PUBLIC AUTHORITIES AS "VICTIMS" UNDER THE HUMAN RIGHTS ACT

Howard Davis*

I. INTRODUCTION

One feature of the current debate concerning the term "public authority" in the Human Rights Act 1998 is a rule to the effect that public authorities are not themselves capable of having and enforcing Convention rights[1]. In what follows this will be referred to as the "rights-restriction rule". The position was confirmed by the House of Lords in *Aston Cantlow*[2] and has been given effect by the courts in relation to English local authorities[3] and to NHS Trusts in Scotland[4]. Despite this, doubts have been expressed. In particular the parliamentary Joint Committee has

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* Law School, Bournemouth University. Thanks to anonymous reviewers, Richard Edwards and Professor Barry Hough; all errors and infelicities are the author's.

[1] *E.g.*, S. Grosz, J. Beatson and P. Duffy *Human Rights The 1998 Act and the European Convention* (London 2000) chapter 4, 4.42-4.44; D. Oliver "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" [2000] P.L. 476. For a pre-Act discussion see D. Oliver "The Underlying Values of Private and Public Law" in M. Taggart (ed) *The Province of Administrative Law* (Oxford 1997) ch .11.

[2] *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire* v. *Wallbank and another* [2003] UKHL 37, [2004] 1 A.C. 546, at [8] (hereinafter *Aston Cantlow* v. *Wallbank).*

[3] R *(Mayor of the City of Westminster)* v. *Mayor of London* [2002] EWHC (Admin) 2440, [2003] B.L.G.R. 611, at [93]-[96]; *R (Medway Council and others)* v. *Secretary of State for Transport* [2002] EWHC (Admin) 2516, [2003] J.P.L. 583, at [20].

[4] *Grampian University Hospitals NHS Trust* v. *Procurator Fiscal* [2004] H.R.L.R. 18 Appeal Court, High Court of Justiciary.

suggested, though without argument, that the denial of Convention rights to public authorities may be wrong in principle and that there are "circumstances in which public authorities have Convention rights"[5].

II. THE SIGNIFICANCE OF THE "RIGHTS-RESTRICTION RULE"

In discussion of the Joint Committee's suggestion, two preliminary points must be made. First, the question whether public authorities have Convention rights needs to be distinguished from the question of their *vires*; second, the issue of a public authority having Convention rights will only arise, under the 1998 Act, if they satisfy other tests, in particular, the "victim" test[6]. These points mean that for many commentators the rights-restriction rule is a matter that may be of little consequence[7]. It is, for instance, unlikely to inhibit a regulatory public authority seeking to challenge ministerial decisions which affect the Convention rights enjoyed by a section of the public for which, given its powers, the authority is responsible. Unlike the "client group", the authority is unlikely to have been directly affected in the ambit of what would be its own Convention rights, and so

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[5] House of Lords House of Commons Joint Committee on Human Rights *The Meaning of Public Authority under the Human Rights Act* Seventh Report of Session 2003-4 HL Paper 39, HC 382, para. [23].

[6] Human Rights Act 1998 ss7(1) and 7(7); Article 34 ECHR. *Eckle* v. *Germany* (1982) 5 E.H.R.R. 1, [66] ("…the person directly affected by the act or omission which is in issue…"). On comparisons with "ordinary" judicial review see: Miles, J. "Human Rights Standing under the Human Rights Act 1988: theories of rights enforcement and the nature of public law adjudication." (2000) 59 C.L.J. (1) 133.

[7] Grosz, S., Beatson, J. and Duffy, P. *op cit*, see note **1** above, paras. [4.42]-[4.44].

is not a "victim" for that reason, rather than because of the rights-restriction rule. Other remedies, in particular "ordinary" judicial review, remain available to an authority with sufficient interest and powers to make a legal challenge; public law rights, in that context, can include the need for intensive scrutiny by the courts of any ministerial decision affecting human rights[8]. Similarly, subject to questions of *vires* and *locus standi*, public authorities can seek declarations about the general meaning of the law, such as its compatibility with European Community law, and in so doing are in a similar position to a non-governmental organisation (NGO)[9]. Again, like an NGO, a public authority, in any legal proceedings, whether or not founded on section 7 of the Human Rights Act, can, under section 3, argue for a particular interpretation of legislation to ensure possible compatibility with Convention rights. Like NGOs, public authorities may also be granted intervention rights in cases in their sphere of interest[10]. Such interventions are also permitted under the Strasbourg rules. In highly restricted circumstances it is even possible that a public authority might be recognised under Article 34 as a victim's representative, and thereby be heard on the victim's behalf, by the Court of Human Rights. The right to represent applicants is complex but one crucial test is

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[8] *E.g., R* v. *Ministry of Defence ex parte Smith* [1996] Q.B. 517, 536 CA.

[9] R v. *Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 A.C. 1; *cf* R *(Howard League)* v. *Secretary of State for the Home Department* [2002] EWHC (Admin) 2497, [2003] 1 F.L.R. 484: declarations on the application of the Children Act to Youth Offender Institutions.

[10] *E.g.*, *R* v. *Re Northern Ireland Human Rights Commission* [2002] UKHL 25, 2002] H.R.L.R. 35. See Hannett, S. "Third Party Intervention: In the Public Interest?" [2003] P.L. 128-150.

that the victims must be individually identified and give their consent[11]; this is a possibility for a public body regulating identifiable individuals (such as Ofcom and broadcasting companies) rather than a general class of otherwise non-assignable persons[12].

There is some evidence that the rights-restriction rule may limit the effect of these existing procedural opportunities. The Administrative Court may reject a human rights ground urged by a public authority in "ordinary" judicial review if in effect it means recognising Convention rights vested in the authority[13] including where a local authority is promoting the Convention rights of a part of its population who may be ill-equipped to do so for themselves[14]. It has also been suggested that non-victims may be barred from seeking declarations of incompatibility under section 4[15]. If that is true, a public authority would be thus

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[11] *E.g.*, *Zentralrat D.S.*R.R. v. *Germany* (1997) 23 E.H.R.R. CD 209; *A and others* v. *Denmark* (1996) 22 E.H.R.R. 458.

[12] See further: J. Miles, "Standing in a Multi-layered Constitution" in N. Bamforth and P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (2003), ch 15.

[13] *E.g.*, *R (Medway Council and others)* v. *Secretary of State for Transport* [2002] EWHC (Admin) 2516, , [2003] J.P.L. 583, at [20]. The authority conceded it had no Convention rights of its own but its claim to argue in terms of the Convention rights of its population was rejected. There is little discussion and it is unclear whether the authority's point was rejected because of the rights-restriction rule or because the authority was not "directly affected".

[14] *R (Mayor of the City of Westminster)* v. *Mayor of London* [2002] EWHC (Admin) 2440, [2003] B.L.G.R. 611, at [93]-[96].

[15] M. Supperstone and J. Coppell, "Judicial Review after the Human Rights Act" [1999] 3 E.H.R.L.R. 301-329, 309 a view supported in *Re S (Minors) (Care Order: Implementation of Care Plan)*

restricted even if it met all the other criteria of being a "victim", and in such a situation it would be treated differently from an NGO.

The main impact of the rights-restriction rule is where there is a dispute between public authorities, including between an authority and ministers, over a matter which directly affects a public authority's freedom of action in a context of Convention rights and freedoms. Such disputes may occur in situations where companies, NGOs and others could reasonably claim their Convention rights and freedoms are directly affected. For example, a right to freedom of expression might be claimed by a public authority wishing to publish a report or information which a minister or some other public body wishes to suppress[16]. Similarly, a public authority might wish to argue that some right, defined in terms of the Convention conception of private life, has been violated perhaps by a police search of its premises[17] or by poor environmental conditions sufficient to raise a

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[2002] UKHL 10; [2002] 2 A.C. 291, at [88]. *Cf R (Rusbridger)* v. *Attorney General* [2003] UKHL 38, [2004] 1 A.C. 357, at [21]. Cited in J. Miles *op cit* see note **12** above. Standing for such a declaration, it is submitted, is likely to be refused at least where it would be tantamount to recognising Convention rights vested in a public authority.

[16] *E.g.* in *Local Authority* v. *Health Authority (disclosure: restriction on publication)* [2003] EWHC (Fam)2746; [2004] Fam. 96 (a dispute over rights of publication. Convention rights were relevant because the court was a public authority; but in effect the authority was asserting a right to freedom of expression); *cf*, *London Regional Transport* v. *Mayor of London* [2001] EWCA Civ 1491, [2003] B.L.G.R. 611.

[17] As in the Zircon affair (S. Bailey, D. Harris and B. Jones, *Civil Liberties Cases and Materials* 4th ed. (London 1995), pp. 454-455). That a search of offices can raise an issue under Article 8 has been accepted in, for example, *Noviflora AB* v. *Sweden* (1993) 15 E.H.R.R. CD 6.

Convention issue[18]. Other potential effects of the rights-restriction rule do not involve inter-public authority conflict. For example, public authorities and individual officials are increasingly vulnerable to criminal charges in respect of actions taken in their official capacity. At trial they will enjoy Article 6 rights but might also have grounds to argue that the prosecution involves a retrospective application of criminal liability violating Article 7[19]. Such a claim could be met through the impact of the court's duty to act compatibly with Convention rights. But such discretion may be limited by the need not to subvert the rights-restriction rule. If courts issue remedies which, in effect, recognise Convention rights of public authorities, why not recognise these rights directly through a weakening of the rule?[20]

The rights-restriction rule is also behind a central argument about the Human Rights Act 1998: whether bodies, including commercial and charitable organisations, which are providing services to the public at the behest of central or local government, act illegally if they act incompatibly with Convention rights[21].

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[18] As in *R. (Medway Council and others)* v. *Secretary of State for Transport* [2002] EWHC (Admin) 2516, [2003] J.P.L. 583.

[19] A possibility, for example, given developments in corporate manslaughter; see G. Forlin, "Directing Minds: caught in a trap" (2004) 154, 7118 N.L.J. 326

[20] The Article 6 right of a standard public authority not to be compelled to accept Alternative Dispute Resolution was implicitly recognised in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 4 All ER 920.

[21] D. Oliver, "Functions of a Public Nature under the Human Rights Act" [2004] P.L. Summer 329; *cf* P. Craig, "Contracting out, the Human Rights Act and the Scope of Judicial Review"

The principal argument against them being so bound is driven, partially, by the concern that, given the rights-restriction rule, such bodies (for example, care homes, universities, perhaps the BBC) would not themselves be able to benefit from the protection of Convention rights. But the consequence of the argument is a denial of convention rights to individuals, including the vulnerable, who have been directly affected by the actions of such bodies, and who may have inadequate alternative remedies. Weakening the rights-restriction rule would, therefore, support the position that defends a broader rather than a narrower conception of the range of institutions to which the Human Rights Act applies[22].

III. "MIRRORING" THE CONVENTION: "STANDARD" AND "FUNCTIONAL" AUTHORITIES

The principal reason, adopted in *Aston Cantlow*, for excluding public authorities from having Convention rights relates to the way the Act "mirrors"[23] the Convention. The Convention rights whose protection is furthered by the Act, are, under the Convention, directed at the state which has the obligation to secure these rights for everyone. Given this, it is assumed that state agencies cannot themselves enjoy Convention rights. This assumption derives from the un-

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(2002) 118 L.Q.R. 551-568 and House of Lords House of Commons Joint Committee on Human Rights *op. cit.* see note **5** above.

[22] The House of Lords House of Commons Joint Committee on Human Rights *op. cit.* see note **5** above, urges a version of the broader view. This may explain the comment in text to note **5** above.

[23] F. Bennion, "What sort of Human Rights Act?" (1998) 148 N.L.J. 6834, 488.

expressed obverse of the standing provision found in Article 34 which, along with "any person" or "group of individuals", identifies "non-governmental organisation[s]" as capable of making applications before the Court of Human Rights[24]. The state is thereby defined in terms of governmental organisations.

Article 34 does not, expressly, require the exclusion of any or all governmental organisations from having Convention rights. Indeed, the term "non-governmental body" was added as a re-draft to the then Article 25 by the Committee of Experts whose aim was to identify, in an inclusive way, the scope of the right of individual petition[25]. Given this legislative history, Article 34 can be read as an inclusionary rule aiming to give non-state public interest groups, the nature of whose legal personality might not be clear, the right to apply to the court if they have been the victim of a rights violation. The scope of the exclusionary power of Article 34, on the other hand, is a matter for the Strasbourg institutions to decide on the basis of their theory of the proper reach of human rights law. As discussed below, the Court of Human Rights does indeed insist on a broad conception of "governmental" which takes the scope of the rights-restriction rule way beyond the central coercive authority in the state. The issue, however, is not argued in detail.

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[24] *Aston Cantlow* v. *Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546, at [8] *per* Lord Nicholls, [47] *per* Lord Hope, [87] *per* Lord Hobhouse and, by strong implication, [158]-[160] *per* Lord Rodger.

[25] See, for example, *Collected Editions of the "Travaux Prèparatoires" of the European Convention of Human Rights* (Martinus Nijhoff The Hague 1975) Volume I, p. 210 and, in particular: *ibid* (1976) Volume III, p 270. See further: Miles, J. *op cit* see note **6** above.

In United Kingdom law, the idea of a "governmental organisation" is "mirrored" and given effect through the definition of a "public authority" in section 6 of the Human Rights Act 1998[26]. As is well known, section 6 of the Human Rights Act 1998 distinguishes between what are here called "standard" public authorities, identified by section 6(1) alone, and what are here called "functional" authorities, identified in sections 6(3)(b) and 6(5) as "any person certain of whose functions are functions of a public nature". The former are identified by institutional characteristics and the latter (which can be "any person" and thus incapable of identification by institutional characteristics) by tests for public function. The distinction between the two ways of being a public authority implies that an important, institutional, criterion for a "standard" public authority is being an organisation with no non-instrumental private side; an organisation with no commercial or charitable purposes characterising its ends. In *Aston Cantlow* the House of Lords "instinctively" recognised that "standard" public authorities included central government departments, local councils, the police and the armed forces. Other criteria were listed for identifying the full range of standard public authorities. Some of these, specifically public funding and the possession of special statutory powers, also appear in criteria suggested by their Lordships for "functions of a public nature" and, perhaps, should be discounted

[26] Confirmed in *Aston Cantlow* v. *Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546: a (standard) public authority is a body "whose nature is governmental in a broad sense of that expression" at [7] *per* Lord Nicholls; a body "exercising governmental power" with "a range of functions which are, in a broad sense, governmental" at [160] *per* Lord Rodger.

for the institutional test for a standard public authority[27]. Criteria exclusively predicated on being a standard public authority include:- a requirement of democratic accountability, a duty to act only in the public interest, and the possession of a statutory constitution[28]. Further unambiguously institutional criteria were identified in Scotland by the Appeal Court, High Court of Justiciary in G*rampian University Hospitals NHS Trust*: a body established by the executive, with functions specified by the executive, with a legal duty to comply with directions from the executive and which is both funded by and dissolvable by the executive; in summary, bodies which are "wholly under the supervision of the state" and "very far from being an entity distinct from or independent of the State", will meet the institutional criteria of being "standard" authorities[29].

Standard public authorities, identified in this institutional way, are bound in all they do by Convention rights and, according to the rights-restriction rule, are institutionally incapable in all that they do, of having their own Convention rights.

"Functional" authorities are bound by Convention rights when exercising "functions of a public nature", but they are not so bound in respect of their private acts[30]. Functional authorities are recognised in *Aston Cantlow* as being

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[27] *Aston Cantlow* v. *Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546, compare [7] with [12], *per* Lord Nicholls. Failing to distinguish institutional from functional tests in some recent Court of Appeal cases has been criticised, see D. Oliver, *op cit* see note **21** above and House of Lords House of Commons Joint Committee on Human Rights *op. cit.* see note **5** above.

[28] *Aston Cantlow* v. *Wallbank* [2003] UKHL 37; [2004] 1 A.C. 546, at [7] *per* Lord Nicholls referring to D. Oliver (2000) *op. cit.* see note **1** above.

[29] *Grampian University Hospitals NHS Trust* v. *Procurator Fiscal* [2004] H.R.L.R. 18, at [9] and [19].

[30] Human Rights Act 1998, ss. 6(3)(b) and 6(5).

capable of exercising Convention rights, certainly in respect of their private acts. What is not clear is whether a functional authority can stand on its Convention rights in respect of an act which is directly attributable to its performance of a public function. Determining the Convention rights of "functional" authorities on the basis of whether or not they were acting in furtherance of a public function would be, it is suggested, incompatible with the Convention "mirroring" that is central to the way this aspect of the Human Rights Act 1998 is dealt with by the courts. There is no Strasbourg equivalent to "functional" authorities. Actions by non-state bodies can engage state responsibility under the Convention, but there is no implication that such responsibility is only engaged when the bodies are performing public functions or that such bodies are limited in the Convention rights they can enjoy, even over the same matter that engaged state responsibility[31]. Article 34 seems to be entirely an institutional test which identifies bodies with standing by their institutional type (whether they are 'governmental' in character) rather than by function. Under the Strasbourg case law a governmental body does not have Convention rights even when it is acting non-governmentally[32]. But the converse is not true - there is no indication in the Strasbourg cases that a non-governmental body exercising public functions, a charity or commercial company, for example, ceases to have Convention rights under Article 34 because the violation it alleges affects it in the way it is exercising

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[31] *E.g.* punishment in independent schools engages state responsibility (*Costello-Roberts* v. *United Kingdom* (1995) 19 EHRR 112), and can found rights claims, at least by their head teachers (*R* (*Williamson)* v. *Secretary of State for Education and Employment* [2005] UKHL 15, [78]; but *cf* [35].

[32] *Ayuntamiento de Mula* v. *Spain* (Ap 55346/00) (1991) 68 D&R 209

those functions[33]. If this is true, there is a difference in the legal standing of standard and functional public authorities in the way they exercise public functions; functional authorities, but not standard authorities, can assert Convention rights not only to further their private (commercial or charitable) interests but also to support the way they exercise public functions. The question is whether this difference in treatment is justifiable or whether it is arbitrary.

IV. JUSTIFICATION AND THE CONCEPTION OF THE STATE

The justification for the distinctive treatment of standard public authorities is to give effect to the relationship of state and society that is said to be implicit in the Convention. The Convention aims to provide a remedy against the institutions constituting the "state" since the securing of Convention rights and freedoms is the responsibility of the state[34]. In *Aston Cantlow*, Lord Rodger, agreeing with the Court of Appeal, said: "arts 1 and 34 assume the existence of a state which stands distinct from persons, groups and non-governmental organisations" [35]. Such state institutions cannot themselves, by virtue of Article 34, have Convention rights because they are defined as being governmental. An expressed aim of the Human

[33] Article 34 would not be a barrier if, for example, the NSPCC, exercising its functions under the Children Act 1998, was prevented by a public authority from publishing matter relating to that function.

[34] Professor Oliver has pointed out that it is inappropriate in the Convention context to express this in terms of establishing domestic remedies against those bodies 'for whose acts the state is answerable before the European Court of Human Rights', D. Oliver, *op. cit* see note **21** above, 333-334.

[35] *Aston Cantlow* v. *Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546, at [159].

Rights Act is to recognise a modern conception of state power and governance[36]. The elision of state and government, however, arguably creates an over-monolithic conception of "government" that is not fully congruent with the modern "hollowed out" or "multi-layered" reality[37].

The privatisation of government is, of course, fully recognised in subsections 6(3)(b) and 6(5) of the Act. Nor is this problem of how the Act characterises the modern state principally focused on the creation of executive agencies since, constitutionally, these act on behalf of ministers and are not independent of them (though disputes involving the degree, if any, of autonomy enjoyed by the agency from ministerial authority can arise[38].) The main characteristic of the modern, multi-layered, state that is not clearly recognised in the scheme of the Act concerns the wide and variable roles of the "quangos" or "non-departmental public bodies"[39] including the various inspectorates, commissioners, directors general and other regulators which are increasingly found in the public life of the United Kingdom. Non-departmental public bodies meet some but not all of the institutional criteria of standard public authorities. They are not functional authorities since their purposes are entirely public; they

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[36] "…a realistic and modern definition of the state" HC Deb. vol. 314 col. 406 (17th June 1998) (Jack Straw M.P.). See also *Aston Cantlow* v. *Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 at [9] *per* Lord Nicholls and at [159] *per* Lord Rodger.

[37] For recent discussions see, *e.g.*, N. Bamforth and P. Leyland, (eds) *Public Law in a Multi-Layered Constitution* (London 2003).

[38] *E.g.*, the dismissal of the Chief Executive of the Prison Service in 1995.

[39] See, for example, P. Craig, *Administrative Law* 5th ed., (London 2003) Ch. 4; Craig uses both terms.

have no, non-instrumental, private interests. They are bound by the criteria of "selflessness" and other criteria identified by the House of Lords in *Aston Cantlow*[40] (though the scope and effectiveness of their duty of democratic accountability is a principal area of public law concern[41]). Similarly, their functions are likely to be within the definition of "governmental" or "public" including, often, a definition focused on the possession of special, ultimately coercive, powers[42]. On the other hand non-departmental public bodies will not fit easily with the institutional definition of a standard public authority if they are institutionally designed to have a significant degree of autonomy or independence from ministers, or from other intuitively "standard" authorities such as the police or local authorities. The need for this independence is a principal reason for their establishment. Of course the autonomy and independence of such bodies is subject to qualification. They are subject to varying degrees of control, supervision, influence, etc., from ministers or they may have complex relationships with other "standard" authorities. This qualified autonomy means that there is a potential for conflict and legal disputes between the non-departmental public body and some other institution of the state, including a minister. If, for example, such a public body came under ministerial pressure not to publish a report, it would not distort language or meaning to say that the public

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[40] See above, note **28** and related text. In *Aston Cantlow* v. *Wallbank* [2003] UKHL 37, [2004] 1 A.C. 546 Lord Rodger implies that the Equal Opportunities Commission is a standard public authority at [152]

[41] *E.g.*, C. Harlow and R. Rawlings *Law and Administration* 2nd ed. (London 1997), ch. 10.

[42] See D. Oliver (2000), *op. cit.* see note**1** above.

body has been directly affected, as regards its freedom of expression, by an action of the government or the state.

Non-departmental public bodies perform functions that may be more or less indistinguishable from "functional" authorities exercising public functions (*e.g.* a regulating and supervising function) or even, in some instances, from NGOs, such as where a public body has a broad promotional duty[43]. In performance of these functions all three, standard and functional public authorities and NGOs, can be directly affected by, be the "victim" of, "governmental", usually ministerial, actions. However, in that the rights-restriction rule "mirrors" Article 34, it seems that standard authorities may not, whilst functional authorities and NGOs may, rely on appropriate Convention rights in their dealings with government and ministers. Given the functional similarities and overlaps between the three types of organisation there is a prima facie argument, based on equality for like cases, for treating standard public authorities in the same way as functional authorities and NGOs as regards the enjoyment of Convention rights. The question is whether there is a compelling argument, going to the identifying institutional character of standard public authorities, which trumps this equality claim and provides sufficient justification for differences in treatment.

The denial of Convention rights to standard but not to functional authorities is supported by the Strasbourg case law on Article 34; and this extends to a broadly-drawn conception of governmental bodies. Reports and judgments

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[43] *E.g.,* the Equal Opportunities Commission's duty to promote equality of opportunity (Sex Discrimination Act 1975 s. 53(1)) or Ofcom's duty to "further the interests of citizens in relation to communications matters" (Communications Act 2003 s. 3(1)(a))

denying standing under Article 34 to public authorities indicate that the Strasbourg concept of a 'governmental' organisation includes bodies principally exercising public functions even if they also have private powers, such as the exercise of interests in land[44]. A "governmental" organisation includes not only "the central organs of the state" but also "decentralised authorities that exercise public functions" with "autonomy *vis-à-vis* the central organs" [45]. As suggested above, the Court of Human Rights is not compelled by Article 34 to this position but is, rather, adopting an implicit and unarticulated theory of the nature and role of the state. The cases involve local councils, which are in the House of Lords' "intuitive" list making up the traditional conception of the state. The fuller discussion in the *Holy Monasteries*[46] case, which decided that monasteries of the Greek Orthodox Church are "non-governmental", was not dealing with a body exercising public functions and so does not address the issue of whether an over-homogeneous conception of government, inappropriate to the complex organisation of a modern state, is being inadvertently promoted in these decisions. The local authority cases are not fully argued, the discussion of the point is brief and axiomatic. They no doubt reflect a civilian sensitivity to the categorial distinction between state and civil society, though that does not rest easily with the

[44] *Ayuntamiento de Mula* v. *Spain* (Ap 55346/00) (1991) 68 D&R 209

[45] *Danderyds Kommun* v. *Sweden* (Ap 52559/99) (2001) First Chamber; see also *Rothenthurm Commune* v. *Switzerland* Ap 13252/87 (1988) D&R 59, p. 251

[46] *Holy Monasteries* v. *Greece* (1994) 20 E.H.R.R. 1.

more pragmatic approach of the common law[47] and, in any case, is itself being adapted to the structures of the complex modern state[48]. They are also broadly in line with the notion of an "emanation of the state" developed by the European Court of Justice for identifying institutions that can be held responsible for the non-implementation of a directive. But the test in, for example, *Foster* v. *British Gas*, identifies institutions for the purposes of fulfilling the obligations of the state[49]. With its indifference to legal form and its requirement of public service, the *Foster* test reaches both standard and (some) functional public authorities and so cannot explain why those two types of body should be treated differently regarding their enjoyment of Convention rights as, it seems, they are under Article 34 ECHR and, therefore, the Human Rights Act. We need further reasons explaining why the concept of the state as ultimate guarantor of Convention rights insists that all publicly constituted bodies (bodies with no non-instrumental private side) must be treated the same, no matter how variegated their forms of autonomy and authority, in respect of denying them the benefit of Convention rights.

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[47] J.W. Allison "Theoretical and Institutional Underpinnings of a Separate Administrative Law" in M. Taggart (ed) *The Province of Administrative Law* (Oxford 1997).

[48] See D. Oliver *Common Values and the Public-Private Divide* (London 1999), pp.17-19 and the citations therein.

[49] *Foster* v. *British Gas* [1990] ECR-I 3313: "a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing public services under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals".

V. JUSTIFICATION AND THE CHARACTER OF PUBLIC POWER

Professor Oliver, in particular, has argued that, in this context, there is a distinct problematic of public power which, in summary, is bounded by the exercise of coercive, regulatory authority within society[50]. Given this, there is nothing arbitrary about measuring the exercise of public power against special standards, whose overarching principle is "selflessness"; similarly it is proper to subject the exercise of such powers to Convention standards[51]. For reasons discussed below, the duty of selflessness is assumed to be incompatible with the possession and assertion of Convention rights and is, therefore, central to the justification for the rights-restriction rule. However, the principle of selflessness may not have this justifying power. Selflessness follows from an institutional characteristic of public institutions: the absence of a non-instrumental private side. But it is not clear why selflessness should not be a required characteristic of the exercise of all coercive regulatory authority whatever the legal and institutional form of its exercise. If that is the case, selflessness will be unable to explain and justify the different treatment of standard and functional authorities on the issue of the possession of Convention rights.

The case for the duty of selflessness of all public bodies with no non-instrumental private side is made in *R v Somerset County Council ex parte Fewings* [52].

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[50] See, in particular, D. Oliver *op cit* see note **21** above.

[51] Professor Oliver's general theory includes the imposition of standards of "considerate decision-making" on private, often monopolistic, companies and organisations exercising public power.

[52] [1995] 1 All ER 513. Discussed by Oliver (1997) *op cit.* see note **1**.

Laws J (as he then was) argued that a public body has no private existence in the sense of an existence operating behind the statutes by which it was created and empowered. There are two separate points. First, that a public authority cannot act other than on the basis of a proper, purposive, understanding of its powers and, second, that in exercising its powers, it must always act on its best conception of the public interest, a public authority having "no axe to grind beyond its public responsibility". The first principle has priority over the second. It would, of course, be undesirable if a standard public authority could assert a right, for example, to private life or to property, against the claims of a private citizen. But this is not the direction of human rights claims, which are against the state (public authorities). Different issues arise if an authority's claim to such rights was asserted as a matter to be weighed by a court in a judgment of proportionality against, for example, a minister's attempt to restrict the authority's freedom in order to advance a pressing social need. Nevertheless, if such a claim was merely the public authority "grinding its own axe", then the matter would be ultra vires on the general principle of administrative law expressed in *Fewings*; this, rather than the rights-restriction rule, would be the explanation and justification of the outcome of the case.

The justification of the rights-restriction rule is, therefore, based on an assumption that the duty to act selflessly and the possession of Convention rights are intrinsically incompatible. The argument that public authorities might have Convention rights, on the other hand, is a claim that there are situations in which a public authority might believe that the best way to advance, within its powers, its conception of the public interest, is by claiming the benefit of a human right for

itself precisely as body which only has the power to use the benefit of that right in the public interest. Against this stands the view that seems to equate the possession of a Convention right with the assertion of solely private interests. Yet nothing in the philosophy of human rights makes it impossible for them to be exercised in the public interest as if they were necessarily a human characteristic akin to the possession of property. In the kinds of cases in which claims of Convention rights for standard public authorities are likely to arise, the issue for the courts will be to choose between the legal rights of parties both of whom are acting on the basis of what their conception of the public interest requires. There is no reason in principle why a standard public authority's claim to the benefit of a Convention right should be assumed to be capable only of advancing an interest of the authority's that is independent of its public duty and hence should be discounted.

Support for the rights-restriction rule can include a political preference for a distinction between state and civil society in which liberty is best promoted by a vigorous civil society where individuals and their associations enjoy freedom to formulate, promote and protect their own interests and conceptions of worthwhile ways of living. Governance, the state's function, is properly limited to the exercise of coercive power or special authority over others. The desirability of pluralism means that wider functions, specifically the provision of welfare, educational and other services, albeit funded and ordered by the state, should be part of civil society rather than subjected to the authoritarian tendency of state

control[53]. This is an attractive argument for a liberal society. It need not, however, mean that the benefits of pluralism flow exclusively from bodies and institutions that are, at least in part, private. There is what may be an equally attractive argument that some functions affecting the public, including, for example, either a "watchdog" or a representative function, though non-coercive and non-regulatory, are best performed by bodies which, defined by institutional characteristics, are entirely public. The public duties of such bodies, including their duty of "selflessness", may make them more truly representative, less "ideological", better resourced and better able to make a convincing case in conditions of polycentric complexity than can an NGO operating in the same sphere[54]. There is no reason to think, for example, that the Equal Opportunities Commission is not an effective representative of the general interests of women or that HM Chief Inspector of Prisons is not at least as effective in relation to prisoners' issues as are the similarly interested NGOs. A weakening of the rights-restriction rule would make such authorities better able to perform their functions in so far as they are brought into conflict with other authorities.

III CONCLUSION

The rights-restriction rule prevents standard public authorities from asserting Convention rights. It has been suggested above that the basis for this rule, the

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[53] D. Oliver (2000) *op. cit.* see note **1** above at pp. 492-3

[54] S. Hannett, "Third Party Intervention: In the Public Interest?" [2003] P.L. 128-150; *cf* M. Arshi, and C. O'Cinneide, "Third Party interventions: the public interest reaffirmed" [2004] P.L. 69-77

mirroring of Article 34 inherent in the Human Rights Act, does not comfortably justify the application of the rule to the full range of bodies and institutions that are within the definition of standard public authorities. An inappropriately homogenous conception of governmental bodies emerges from the test for standard authority. The test relates to institutional character rather than function and includes not only ministers, Parliament and the courts, bodies exercising the ultimate coercive authority of the state, but extends to the highly variable range of inspectorates, commissioners, regulators and others who are exercising public powers, but whose institutional identity and legal powers are designed to give them independence from ministers but an independence qualified by various intervention rights that ministers can exercise. Given that Convention rights are, in character, rights against the state, there is a case for saying that some such standard public authorities could, reasonably, enjoy Convention rights at least in respect of their legal rights regarding disputes with other standard authorities including ministers. A significant objection to this is that, absent amendment to the Human Rights Act, all standard authorities would have to enjoy Convention rights, and such rights could not be confined to litigation between public authorities but could also be asserted by a public authority against non-state claimants including those making human rights claims against the authority. Two answers to this point are suggested. First, given that the rights-restriction rule is derived from the Human Rights Act's "mirroring" of the Convention, including Article 34, it is noticeable that the exclusionary, as distinct from the inclusive, force of Article 34 reflects an unargued and implicit conception of state and government. Because of the heterogeneous, multi-layered, nature of modern

government, this conception may be in need of refinement in order to deal with various kinds of intra-governmental disputes; disputes brought, in pursuance of their conception of the public interest, by standard public authorities against others including political and legal superiors. Second, the objection to standard public authorities enjoying the benefit of Convention rights presumes that the exercise of such rights is incompatible with their overriding duty of selflessness. Here it is suggested that there is no necessary incompatibility between exercising Convention rights and acting in the public interest. The duty of selflessness goes to the legal powers, the *vires*, of a public authority and so any claim to Convention rights that was, in effect, merely self-serving, would be discounted as ultra vires. If standard public authorities have Convention rights, the core case would be of a public authority, directly affected by a decision or action of another authority, such as a minister, which decision the authority wishes to resist on the basis of its conception of the public interest. The particular advantage is that standard public authorities are then equally placed with functional authorities and others when performing important public interest functions, including "watchdog" and representative roles, which may bring them into dispute with other agencies of the state.