning services were not considered private acts. As a consequence, even if a body were found to be a hybrid or functional public authority, the Convention would not apply to those "private" acts or services.

The majority and minority judgments reflect different ideological positions, on the role of government, the value of "welfare law" and the desirable reach of human rights. The majority judges expressed great concern for the position of the care home. Imposing human rights obligations was at odds with the agreed contractual terms.[86] It would create uncertainty which would inevitably result in additional economic loss. Lord Mance noted that "the self-interested endeavour of individuals usually works to the benefit of society".[87] If the aim of the HRA is to be realised and human rights are to become part of our culture, then both public and private bodies must consider it fundamental to the services provided. Abiding by human rights standards should be perceived as an essential part of good practice rather than as a burden. Presumably additional costs may be incurred by imposing public law duties on private contractors and this factor should be taken into account when government bodies are considering the cost benefit analysis of contracting out.

The nub of the issue is whether social welfare is considered a responsibility of the government in the United Kingdom. Lord Neuberger was of the opinion that providing care and accommodation in this country would not be considered a governmental function.[88] Lord Mance distinguished between arranging the care and accommodation and providing it. Care and accommodation, in his view, "is not an inherently governmental function."[89] Baronness Hale carefully analysed the social welfare law since its inception approximately sixty years ago and forcefully concludes that after such a length of time, it is now an intrinsic part of our government to provide care for the needy. She points out that the system has always permitted those who can afford to make their own arrangements to do so.[90] For Lord Bingham, the issue was clear: the ultimate responsibility lies with the state.[91] These ideological differences at play reflect the different political perspectives evident in this decision.

It is clear from this decision that the broader issue of contracting out of public services to private bodies has not been finally resolved.

[86] *YL*, at para. [116].
[87] *YL*, at para. [105].
[88] *YL*, at para. [162].
[89] *YL*, at para. [115].
[90] *YL*, at paras. [49]–[53].
[91] *YL*, at para. [15].

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The judgment in *YL* mentioned many further areas of uncertainty including foster care and private landlords providing shelter for the homeless. Lord Mance reserved his opinion on whether those delivering health or educational services would be characterised as hybrid or functional public authorities.[92] Lord Neuberger's view of the scope of public authorities was very restrictive. He doubted whether the commercial provision of private hospitals, private schools and private landlords could fall within it.[93] The Government has recently indicated that it will step in to ensure that private and voluntary care homes are included within the scope of the HRA and will be able to rely upon Convention rights.[94] The Joint Committee on Human Rights has wisely urged the Government to act as soon as possible by regulation in the short-term and then by amendment to primary legislation.[95]

The consequence of the Y*L* decision is that the delivery of many formerly public services by way of contractual arrangements with private bodies is beyond the reach of human rights law and regulated solely by the private law of contract. This decision creates a lacuna for many public recipients of services. Occasions may arise where there will be no direct contractual relationship between the private service provider and the users of services. The Joint Committee on Human Rights described such recipients as "stranded victims".[96] Even if individuals can seek judicial review against local authorities who have arranged the care placements, this is hardly encouraging a culture of human rights to flourish. Human rights values must traverse the public-private boundary if there is to be a change of culture in our institutions delivering public services.

Conclusion

A recent publication by the Joint Committee on Human Rights has highlighted the appalling treatment that some elderly people are subject to in spite of the regulatory framework.[97] They are "convinced that the existing legislation does not sufficiently protect and promote the rights of older people in healthcare."[98] Circumstances may arise where vulnerable individuals may wish to have power to challenge abuse or mistreatment. Whereas all residents have the usual common

[92] *YL*, at para. [123].
[93] *YL*, at para. [135].
[94] HL vol. 693 col. 597 (27 June 2007) .
[95] "The Human Rights of Older People in Healthcare", Joint Committee on Human Rights, (2006–7) above n.81, para. [161].
[96] Joint Committee on Human Rights (2003–4), above n.14, para. [84].
[97] "The Human Rights of Older People in Healthcare", Joint Committee on Huamn Rights, (2006–7), above n.81, at para. [20].
[98] *Ibid.*, para. 59.

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law and criminal law protection against mistreatment, the Human Rights Act provides additional valuable rights to individuals. It empowers individuals to challenge individuals and agencies and provides remedies that are unlikely to be available even if a private law remedy exists.

It may be that the same protection for the dignity and respect of individuals could be effectively achieved through novel private law solutions intersecting with public law values.[99] One suggestion includes the development of a "law of public contracts" to deal with the special problems posed by government contracts. Public law doctrines would modify the ordinary law of contract where the government is a party.[100] At the moment however, as a consequence of the decision in *YL*, publicly funded residents in care homes cannot rely on private law to adequately protect their human rights.

The *YL* decision could also have wider implications for public law. It may reflect a certain ambivalence about public law itself. Freedland has commented that the public-private debate is more "about whether to recognise or accept public law as a distinct part of English law."[101] The Diceyean legacy still permeates our legal system and public law has to fight its corner in order not to be overwhelmed by the "apparently" superior private-law-based common law.[102] The exponential growth in the use of contracting out to deliver public services, regulated largely by private law is with us for the foreseeable future. In order for human rights values to infiltrate our institutions and to become part of our culture it must overlap both the public and private spheres.

[99] See generally, D. Oliver, *Common Values and the Public-Private Divide* (London 1999).

[100] Anne C.L. Davies, "English law's Treatment of Government Contracts: The Problem of Wider Public Interests", in M. Freedland and J-B Auby, eds., *The Public Law / Private Law Divide* (Oxford 2006), 113. See also M. Aronson, "A Public Lawyer's Responses to Privatisation and Outsourcing" in M. Taggart, ed., *The Province of Administrative Law* (Oxford 1997), 40.

[101] M. Freedland, "The Evolving Approach to the Public / Private Distinction in English Law", in above n. 100, p. 95.

[102] *Ibid.* p. 107.

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