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THE PRIVATE SECTOR AS SERVICE PROVIDER AND ITS ROLE IN IMPLEMENTING CHILD RIGHTS

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Harmonising Governance and Human Rights: A Process of Continuing Adjustment

A traditional reading of international and human rights law would state that human rights laws only govern the behaviour of the state. This classic human rights model is based on the assumption that the state is the sole centre of institutional power and therefore potentially represents the most serious threat to individual rights and freedoms. However, the emergence of new forms of governance, involving third and private sector bodies as service providers, complicates the operation of this classic model of human rights law. As the power of these non-state bodies increases, so too does their capacity to infringe the rights of individuals. The distinction between state and non-state bodies for the purposes of determining the reach, or applicability, of human rights law becomes questionable and, it is suggested, requires adjustment in light of changing modes of governance.

This paper will look at some of the issues that arise when non-public bodies participate in delivering public services. It will ask whether these bodies should be made accountable to international human rights standards and, if so, by which means. The experience of the United Kingdom under the Human Rights Act 1998 and the case law of the European Convention on Human Rights will be considered to understand how these legal systems have attempted to treat these questions. The issues will also be considered within the Irish legal framework, and in particular, with reference to the third sector bodies which play such a dominant role in the delivery of primary education in Ireland. This case study highlights how key provisions of the Convention of the Rights of the Child, such as the right to education and the right to freedom of thought, conscience and religion, are at risk when third sector service providers are not held accountable to human rights standards.

Theoretical issues: a need for adjustment

At a theoretical level the question of whether human rights law should be applied to non-state actors, such as third sector service providers, requires consideration as to where the line should be drawn between public law and private law.[1] Should the application of human rights law be restricted to relations between the state and the individual? Or should human rights law also have a degree of effect in private law, an area that has traditionally been cut off from human rights law? To use the terminology which has entered the legal lexicon via EC law, should human rights law simply have a *vertical* effect whereby the law is only concerned with the relationship between the state and the individual, or should it additionally have a *horizontal* effect according to which human rights standards should also govern relations between non-state bodies and individuals.[2]

As the number of non-state bodies exercising public functions increases, there has been a growing recognition that the boundaries between public and private law must adjust in line with this development.[3] It is suggested that where the boundary is drawn should depend on the purpose of making the distinction in the first place. In the case of human rights, the fundamental aim is to protect the rights of individuals from those bodies who possess significant power over their lives. Therefore, the

crucial issue in the public/private debate should lie in recognising that individual rights are most seriously threatened by institutional power whether or not this power is exercised by an organ of state, civil society or a private enterprise.

Such a conclusion suggests that the traditional vertical approach of human rights law is ineffective in capturing the sources of power that may potentially offend against the rights of individuals and that as a consequence adjustments must be made to adapt this approach to match the evolving processes of governance.

Implementation issues: a need for adjustment

Responsibility to take account of the new patterns of governance in applying human rights law falls both on international supervisory mechanisms and on domestic legal systems.

In general, questions as to who to hold accountable under human rights law - by what means - are more easily answered at the level of international law than at the domestic level. Only states are signatories to international treaties and therefore only states are bound by such treaties. International human rights tribunals may therefore only hear complaints brought against states but not against private or third sector bodies. However, international human rights law has from the outset acknowledged the role of private actors in implementing human rights treaties.[4] It has responded to the growth of third and private sector bodies in service provision in a number of ways in an attempt to encourage the accountability of these bodies. For example, the committees that supervise the implementation of human rights treaties have increasingly made reference, through the issuing of General Comments, to the responsibilities of non-state actors in the implementation of treaty rights.[5] Furthermore, certain human rights treaties have explicitly recognised the potential of non-state bodies to be human rights offenders and have made references to the responsibilities of the third and private sectors within the treaty provisions.[6] The Convention on the Rights of the Child established the obligation on states to set standards in conformity with the Convention and ensure compliance by the appropriate monitoring of institutions, services and facilities, including those of a private nature.[7]

Such initiatives are a positive response towards making non-state service providers accountable under international human rights law. However, despite these efforts there is a growing concern that the implementation of rights set out in the treaties is hindered by the lack of accountable placed on third sector bodies when state-like functions are delegated to them by the state. An accountability vacuum is thereby created which results in diminishing international human rights standards.

It is at the level of domestic human rights law where the issue of applicability of public human rights standards to third and private sector service providers is coming to the fore[8] and where the strongest potential exists to make human rights law pertinent to the way in which societies are governed today. Governments have an opportunity to incorporate human rights instruments, such as the European Convention on Human Rights, into domestic law in a way which makes human rights

meaningful to people who live in a society where power is no longer concentrated in a centralised government.

When a state decides to adopt by legislation a human rights instrument, one of the fundamental decisions to be made is what will be the scope of applicability of that legislation: against whom may the rights be invoked? If the state is willing to accept that new modes of governance demand something more that the traditional verticalist approach, then there are a number of ways in which the incorporating legislation can be drafted to make third and private sector service providers accountable to the rights contained in the human rights instrument.

Thus, the state may decide to restrict itself to a verticalist approach and to impose obligations directly on public bodies only. However, the application clause may be drafted to define public bodies in an expansive manner so as to cover not just state actors but all bodies involved in public service provision. Sometimes, specific guidance is given in the application clause as to who should fall under the term 'public body'.[9] However, frequently, the text is drafted in somewhat ambiguous terms and it is left to judicial interpretation to decide which bodies are categorised as public authorities and thus liable under the legislation. Therefore, the issue of how to define a public authority becomes crucial to the operation and effectiveness of the human rights instrument.

A second approach is one where the interpretative clause of the incorporating legislation may be drafted to instruct the courts to interpret statutory law, common law or both in a manner that is compatible with the rights contained in the instrument. This would apply equally to private law cases as to public law cases. In this way there is a degree of horizontal effect that will bear on wholly private relationships and disputes including, for example, cases involving a private individual and a third sector body.

A third way in which the legislation could be drafted so as to have an effect on non-public bodies is to include the courts in the definition of a public body in the application clause and therefore bound them to act in a way compatible with the provisions of the human rights instrument. Thus, when a citizen sues another citizen then the matter would come before the court which would have to apply the standards of the human rights instrument. In this way an additional degree of horizontality effect is introduced.

A state may choose to include one or several of these options when it decides to make a human rights instrument applicable in its domestic legal system. This can be illustrated by the case of the United Kingdom which has recently incorporated the European Convention on Human Rights (ECHR) through the Human Rights Act (HRA) 1998. The approach it took to the measures in the HRA, and the subsequent two years of adjudication of the Act, help highlight the potential impact such measures can have on third and private sector service providers. The UK Act and experience provide a particularly useful case study given that the Irish Government has stated that 'following its consideration of the matter, …[it has] decided to adopt a similar interpretative type approach…' in its bill which is designed to give further effect to the ECHR in Irish law, the European Convention on Human Rights Bill,

2001.[10] Furthermore, under the terms of the Belfast Agreement, the Irish Government is obligated to ensure that the measures it puts in place to strengthen the protection of human rights in its jurisdiction will offer 'at least an equivalent level of protection of human rights as will pertain in Northern Ireland.'[11] It is therefore important to be aware of the scope of applicability of the UK's HRA and the level of protection it is offering its citizens.

The UK Human Rights Act and non-public service providers

Under the legal systems of both the United Kingdom and the Republic of Ireland international law treaties, such as the ECHR, are not self-executing and do not give rise to rights enforceable in domestic courts. In the UK, the government's main aim in introducing the HRA was to allow cases raising Convention issues to be dealt with in UK courts thereby providing for further effect to be given to the ECHR.[12] Until then, the UK courts had very limited powers to take account of the Convention. Although the Courts would apply the presumption that Parliament intends to comply with the United Kingdom's obligations in international law, they could not normally accede to arguments based on Convention rights, or offer remedies for breaches of these rights.

The HRA enables the 'Convention rights' to be relied upon in three major contexts, all of which have significant impact on third sector service providers. First, the Act renders it unlawful for any public authority to act in a way which is incompatible with a Convention right. Public authorities are not defined exhaustively in the Act. Section 6,[13] the application clause, envisages two types of public authorities: bodies which are manifestly public authorities (standard authorities) within s.6(1) and bodies which are not clearly within s.6(1) but fall within the definition in s.6(3), in that they exercise one or more public functions (functional authorities). The distinction is an important one since standard public authorities within s.6(1) are required to respect Convention rights in everything they do; but functional public bodies which are public authorities by virtue only of s.6(3) have no obligation to comply with the Convention in their private law activities.

The notions of 'public authority' and 'functions of a public nature' introduce a need for a definition of both terms. From the point of view of third sector service providers the definition of public functions is particularly crucial in deciding if they are to be defined as a functional public authority. The term appears to have been borrowed not from the Convention or its case law but from the New Zealand Bill of Rights Act 1990. However, there is relatively little New Zealand case law elaborating on the definition of public function. Nevertheless, it would seem that it is fundamental to the New Zealand analysis of a public function that the function is conferred or imposed on the relevant person or body by or pursuant to law.[14]

The Home Secretary stated during the parliamentary debates on the passing of the Bill that the test of public function 'must relate to the substance and nature of the act, not to the form and legal personality.'[15] He suggested that any definition of a public authority should be consistent with existing Strasbourg case law[16] and that the courts should draw upon the tests used in domestic judicial review for identifying public bodies and functions. However, it has been noted that this suggestion is problematic

as the factors used to identify a public body in domestic judicial review are not necessarily consistent with the Home Secretary's explanation of section 6 of the HRA (Bamforth:199). Bamforth notes that in determining whether a body is amenable to judicial review courts often use a variety of criteria relating to the source of a body's power *as well* as to the nature of its function. Furthermore, the Convention and common law may sometimes adopt different approaches as exemplified by some recent decisions concerning private schools where domestic law precludes the use of judicial review when the applicant has voluntarily submitted to the regulatory power of the respondent. The issue then falls into private law sector. By contrast, the European Court of Human Rights has ruled that governments can be liable for violations involved in the administration of discipline in private schools. The argument given is that such schools co-exist with a system of public education and that the Convention right to education is guaranteed equally to pupils in state and private schools. 'The obvious implication of the ECHR position on private schools is that they are - contrary to the contract exception in domestic law - sufficiently 'public' that their activities are covered by the Act. Ultimately, the courts may be faced with a choice between according priority to the Convention approach or to that favoured in domestic law.' (Bamforth:1999:162)

During the passage of the Bill it was suggested that certain activities such as education would be public functions whether or not the provider was a public authority. For instance, the Lord Chancellor said 'if a court were to hold that a hospice, because it provided a medical service, was exercising a public function, what on earth would be wrong with that? Is it not also perfectly true that schools, although underpinned by a religious foundation or a trust deed, may well be carrying out public functions?' [17]

The issue has yet to be fully worked out by the courts. Only a small number of cases to date have considered the question of when an essentially private or third sector body will be considered a functional public authority under the HRA. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue*, [18] the point was made that the fact that a body performs an activity which otherwise a public body would be under a duty to perform, cannot mean that such performance is necessarily a public function. Nor does the fact the activities of a commercial body are subject to extensive statutory regulation necessarily mean that its activities involve the carrying out of a public function. But insofar as a private company has been endowed with statutory duties and powers, it was held that that it would be considered a public authority in relation to those functions. The judge observed that the European Court of Human Rights has made it clear that the State cannot absolve itself of its Convention obligations by delegating the fulfilment of such obligation to private bodies or individuals, including to the headmaster of an independent school.[19] In *Aston Cantlow Parochial Church Council v Wallbank*,[20] the Court of Appeal found a parochial church council to be a public authority on the basis that: 'It is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act.'

However, in *R (Heather) V The Leonard Cheshire Foundation*,[21] Stanley Burnton J held that 'public' in section 6(3)(c) was being used in the sense of 'governmental'. As a result, the Leonard Cheshire Foundation was held not to be a 'functional public

authority' despite the fact that it was in receipt of public funding, was regulated by the state, and, if it had not provided care, such care would have to be provided by the state. It has been submitted that this decision is open to question since a generous interpretation of a public 'function' would extend the scope of functional authorities beyond those public bodies which perform governmental functions (Clayton:2001:22).

The second way in which a third sector service provider may find itself affected by the HRA is via the interpretative clauses of the Act. These require the courts to interpret primary and subordinate legislation, so far as it is possible, in a manner compatible with Convention rights and, in so doing, they must take into account, though not necessarily follow, the decisions of the European Court of Human Rights in Strasbourg.[22] No new cause of action is created, but any dispute on the interpretation of legislation creating an obligation or right will have to be resolved having regard to the requirements of the Convention. The wording of the interpretative clause does not limit its effect only to legislation concerning public authorities and so it can apply to wholly private disputes. This principle of direct statutory effect has been applied, for example, in *Wilson v First County Trust*[23] where the Court of Appeal decided that the bar against enforcing a credit agreement breached the right of access to the court under Article 6 and the right to enjoy property under Article 1 of the First Protocol.

Finally, the application clause includes the courts as a public authority which must act in a way which is compatible with the Convention rights.[24] Hunt notes (2001:166) that all commentators appear to agree that this inclusion obliges the courts to develop the common law governing private relations in a manner compatible with the Convention.[25] The only area of real disagreement is whether, and if so to what extent, courts are *obliged* to develop the common law to protect Convention rights.[26] The consensus view suggests that while the HRA makes Convention rights relevant in proceedings between private parties it stops short of conferring any new causes of action against individuals as the rights cannot be directly enforceable against a private body. In *Venables v News Group Newspapers*,[27] Dame Butler-Sloss P appeared to back this view and held that, while the court was obliged in such cases to act compatibly with Convention rights in adjudicating on common law causes of action, the Convention does not give rise in private law proceedings to free-standing causes of action based on Convention rights.[28]

This brief review of the HRA illustrates the various means by which third sector service providers may be held accountable under human rights law: both directly if defined as a public authority and, indirectly when the courts are obliged to interpret legislation and common law in light of the human rights provisions. In identifying which third sector service providers should be held accountable the case law of the European Court of Human Rights is an essential, and indeed obligatory, reference tool.

The European Convention on Human Rights and third sector bodies

A consideration of the case law of the European Court of Human Rights is relevant given that the overall purpose of a state incorporating the ECHR into the domestic

legal system is to enable individuals to rely upon Convention rights in the domestic courts in the same circumstances as they can rely upon them in Strasbourg. With that objective, it can be assumed that a person or body whose actions could legitimately be held accountable in Strasbourg should not fall outside the scope of applicability of the legislation at home.[29]

The Court's jurisprudence is helpful in two instances. The first has to do with the definition of the state. The Strasburg organs (Court and Commission) have held that 'the state' is to be construed broadly as referring to all emanations of the state.[30] In *Cosans v. UK*, a case dealing with corporal punishment in state schools, the Government questioned whether it could be held responsible for matters arising out of the running of individual schools. The Commission noted, however, that the 'responsibility of a state under the Convention may arise for acts of all its organs, agents and servants'.[31] Responsibility for the actions of teachers in Scottish state schools lay with the Secretary of State for Scotland and the regional educational authorities, and through them with the Government as a whole. This case emphasised that central government will be held responsible for the actions of all other branches of the state apparatus.

The second area concerns instances where the state has delegated its powers to non-state bodies. Here the Court has consistently made clear that the government cannot evade its own responsibilities by contracting out its functions to private and third sector bodies. In *Costello-Roberts v UK*,[32] the UK was held responsible for the actions of a private school, on the basis that the state has delegated to the school the function of securing the Convention right to education. The UK Government could not absolve itself from responsibility for securing the right to education by delegating its obligations to schools in the private sector. Hence, as mentioned above, the actions of the headmaster of an independent school could engage the responsibility of the state. In this case, the jointly partly dissenting opinion of four of the judges sent a clear message (which was not relevant to their dissent) that privatisation did not affect the scope of the Convention and its protection. They stated: **'**A state can neither shift prison administration to the private sector and thereby make corporal punishment in prisons lawful, nor can it permit the setting up of a system of private schools which are run irrespective of Convention guarantees'.

Ireland and the European Convention on Human Rights Bill

In April 2001, the Irish Government published a bill designed to give further effect to the rights contained in the ECHR. The Bill, known as the European Convention on Human Rights Bill, adopted the British model of administrative incorporation (described above). This decision has been criticised on the grounds that such an approach is only required in a jurisdiction with parliamentary sovereignty. In Ireland, the Parliament is subordinate to the Constitution and the courts and, it is therefore argued, a legislative or constitutional model would have been preferable.[33] This Bill has now lapsed with the end of the last Dail. It can either be put back on the Order Paper for the new Dail or a new Bill can be drafted and started de novo.[34]

In the absence of an indication that a new bill will be drafted, the discussion below will focus on the provisions provided for in the 2001 Bill and will look at the potential implications for third sector service providers.

The application clause of the Bill is found in Section 3. It states that every organ of the State must perform its functions in a manner compatible with the State's obligations under the Convention provisions, unless it could not have acted differently according to the law of the State. The Explanatory Memorandum to the Bill defines 'Organs of the State' to include any body which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised.

During the initial Dail debate on the Bill, the Opposition voiced fears that 'all sorts of functions of a public nature undertaken by persons of legal identity will fall outside the provisions of this Bill'.[35] It was argued that the clause was far narrower than the provisions of the UK's HRA and as a consequence the citizens of Northern Ireland would have greater protection than those in the Republic of Ireland. The Minister was asked for clarification on this issue.

In the absence of further guidance, it is unclear which tests will be used to establish whether non-state service providers will be regarded as bodies through which executive or legislative powers are exercised. Reference will perhaps be made to tests used in judicial review cases. However, as noted above, this approach may prove unhelpful as the factors used in such tests may not be relevant to identifying a body through which the powers of the state are exercised and, additionally, may not concur with the approach of the European Court of Human Rights. These issues demand much debate during the passage of the Bill. It is strongly suggested, that following Strasbourg case law, which the courts will be obliged to take account of, the definition of a state organ should be a generous one. Any body, including a third sector body, which provides services to secure Convention rights, such as the right to education, should be considered liable under this application clause.[36]

The interpretation clause of the Bill states that in interpreting any statutory provision or rule of law, a court must, as far as possible, do so in a manner compatible with the State's obligations under the Convention. Courts must also take account of the principles laid down by the jurisprudence of the Strasbourg organs.[37] The Explanatory Memorandum to the Bill defines 'rule of law' to include common law. For the purposes of determining the impact on third sector service deliverers, this clause would appear to match the effect of the interpretative clause of the HRA in the UK when combined with the result of defining courts as a public authority in the HRA application clause (which leads to the courts being required to develop the common law in a manner compatible with the Convention). Therefore, it seems that the scope and implications of the interpretative clause will mean that Convention rights will be capable of being considered in litigation between private parties when initiated on the basis of existing domestic remedies, even where no organ of the state is involved. In other words, individuals involved in private litigation who wish to have the Court consider human rights standards will need to identify an existing cause of action on to which they must try to graft one of the ECHR guarantees.

It is therefore suggested that the provisions of the European Convention on Human Rights Bill could have applicability to third sector service providers in two ways. First, if a third sector service provider falls within the definition of organ of the state under Section 3 (the application clause) that body will have to perform its functions in a manner compatible with the ECHR. Secondly, in cases where the third sector body is not considered an organ of the state, it may be involved in private litigation where human rights standards are raised and where the court is asked to consider these standards in its interpretation and application of statutory and common law.

Third sector service providers in primary education: 'organs of the state'?

The structure of the primary education system in the Republic of Ireland is highly unusual. The vast majority of schools are publicly funded and privately owned, predominantly by religious bodies - approximately 93% of schools are Catholic and 6% are Protestant.[381] There is no parallel system of non-denominational schools organised by the State.

Every primary school must have a patron. The role of patrons as owners of schools was given statutory recognition in the Education Act 1998. In the vast majority of schools the patron is the Roman Catholic or Church of Ireland (Protestant) bishop of the diocese. The Board of Management is appointed by the Patron and agreed by the Minister of Education. The Board is charged with the direct governance of the school and is required to uphold the ethos of the school.

The question arises as to whether these schools should be considered organs of the state under the European Convention on Human Rights Bill? In the absence of a clear definition of bodies liable under Section 3 of the Bill, it is difficult to reach a definite conclusion. However, this will be an essential task and in undertaking it the following factors should be considered:

First, within the structure of Irish primary education, the third sector bodies are critical in fulfilling the state's obligation under the right to education.
Secondly, Strasbourg case law indicates that the government is responsible for the actions of a non-state school on the basis that the state has delegated to the school the function of securing the right to education.

Thirdly, the provisions of the Bill are subject to the overriding authority of the Constitution which remains the supreme law of the country. To date, denominational school bodies have been excluded from rights obligations found in the Constitution. For instance, in *McGrath and O'Ruairc v Trustees of Maynooth College*[39] it was held that the prohibition of discrimination under Article 44.2.3 of the Constitution was confined to the State and not extended to institutions receiving public funding.[40]

[1] Of a total of 3,186 primary schools, 21 are multi-denominational schools. These schools are established, owned and managed by groups of parents coming together to form private limited companies.

Religious third sector bodies are additionally safeguarded by Article 44.2.5 of the Constitution which protects the rights of denominations to control their own affairs.

Fourthly, the law of precedence will be affected by the Bill. Current case law will need to be re-examined in the light of new principles and it will be open to a court to refuse to follow authority on the basis that those decisions are not compatible with Convention rights. Because the Convention has been recognised as a 'living instrument' the court is entitled to reverse a previous decision in order to reflect changing standards and social attitudes.

The final factor to consider is that under the Belfast Agreement there is an obligation to provide for equivalence of human rights protection North and South. It would clearly be unacceptable if different levels of human rights protection were offered within one education system compared with another. As already noted, under the application clause of the UK's HRA it would appear that schools, including those underpinned by a religious foundation or a trust deed, will be accountable under the Act given that they carry out functions of a public nature.

The issues within the Irish primary school system

The religious nature of the vast majority of the third sector service providers in education raises particular issues for individuals who do not identify with the ethos of these bodies.[41] Within the context of the Convention on the Rights of the Child (CRC), the rights that are most vulnerable under this system of educational governance are the right to education (Articles 28 and 29), the right to freedom of thought, conscience and religion (Article 14) and right to freedom from discrimination (Article 2).[42] The operation of what is described as the 'integrated curriculum' illustrates how these rights are threatened when religious third sector service providers control 99% of schools and no genuine alternative is made available to pupils and parents.

The 'integrated curriculum' describes the policy whereby religious values are expected to infuse the entire curriculum. The principle of the 'integrated curriculum' was officially endorsed with the introduction of the 1971 Curriculum. Rule 68(b) of the Curriculum states 'the separation of religion and secular instruction into differentiated compartments serves only to throw the whole educational function out of focus'. Instead it recommends that religious instruction should be integrated as much as possible into other lessons. All schools were consequently expected to offer a curriculum where religious and secular instruction could be integrated. This move underlined Rule 68 of the Rules for National Schools.[43] This Rule states

> Of all the parts of a school curriculum Religious Instruction is by far the most important….Religious Instruction is, therefore, a fundamental part of the school course, and a religious spirit should inform and vivify the whole work of the school.

The existence of the integrated curriculum renders valueless the opt-out provision that does exist and which allows children to be withdrawn from any periods of formal instruction. If religion is supposed to permeate the day, including via morning assembly and periods devoted to sacrament preparation, and to play a role in the

teaching of all subjects, then a child cannot be withdrawn from all classes without rendering her/his education ineffective.

It is strongly suggested that the 'integrated curriculum' violates Article 14 of the CRC, the right to freedom of thought, conscience and religion, as a child may be forced to be educated in a manner not in accordance with her or his conscience in order to secure an education. In addition, it is submitted that the right to education (Articles 28 and 29) may be breached, as a child who did not want to be educated in a particular religious ethos would have no access to alternative education.

By delegating its education duties to third sector bodies but yet not making such organisations accountable to human rights standards, the Irish State is evading its international human rights responsibilities. It would seem that there are two options open to the State to remedy this situation. It must impose on the religious bodies running the schools an obligation to respect human rights standards. In practical terms, with respect to the integrated curriculum, this would mean that that the teaching of formal religious subjects and secular subjects would have to be separated to allow children to withdraw from formal religious instruction if it is contrary to their beliefs. Alternatively, the State could allow the religious bodies to continue to run their schools in their preferred manner, but the State would be obliged to set up a parallel system of non-denominational schools to cater for the wishes of those who did not want to be educated in a particular religious environment. It is suggested that if it proves economically unviable to support both a denominational and non-denominational school in any particular area where there is demand for both, then it is obligated to give priority to a non-denominational school. Timetabled denominational instruction would be provided in the state schools for those want it.[44]

Conclusion

The example of the Irish primary education system, and specifically the practice of the integrated curriculum, illustrates the threat to human rights that can arise when public service delivery is delegated to third sector bodies. Governments must recognise the need to harmonise changing modes of governance with their human rights obligations. This could be achieved through the development of specific guidelines to assist both states and non-public service deliverers identify where international law responsibilities lie within these new patterns of governance. However, it is suggested that the inclusion of non-public service deliverers within the scope of applicability of domestic human rights legislation, for example, legislation incorporating the European Convention on Human Rights, is the most effective means of ensuring that the rights of individuals are protected in a situation of evolving processes of governance.

[1] Some commentators have argued that such a deliberation is itself superfluous as it presupposes that there is a fundamental distinction between the public and private spheres of law and by framing the debate in this way it 'assumes the very thing that needs to be debated' (Sedley:1999:23). As Hunt (2001:173) notes 'the very presence of law introduces a public element: private relations are in part constituted by both statute and common law, and the State lurks behind both'. Clapham suggests that it

is (1995:20: fn 1) 'quite likely that it is the desire to protect a right to privacy from state interference that has led to the assumption that there is a sphere sealed of from the reach of human rights law'.

[2] A range of possible positions exists between these two theoretical extremes. When a state incorporates an international human rights instrument into its domestic legal context, it has an opportunity, through the wording of the text of the incorporating act, to decide the scope of applicability of that human rights instrument. This is discussed in further detail in the next section.

[3]There is a growing awareness on the part of the international bodies that supervise the implementation of human rights treaties of the need to hold non-state bodies accountable to human rights standards. The Committee on the Rights of the Child has called a meeting in September 2002 specifically on the issue of the 'The private sector as service provider and its role in implementing Child Rights'. The aim is to discuss the impact of increasing participation of private sector actors in the provision of state-like functions on the implementation of the Convention on the Rights of the Child and to develop guidelines, which would include standard-setting for private service providers as well as monitoring and regulation by State parties.

[4] The preamble of the Universal Declaration of Human Rights states that 'every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for the rights and freedoms…'.

[5] For example, the Committee on Economic, Social and Cultural Rights (which monitors the International Covenant on Economic, Social and Cultural Rights) noted in its General Comment No.12 that non-governmental organisations as well as the private business sector have responsibilities in the realisation of the right to adequate food. In addition, the Committee in General Comment No.14 on the right to the highest attainable standard of health and in General Comment No.13 on the right to education has referred to the responsibilities of the private sector.

[6]Article 2(e) of the Convention on the Elimination of All Forms of Discrimination against Women clearly states the states parties' obligation 'To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise.' Similarly, the Convention on the Elimination of All Forms of Racial Discrimination obliges state parties in article 2(d) to 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization'.

[7] Article 3(10) and Article 3(3)

[8] The British Government passed the Human Rights Act in 1998. The Act is designed to give further effect to the European Convention on Human Rights within the domestic legal system. The Irish Government is in the process of passing legislation to incorporate the Convention. The implications for third sector bodies of the manner in which such incorporation has been carried out, in the UK case, and is proposed, in the Irish case, is the subject matter of later sections.

[9] The Canadian Charter in section 32(1), sets out to whom the Charter applies. It provides:

This Charter applies:

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament…; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[10] Explanatory Memorandum of the European Convention on Human Right Bill, 2001. p.3. The status of this bill will be discussed later in the essay.

[11] The Belfast Agreement, Rights, Safeguards and Equality of Opportunity. Art. 9.

[12] The model chosen by the UK in order to give the Convention further effect in domestic law seeks to reconcile a transfer of power to the judiciary with parliamentary sovereignty. The Act authorises a court, at the instance of a private litigant, to make a declaration of incompatibility between a Convention right and a statute. Where such a declaration is made, a minister may take steps to make amendments to an act of parliament, which the Minister 'considers necessary to remove incompatibility'.

[13] Section 6

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(3) In this section 'public authority' includes –

(a) a court or tribunal

(b) any person certain of whose functions are functions of a public nature …

(5) In 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.

[14] *Federated Farmers of NZ(Inc) v NZ Post Ltd* [1990-92] NZBORR 331, *TV3 v Eveready New Zealand Ltd* [1993] 3 NZLR 435.

[15] Hansard, H.C., June 17, 1998 col. 433.

[16] The jurisprudence of the European Court of Human Rights concerning the definition of public authority will be discussed in the next section.

[17] H.L. Deb., vol. 583, col. 800, November 24, 1997.

[18] [2001] 3 WLR 183.

[19] *Costello Roberts v Untied Kingdom* (1993) 19 EHRR 112, para.60.

[20] [2001] 3 All ER 393, 402, para. 35.

[21] [2001] EWHC Admin 429.

[22] Section 2 states that courts must take into account the decisions of the Strasbourg organs.
Section 3 (1) states that 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

[23] [2000] QB 407, (No 2) [2001] 3 WLR 42

[24] Section 6 (3)(b)

[25] There is now considerable literature on the horizontal effect of the Act. The consensus view amongst human rights lawyers (Hunt, Wade, Buxton, Leigh, Kentridge, Fenwick, Lester & Pannick) appears to be that the Act will have significant horizontal effects but will not go so far as to create new causes of action.

[26] Hunt (2001:167) points out that the debate is not now 'so much about whether the law governing private relations should be compatible with Convention rights (that debate has largely been settled by the form of the legislation); it seems to be more concerned with the extent to which development of the common law will tread on Parliament's toes. In which case, the issue has become less a philosophical one about public and private, and more an issue of relative institutional competence between the courts and Parliament.'

[27] [2001] 2 WLR 1038

[28] Hence, litigants in private common-law actions will not be able to found a challenge directly on a Convention right. They will need to identify an existing cause of action on to which they must try to graft one the ECHR guarantees.

[29] To some extent, the Strasbourg case law has been able to circumvent the need to identify the criteria for determining when a body is a public body or is performing public functions by the development of the doctrine of positive obligations. This doctrine imposes a positive duty on the state to secure certain Convention rights. Hence it does not matter to the Court whether and what kind of body caused a violation. In its eyes the state is responsible for the overall failure within the system which has resulted in the breach.

[30] The ECJ has taken a similarly wide view of the state, holding that any organ or 'emanation of the state' will be caught by EU legislation. *Foster v. British Gas plc [1991] 1 Q.B. 405*

[31] *Cosans v UK*, Appl.No 7743/76, (1978) 12 D&R 140, 148-149

[32] A/247-2, (1995) 19 EHRR 112

[33] Mr Justice Barrington, President of the Human Rights Commission, described the decision as 'extraordinary' and 'regrettable', and pointed out that it would lead to a situation where 'we will have two systems of superior law'. The Irish Times, 21 May 2001. The Bar Council said that if the model was chosen from fears about the separation of powers between the courts and the executive, these were misplaced. The Irish Times, 12 July 2001. Senator Maurice Hayes has noted that the British model 'was an ingenious device to deal with the problem of British sovereignty. We have the same ingenious device, when the problem did not exist'. The Irish Times 14 June 2002.

[35] Alan Shatter, Dail Debate, 14 April 2001

[36] See judgment of *Costello Roberts v Untied Kingdom* (1993) 19 EHRR 112

[37] The European Court of Human Rights, The European Commission of Human Rights and the Committee of Ministers

[38] Of a total of 3,186 primary schools, 21 are multi-denominational schools. These schools are established, owned and managed by groups of parents coming together to form private limited companies.

[39] [1979] I.L.R.M. 166

[40] Casey (1992:572) observes that if correct this decision, 'leads to an odd result. The State may not, by statute or administrative action, make continuing religious allegiance a ground for dismissal from the public service or from private employment, since to do so would violate Article 44.2.3. But if it hands over to religious denominations money used for paying teachers' salaries, both it and they are free from constitutional constraints. There is surely something "Kafka-esque" about such a situation.'

[41]It also causes difficulties for those teachers and parents who do not wish to teach in or to have their child educated in a single faith environment.

[42] The focus here will be on the rights of the child. Clearly, such a system also calls for a discussion on the rights of teachers in a denominational system of education: the right to employment, right to private life, freedom of thought, conscience and religion and freedom from discrimination.

[43] It is of interest to note that those countries with the highest proportion of children going to public schools (Germany 98.9%, Greece 94.1%, Denmark 93% Italy 92.6%) all include religion as a curriculum subject but each operate a very workable opt out clause.

[44]The regulatory framework for the governing of primary schools includes the 'Rules for National Schools'.

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