THE PROTECTION OF CHILDREN'S HUMAN RIGHTS IN THE CONTEXT OF THE PRIVATISATION OF EDUCATION



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THESIS ABSTRACT

The privatisation of education has mushroomed in recent years. As a phenomenon, it covers a vast range of different situations, and in some contexts is widely thought to have deleterious consequences for children's rights, including segregation, marginalisation, and inequality. This Thesis deals with human rights law's response to this state of affairs in England, India, and South Africa.

Any approach to children's rights in private education should be based on the premise that children are worthy of respect as people, which requires respect for their vulnerability and the nurturing of their capabilities. This claim is as strong in private schools as it is in public schools, but in general, the legal relationship between child and private schools is not conceptualised as a 'vertical' one which attracts the application of human rights law. Instead, these relationships are seen as 'horizontal', and therefore regulated by the ordinary law.

This ordinary law must be rigorously scrutinised for its compliance with children's rights. The approach in this Thesis moves past the distinction between the direct and indirect effect of human rights law, and between horizontal and vertical obligations, by recognising that, in truth, even purely vertical human rights texts make demands of horizontal relationships.

The Thesis undertakes a close review of case law and commentary to identify the factors which are relevant to determining what those demands are in the three jurisdictions, and identifies certain analytical challenges which courts' attempts to answer this question reveal. It proposes a new approach to determining the human rights duties of private actors which can overcome those challenges, by applying a

three-factor test based on power, vulnerability, and social role. These modalities indicate human rights obligations on private schools, to which, even where there is no explicit textual mandate for horizontal duties, the state must give effect.

Abstract: 299 words

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AJCL	American Journal of Comparative Law
Compare	Compare: A Journal of Comparative and International Education
CUP	Cambridge University Press
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRLR	European Human Rights Law Review
ELJ	European Law Journal
ESTA	Extension of Security of Tenure Act
IJCR	International Journal of Children's Rights
IJLPF	International Journal of Law, Policy and the Family
ILJ	Industrial Law Journal
JEP	Journal of Education Policy
JILI	Journal of the Indian Law Institute
LQR	Law Quarterly Review
Minn J Int'l L	Minnesota Journal of International Law
NILQ	Northern Ireland Legal Quarterly
OUP	Oxford University Press
PL	Public Law
RTE Act	Right of Children to Free and Compulsory Education (RTE) Act, 2009
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SASA	South African Schools Act
SCA	Supreme Court of Appeal
SGBs	School Governing Bodies
UNCRC	United Nations Convention on the Rights of the Child

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CHAPTER 1

CHILDREN'S RIGHTS AND THE PRIVATISATION OF EDUCATION

A. INTRODUCTION

Children do not leave their human rights at the school gate.[1] They enjoy human rights to, in and through education. In this Thesis, I will critically reflect on the way in which the law safeguards these rights in the context of private education, by comparing the approaches adopted by the laws of England, South Africa and India. My central argument is that a far more rigorous and principled approach to the rights of children in (private) schools is necessary, one which starts with the child as beneficiary of the right and develops the obligations on the state and other actors which those rights imply from that starting point. My goal in this Thesis is not so much to explain what the law pertaining in these three jurisdictions is, as to cross-check their insights and assumptions against each other, to test common understandings of the way in which human rights law interposes in the triangular relationship between private educational actors school, child, and state.

In this introductory Chapter, I will briefly set out the basic problem to which this Thesis directs its efforts. I will explain my methodology, the choice of jurisdictions for the comparative analysis, and summarise my argument and conclusions.

[1] *Tinker v Des Moines* 393 U.S. 503 (1969) 506; Committee on the Rights of the Child, General Comment No. 1 (2001) CRC/GC/2001/1 para 8.

(1) The Basic Problem of the Divide between Public and Private Actors

The central issue with which I seek to grapple in this Thesis is that public and private schools are treated differently by the law. In short, the effect of this difference in treatment appears to be that private schools have different human rights obligations from public ones. However, as I will show, this difference is not consistent with the principles underpinning human rights law, nor is it reflective of any coherent position of principle at all.

It is necessary first to set out the basic problem, before setting out its particular manifestation in the context of education.

On the level of principle, human rights are generally considered to be rights to which everyone is entitled, all of the time. Sometimes, for whatever reason, it will not be possible to realise everyone's human rights at once. This may be the case for reasons of resource scarcity, or because another right or some other compelling public interest conflicts with a right. Where it is said that a competing public interest should take priority over a right, justification is required. The law responds to this need for protection by imposing obligations on certain classes of actor which flow from the existence of those rights.[2]

It follows from the existence of these obligations that there must be some sort of legal test for which actors are to bear those obligations, and, where applicable, how those obligations are to be divided up between different actors. The legal test which has been predominant (but not universal, and certainly not universal in the jurisdictions

[2] See e.g. s. 6 HRA 1998 (UK); s. 8 Constitution of the Republic of South Africa, Art. 12 Constitution of India.

reviewed in this Thesis) is that *'public'* or *'state'* actors are the ones which bear human rights obligations. *'Private'* actors do not, or at least, do not in the same way.[3]

There are two ways in which reliance on the concept of *'public-ness'* could present a problem.

- The first would be if there were no possible coherent way to define *'public'*. If that were true, there would be a high risk that human rights would in some circumstances go unprotected. Many commentators have expressed the view that it is not possible to define *'public'* adequately, or even the view that it is a wholly contingent concept with no independent content.[4]
- The second way in which this could be a problem is if the *'public'* test did not encompass all of the situations where the important interests described above required protection. Many commentators have observed that various particular tests for *'publicness'* do not, in their opinion, capture all such situations.[5]

These two problems are not mutually exclusive – it could well be that the test for publicness is both impossible to coherently apply, and, in the way it has been applied, it fails to capture all the cases which it should. This argument is not new. The problem of the law's response to the private actor which interferes with human rights has received significant treatment, as the bibliography at the back of this Thesis attests.

[3] Paul Craig, 'Public Law and Control over Private Power' in Michael Taggart (ed), *The Province of Administrative Law* (Bloomsbury 1997).

[4] Stephanie Palmer, 'Public Functions and Private Services: A Gap in Human Rights Protection' (2008) 6 International Journal of Constitutional Law 585, 599.

[5] ibid 601.

One of the contexts in which this issue has attracted most attention is that of privatisation.[6] The problem with privatisation (in this regard – there are many others!) is that, shortly stated, relationships which individuals once had with the state, they now have with a private actor.[7] Where, for example, the state may once have provided public hospitals and schools, privatisation shifts the service provider from the public domain to the private, and, concomitantly, changes the obligations which the service provider owes.[8] Privatisation thus throws the problem into sharp relief: the beneficiary of the right has the same interest as before, and a similar relationship with service provider as before, but the human rights obligations have changed.

However, this state of affairs merely *illustrates a problem which has always been there*. When a care home is privatised, for example, we notice the change in obligations owed by the service provider, which might arouse intuitive discomfort. However, it has proven difficult amongst those who hold such views to articulate why that change in the obligations owed reflected a shift from the *'correct'* allocation of duties to an *'incorrect'* one. Even in the absence of privatisation, we would still need to know where the boundaries of duty-bearing lay (i.e. we would still need to know whether care homes should owe human rights obligations, and which obligations they should owe). Privatisation – that is, the shift from public to private – merely gives us occasion to

[6] Danwood Mzikenge Chirwa, 'Water Privatisation and Socio-Economic Rights in South Africa' (2004) 8 Law, Democracy & Development 181.

[7] John Kitsos, 'Privatisation and Public Private Partnerships: Defining the Legal Boundaries from an International Perspective' (2015) 10 European Procurement & Public Private Partnership Law Review 17, 22.

[8] Mark R Freedland, 'Government by Contract and Public Law' (1994) PL 86, 102.

question the adequacy of the current framework for answering that question.[9] It does not raise new challenges of principle (in this regard at least).

(2) The Educational Context: Expanding Privatisation

This Thesis will focus on privatisation and the public-private distinction in one particular field: that of education. Privatisation in education has been something of a hot topic in recent years. There has been a mushrooming in the provision of education by private providers, such that it has attracted the attention of education researchers,[10] as well as the former UN Special Rapporteur.[11] This huge growth has been driven by a number of factors, including perceived deficiencies with public education,[12] financial troubles, pressure from international organisations,[13] policy-makers on a *macro* level, certain individuals including educationists, philanthropists and *'edu-preneurs'*, and decision-makers on a *micro* level such as parents,[14] teachers, and even children themselves.

[9] The profligate academic response to *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, from which this example is drawn, illustrates this well.

[10] Antoni Verger and others, 'Manufacturing an Illusory Consensus? A Bibliometric Analysis of the International Debate on Education Privatisation' (2019) 64 International Journal of Educational Development 81.

[11] Kishore Singh, 'Report of the Special Rapporteur on the Right to Education' (2014) A/69/402; Kishore Singh, 'Report of the Special Rapporteur on the Right to Education: Protecting the Right to Education against Commercialization' (2015) A/HRC/29/30.

[12] Xavier Dumay and Vincent Dupriez, 'Educational Quasi-Markets, School Effectiveness and Social Inequalities' (2014) 29 JEP 510, 510.

[13] Antoni Verger, 'Experimenting with Educational Development: International Actors and the Promotion of Private Schooling in Vulnerable Contexts' in Gita Steiner-Khamsi and Alexandra Draxler, *The State, Business and Education* (Edward Elgar Publishing 2018) 24–25.

[14] Anat Gofen and Paula Blomqvist, 'Parental Entrepreneurship in Public Education: A Social Force or a Policy Problem?' (2014) 29 JEP 546, 547.

For these purposes, privatisation in education is best seen as a series of processes rather than as a single event. Different **kinds of private actors** can be involved, from the paradigm case of multinational low fee education businesses to local community schools, charities, and individual parents. The **processes** of privatisation can also vary significantly, from exogenous processes whereby powers, assets and responsibilities are shifted to the private sector, to endogenous ones where processes and practices are imported from the private sector into the public sector.[15] The ways in which these different process and actors might **interact** and influence each other, and interact with and influence public education, are multitudinous. In addition, the interplay of public and private in education is inevitable, and it is hard to identify a default or natural baseline of *'public'* education from which privatisation or public-private partnerships might shift the system. Examples of the private, public-private partnerships, or privatisation in education might include: increasing managerialism in public education; the introduction of fees to parents (with the shift in responsibility for the provision of education this implies[16]); tax incentives for independent schools; public contracts with business to provide low-fee schools; academisation; grant-assisted education in independent schools; home-schooling; minority educational institutions; and charity or religious educational institutions, among others.

This complexity is exacerbated by the many different entities and institutions which could be covered by the term *'school'*. The jurisdictional review below will serve to indicate the variety of entities which this term can cover. For the sake of making an

[15] Stephen Ball and Deborah Youdell, 'Hidden Privatisation in Public Education' (Education International 5th World Congress, 2007).

[16] Edward B Fiske and Helen F Ladd, *Elusive Equity: Education Reform in Post-Apartheid South Africa* (Brookings Institution Press 2004) 136.

already complicated question as uncomplicated as it can be, in this Thesis *'school'* is defined broadly, and in accordance with its natural meaning, as entities which directly provide full-time education to children. A *'private school'* is, accordingly, an entity (probably, but not necessarily, a legal person), involved in the direct provision of education, which is not a part of, or deemed to be a part of, the state. At this point it is important to highlight one critical point: private education does not refer only to expensive, elite education. As the jurisdictional review below shows, low-fee (and low-quality) private education is a mushrooming phenomenon which sits alongside more traditional, elite private schools, as well as religious, community and charity educational institutions.

This diversity provides an excellent example of the problem referred to above. While there has been much consternation about the increase in low-fee private education, which does indeed reflect the privatisation of education, this consternation reflects a need to look deeper, and explain why that shift was wrong by reference to the correct allocation of human rights obligations in the triangular relationship between child, private school, and state. Answering that question will necessarily have implications not only for low-fee private education, but for elite private schools, and other private educational institutions.

Subject to these caveats about essentialising a varied and sometimes politically or practically incompatible set of processes,[17] the privatisation of education in general has been subject to significant criticism from a human rights perspective.[18] Without

[17] Verger (n 13).

[18] Mireille de Koning, 'Public–Private Partnerships in Education Assessed through the Lens of Human Rights' in Gita Steiner-Khamsi and Alexandra Draxler, *The State, Business and Education* (Edward Elgar Publishing 2018).

seeking to be exhaustive, the following is a summary of some of the criticisms which have been levelled.

First, and most importantly, there is significant evidence that private education increases inequality, social segregation, and marginalisation.[19] Some communities and parents are saddled with choices they are not given the resources to exploit, while other affluent and powerful communities have the resources to exploit those choices.[20] Even leaving aside these effects, it is very much an open question to what extent privatisation improves service provision (to the extent it is possible to make claims about the effect of *'privatisation'* as a single phenomenon).[21]

Second, it also has detrimental impacts on state provision.[22] *Firstly*, it does so because resources are diverted from the state system to private actors who require profit incentive, leaving the state system under-resourced. It *secondly* does so by, in cases of endogenous privatisation, bringing into the public sector precisely the sort of processes which give rise to the marginalisation set out above. State schools begin to imitate private schools by selecting the students they want; and serving demographically distinct and socially advantaged communities.[23]

[19] Becky Francis, Martin Mills and Ruth Lupton, 'Towards Social Justice in Education: Contradictions and Dilemmas' (2017) 32 JEP 414, 416.

[20] Diane Reay, 'What Would a Socially Just Education System Look Like?' (2012) 27 JEP 587, 591.

[21] Steven J Klees, 'Liberia's Experiment with Privatising Education: A Critical Analysis of the RCT Study' (2018) 48 Compare 471, 479.

[22] Kishore Singh, 'Safeguarding Education as Public Good and Regulating Private Providers' (2015) 45(2) Social Change 308, 314.

[23] Elizabeth Brown and Molly Vollman Makris, 'A Different Type of Charter School: In Prestige Charters, a Rise in Cachet Equals a Decline in Access' (2018) 33 JEP 85, 86.

Third, privatisation shifts the education system from democratically controlled fora to privately controlled ones. Once educational resources are shifted into private hands, the owners and controllers of those resources have less obligation to account for their actions to the wider public, and are free to privilege certain kinds of education and knowledge.[24] They need only account – to the extent it amounts to accountability – to their *'customers'* in the educational marketplace.[25]

Fourth, relatedly, privatisation often brings with it a view of education which is inconsistent with the view of education shared by most theories of human rights.[26] It is often explicitly or implicitly based on a human capital approach to education,[27] which would (usually[28]) hold that the value of education is measured by reference to the way it makes people more valuable as workers or consumers in economic value chains.[29] By contrast, to the extent the human right to education can be said to be grounded in theory, it is a theory which recognises education as valuable in many ways not recognised by the market,[30] and as valuable as an end in itself[31] as part of what makes

[24] Francis, Mills and Lupton (n 19) 420.

[25] Gofen and Blomqvist (n 14) 550.

[26] Committee on the Rights of the Child, General Comment No. 1 (2001) (n 1).

[27] Hugh Lauder, 'Human Capital Theory, the Power of Transnational Companies and a Political Response in Relation to Education and Economic Development' (2015) 45 Compare 490, 491.

[28] Enrica Chiappero-Martinetti and Anna Sabadash, 'Integrating Human Capital and Human Capabilities in Understanding the Value of Education' in Solava Ibrahim and Meera Tiwari (eds), *The Capability Approach From Theory to Practice* (Palgrave Macmillan 2014) 208.

[29] Lauder (n 27) 492.

[30] Morwenna Griffiths, 'Why Joy in Education Is an Issue for Socially Just Policies' (2012) 27 JEP 655, 667.

[31] Reay (n 20) 590.

a good life.[32] On a practical level, this can lead to incentive structures for educational actors being dissociated from the broader value of education.[33]

The goal in this Thesis is not to prove or disprove any of these points, and the point is not that privatised systems have nothing better to offer in any context.[34] The goal is instead to deal with the legal question which is set out above. These concerns merely explain why a good answer to that question is so urgent.

The urgency of the question has led to international action to attempt to provide guidance on the difficult question of the demands of human rights law in the context of educational privatisation. In March 2019, a group of experts agreed the Abidjan Principles.[35] These Principles followed three years of stakeholder consultation and drafting discussions. They affirm that the primary responsibility for the provision of quality education rests with the state, and that the state must take steps to protect the rights of children where they attend private schools, or where the privatisation of education might interfere with the realisation of their human rights.

However, as the reader will note from the previous discussion, this admirable principle to an extent begs the question of what it is that human rights law demands when children interact with private schools, and the way in which it might be different to that required when they interact with public schools. Again, privatisation has injected

[32] Griffiths (n 30) 655.

[33] Amanda Keddie, 'Children of the Market: Performativity, Neoliberal Responsibilisation and the Construction of Student Identities' (2016) 42 Oxford Review of Education 108, 120.

[34] Francis, Mills and Lupton (n 19) 424.

[35] Available at <www.abidjanprinciples.org/en/principles/overview>, last accessed 31 December 2021.

urgency into a question which was always there. What does human rights law require where two private actors (in this case private school and child) interact with each other?

This potential difference in treatment is alluded to in the introduction of the Abidjan Principles, which recognise that protecting rights in private education involves tension with recognised liberty rights enjoyed by parents and private schools, and certain minority rights. The Principles reflect careful consideration of how this balance is to be struck at a policy level. My hope is that, in addition to providing useful legal analysis, this Thesis will contribute to the implementation of these Principles on the level of individual legal relationships, by articulating the theoretical questions that are concealed by questions of (a) balance between the rights of individual children in individual cases and the rights of private schools, and (b) what exactly it is that human rights law requires the state to achieve by regulating private schools.

(3) Education Throws the Basic Problem into Sharp Relief

The challenges presented by this already difficult question are even more difficult in the educational context. The focus on the putative duty-bearer rather than the beneficiary of a right leads to particular problems in the context of private education. This is because there are certain features of that context which add complexity.

First, education is a field with a particularly disparate set of actors, motivations, and sources of authority. The rights, powers and authority of parents, teachers, schools, communities, children, businesses and public authorities interact in particularly complex ways.[36] The law's (and state's) task is much more complicated than merely interposing in one bilateral relationship from a position of singular sovereign authority.

[36] Gofen and Blomqvist (n 14) 547.

There is diffuse authority, and with it, diffuse responsibility for the realisation of children's rights.

Second, children are in a position of particular vulnerability where education is concerned. They have little say in public democratic decision-making and are vulnerable to influence.[37] Schools and teachers exercise huge legal and practical powers over them when they are there. Further, those who have control of children's education have control not only of them in that moment but also their future.

Third, children are under conditions of particularly stark compulsion in the education context. They are under a legal obligation to attend school, and states are under international legal obligations to compel them to. They may have little say over the school in which they end up, that choice being left as a matter of law to the parents. Once in school, they are subject to a very significant level of control by the school. This significant legal control coupled with the lack of children's voices in the democratic process makes the need for legal clarity in the various private and public relationships in education particularly pressing.

(4) Interim Conclusion: Studying Two Problems Reflexively

The foregoing analysis discloses two key problems. There is a general problem, of how it is to be determined what the demands of human rights law are in the context of relations between notionally private actors, and the theoretical basis on which such an analysis should be undertaken. There is also the specific problem of how to realise children's rights in the complex context of privatised education. In this Thesis, I propose to study these two problems reflexively – that is, by using the insights which

[37] Keddie (n 33) 108–109.

arise tackling each one to inform the other and vice versa in an iterative, back-and-forth process. The first problem (of determining the theoretical basis the allocation of obligations implied by human rights law) will be informed by considering it through the lens of the privatisation of education, which raises the issue particularly starkly. Conversely, the second problem (of determining the obligations implied by human rights law which private schools owe) can begin to be answered once it is clear what the theoretical basis for the allocation of obligations is generally. A comparative approach will allow this reflexive analysis to benefit from yet another axis of critical reflection and interrogation: the different responses to these different problems which pertain across three jurisdictions.

B. METHODOLOGY

This Thesis will investigate these reflexive questions by comparing the approaches adopted in England, India and South Africa. This will therefore be an exercise in comparative law. In this section, I will set out and defend the comparative method which I will use. Comparative law is always a delicate undertaking. It is necessary to be alive to its pitfalls in designing comparative research methodology.[38] A full defence of the method adopted is therefore necessary.[39]

[38] Abhik Majumdar, 'Codification of Islamic Law in South Asia, or How Not to Do Comparative Law' (2019) 10 South Asian History and Culture 152, 153.

[39] Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (OUP 2014) 231.

(1) Comparative Law Method

There is no one *'comparative method'*.[40] The way in which a question is to be researched and written about depends on the question. The question posed is the master of methodology, and not the other way around. This Thesis will use comparative law as an *interrogatory*, adopting what will be described as a *'comparative critical internal perspective'*, a form of *'concept formation through multiple description'*.[41] This approach can be broken down into the following elements.

First, it is **comparative.** Comparative study provides an excellent tool for this kind of reflexive, critical investigation, provided that it is used with care and sensitivity. As set out above, this is a field with much accreted assumption and uncertainty, and a not insignificant potential for the law to drift from its principled foundations when refracted through doctrine like the *'publicness'* test. Indeed, the lack of consistent meaning ascribed to the word *'public'* suggests a risk that even where the same word is used across different jurisdictions, it might mean different things.[42]

The strength of comparative law in such a context is that experience from other jurisdictions can provide a fresh and helpful perspective.[43] By comparing the experience in multiple jurisdictions, it is possible to identify gaps in reasoning, assumptions, and even mistakes which might be easier to miss were analysis confined

[40] ibid 225; Uwe Kischel, *Comparative Law* (OUP 2019) 88.

[41] Hirschl (n 39) 228.

[42] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' (1991) 39 AJCL 1, 11.

[43] Ralf Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' (2009) 57 AJCL 765, 789.

to the legal debate which pertains in a single jurisdiction.[44] Sacco explains that there might be hidden *'formants'* (or notions guiding legal interpretation) which only become apparent when viewed through a comparative lens (which Sacco calls *'cryptotypes'*).[45] Comparative law allows us to test whether jurisprudence said to be based purely on logic and deduction in fact conceals value judgments.[46] It has been observed in this connection that the problems thrown up by privatisation and the public-private divide are good subjects for comparative study.[47] Problems of horizontal effect have given rise to lots of strands of analytical difficulty,[48] of precisely the sort which comparative law has the tools to attempt to organise.[49]

Comparative study is also useful in that it permits more general conclusions. While the kind of methodology adopted here would not be suitable for drawing large scale empirical conclusions, deriving analytical principles (common *'theoretical concepts'*[50]) from three jurisdictions rather than one increases the chances that the conclusions will be applicable elsewhere. This is important given that this Thesis was

[44] Kischel (n 40) 33.

[45] Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 AJCL 343, 384.

[46] Sacco (n 42) 24; Hirschl (n 39) 235.

[47] Francesca Bignami, 'From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law' (2011) 59 AJCL 859, 906; Janina Boughey, 'Administrative Law: The Next Frontier for Comparative Law' (2013) 62 ICLQ 55, 79–87.

[48] Mark Tushnet and Mark Tushnet, 'Comparative Constitutional Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2019) 1217.

[49] Kischel (n 40) 74.

[50] Mathias Siems, 'New Directions in Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), Mathias Siems, *The Oxford Handbook of Comparative Law* (OUP 2019) 856.

in part inspired by drafting of the Abidjan Principles, which now fall to be implemented in domestic systems. A comparative approach makes it more likely that the conclusions drawn can inform that process.

Second, it is **critical.** This Thesis seeks to illuminate the legal analysis lying behind horizontal human rights, as well as to investigate the law's response to private educational actors, and to do so by allowing these areas of interest to explain each other reflexively. In order to do so, it is not sufficient simply to collate legal answers to tricky questions. Rather, it is necessary to be critical about the legal approaches adopted in the jurisdictions, and to test those approaches. Comparative law is an ideal starting point for this, as it allows reflection and criticism of the legal system from the perspective of another,[51] and for cross-jurisdictional inspiration.[52] It is through critical reflection that it becomes possible to abstract principles – or at least modes of analysis – from the disparate jurisdictions. Without a critical basis for comparison (a *tertium comparationis*), it is impossible to produce anything more than raw legal facts.[53]

Critical approaches of this sort have precedent in comparative study. Möller adopts such an approach to develop his *'global model of constitutional rights'*. He critically reviews constitutional practice against his theory of rights, in order to generate the best understanding of constitutional rights which still coheres with (most) practice.[54] This critical analysis allows him to draw on the practice of courts around the

[51] Madhav Khosla, 'Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision' (2011) 59 AJCL 909, 914.

[52] Sandra Fredman, 'Foreign Fads or Fashions: The Role of Comparativism in Human Rights Law' (2015) 64 ICLQ 631.

[53] Kischel (n 40) 5.

[54] Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 20–22.

world to develop (*'reconstruct'*) an approach to constitutional rights which helpfully abstracts key features of rights practice. His conclusions are interesting and valuable, but, for the reasons set out below, his approach cannot be adopted wholesale for this Thesis.

Third, it is **internal**. The point at which it is necessary to depart from Möller's approach is in the source of the principles that form the basis for critique. Möller's approach is one which he terms *'moral reconstruction'*. He contrasts this with *'zeitgeist reconstruction'*, which does not source the criteria of critical review from higher normativity, but from the moral perspective of those engaged in the law.[55] His *tertium comparationis* is therefore one which is drawn externally from higher principle, rather than internally. However, there is a spectrum between, on the one hand, moral, external reconstruction; and on the other, zeitgeist, internal reconstruction. They are not binary: moral reconstruction must be based in the principles of law actually articulated in the legal system under review, and zeitgeist reconstruction will still require some sort of interpretation of the approach in that legal system, which will be influenced by external normative factors.

Part of the task of this Thesis is to draw positive conclusions from three specific legal systems, and to use those conclusions to illuminate aspects of those systems previously given insufficient attention. It would not be appropriate to start from a *purely* external normative basis. To undertake this kind of work, it is necessary to situate the analysis closer to the internal end of the spectrum. The basis of criticism must be a moral theory (in this case of children's rights) which would be broadly acceptable in the jurisdictions under review. This does not mean that it is impossible to

[55] ibid 21.

adopt any kind of moral standpoint (indeed, it would be impossible not to[56]). However, the standpoint adopted does need to be one which could be said to be a fair interpretation of the principles pertaining in the jurisdiction(s) under review. Chapter 2 provides an account of children's rights which could be said to be a *broadly* acceptable definition of the moral conception of children's rights shared by the jurisdictions under review, based on their common ratification of the UN Convention on the Rights of the Child (**'UNCRC'**), and the (at least partially) warm welcome which the UNCRC has received in those jurisdictions' domestic courts. It will then be possible to approach the problem asked in a way which allows for abstracted, critical legal insights, but from a semi-internal perspective which would allow those insights to have at least some principled and doctrinal force in the specific legal systems under review.

It is necessary to address some potential immediate objections to this approach. First, there are challenges associated with identifying a common core of children's rights, and the risks of transplanting constitutional theories.[57] This analysis attempts to strike the right balance between relativism and universalism which lies at the heart of the discipline of comparative law.[58] Comfort can be taken from the fact that all three jurisdictions under review are signatories to the UNCRC, and there is increasing convergence in constitutions making this kind of national public law comparison

[56] Kischel (n 40) 36.

[57] Claudia Geiringer, 'When Constitutional Theories Migrate: A Case Study' (2019) 67 AJCL 281, 324.

[58] Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 Harvard International Law Journal 411.

worthwhile.[59] Indeed, it has been argued that human rights law is inherently and unavoidably comparative.[60]

Second, it might also be objected that such an approach is liable to run afoul of the common critique of comparative law that it is often ignorant of social context. Hirschl, in this vein, has suggested that comparative constitutional law really needs to shift to comparative constitutional *studies*, to encompass the social, cultural, economic and political environment in which law operates, and from which it cannot be separated.[61] This surely seems right, but there are two reasons why, in this specific context, the methodology adopted could provide useful conclusions, even in the admitted absence of close study of the entire constitutional context in the way Hirschl suggests. *Firstly*, there is once again an extent to which this is a limited criticism, given that this Thesis does not argue for any kind of legal transplant, but rather for the systems to learn from the analytical steps the others take. Rather than exposing comparative constitutional law to the stringent methodological requirements of the social sciences, it is better to be *informed* by those disciplines,[62] particularly in cases where the exercise is not driven by functional comparison, but by analytical comparison. Functional comparison compares the way in which legal systems discharge a particular function, such as minority shareholder protection, or the regulation of the employment

[59] Boughey (n 47) 59; Tushnet and Tushnet (n 48) 1215.

[60] Samantha Besson, 'Comparative Law and Human Rights' in Mathias Reimann and Reinhard Zimmermann (eds), Samantha Besson, *The Oxford Handbook of Comparative Law* (OUP 2019).

[61] Hirschl (n 39) 281.

[62] Mark Tushnet, 'Saying and Doing In Comparative Constitutional Studies — Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law' (2016) 64 AJCL 201, 203.

relationship.[63] Analytical (or *'concept'*[64]) comparison, by contrast, looks at the legal doctrinal steps which are taken in resolving disputes which arise in a particular context. Given that all of these jurisdictions exhibit the basic features of the problem set out above, the analytical approach to resolving that problem of legal doctrine can inform and illuminate the approach in other jurisdictions, without the kind of in-depth sociological analysis which would otherwise be necessary. *Secondly*, and relatedly, this is an exercise in comparative constitutional law. Hirschl's proposal is valuable, but in the context of horizontal rights, it is premature. This is a field so beset by basic analytical and conceptual uncertainty that this is a necessary first step towards placing those analyses and concepts in their social, political, economic or cultural context. A proper shift from comparative constitutional law to comparative constitutional studies requires enormous depth and breadth in comparative knowledge which goes far beyond law, and far beyond the scope of this study.[65]

Finally, when undertaking comparative law, there is a risk that methodological concerns swallow the comparative exercise. There is likely to be something of value and interest in the outcome of comparing two (or three) systems. Provided that empirical claims (requiring far more exacting methodological rigour) are avoided,[66] there is a case for arguing that researchers should just *'get on with what they regard as comparative constitutional research, and let others decide what is valuable in the*

[63] Kischel (n 40) 88.

[64] ibid 162.

[65] Rosalind Dixon, 'Toward a Realistic Comparative Constitutional Studies?' (2016) 64 AJCL 193, 197.

[66] Hirschl (n 39) 228.

product'.[67] This is so even if all that is achieved is an assembly of information (*'stuff'*) which others can use and analyse.[68] This Thesis makes claims going beyond that, but even if they are not accepted, the exercise it undertakes is still a useful (and, depending on the reader's proclivities, very interesting!) one.

(2) Case Studies

The comparative analysis will study India, South Africa, and England. It is necessary to make sensible and justifiable decisions about which jurisdictions are to be considered in order to frame any comparative methodology.[69] These jurisdictions are appropriate for this reflexive study for three reasons.

First, all have protections for the right to education (as detailed below). They all have experience negotiating the conflicts between the liberty to found private schools, and the obligation of the state to promote high quality and equal education. The jurisdictions differ in the emphasis they put on these different aspects of the right, but all have had to face up to this common tension.

Second**,** all three have grappled explicitly with difficult questions of horizontal human rights. In all three, public/state entities receive different treatment as potential duty bearers under human rights law than private actors. In all three, finding where exactly this line is to be drawn has proved difficult, and an approach yielding predictable and rational outcomes has yet to be found (as Chapter 3 will set out). Further, in all three jurisdictions, there has been significant concern given to the

[67] Tushnet (n 62) 201.

[68] ibid.

[69] Khosla (n 51) 911.

question of the interaction between horizontally applicable law (usually private law) and human rights. Finally, in India and South Africa, directly horizontally applicable rights are accepted parts of constitutional law, to which England provides a useful counter-example. It is itself a useful insight to note that similar analytical concepts are deployed in these very different jurisdictions,[70] which share *'structural regularities'* in their approaches to horizontal rights which absent comparative analysis would otherwise be missed.[71] Indeed, the fact that they have differences makes the explanatory power of the argument all the greater if it can be shown to apply, *mutatis mutandis*, across all three jurisdictions.[72]

Third, these jurisdictions cross-cite each other in this field, and it is therefore of interest to see whether they adopt similar concepts or cryptotypes, in spite of the significant differences between their constitutional conceptions of the human rights obligations of private actors. In addition, as Chapter 2 will set out, it is arguable that these jurisdictions share a common core conception of children's rights. Academic legal commentary in the three jurisdictions also regularly cross-refers.

Finally, it is necessary to quickly say a word about *'cherry-picking'*. One of the redolent critiques of comparative study is cherry-picking: selecting only those jurisdictions which support a point which the author has decided they would like to make, and ignoring those jurisdictions which do not support that view. For the reasons given above, the choice of jurisdictions is appropriate for this study (and it might be respectfully noted that there is simply no way around the fact that limited geographical

[70] Hirschl (n 39) 230.

[71] Sacco (n 42) 5.

[72] Hirschl (n 39) 260.

scope is a reality for most comparative research[73]). However, if the reader is unpersuaded, an alternative, subsidiary response, is that for this kind of research, *'cherry-picking'* is not a significant problem.

First, this is a reflective study of analytical concepts which pertain in the laws of England, India, and South Africa by comparing those jurisdictions with each other. The conclusions drawn are primarily analytical ones in respect of the three jurisdictions under review, rather than claims about the general position in all the legal systems of the world.[74]

Second, it is not argued that the fact a particular solution is adopted in one jurisdiction is evidence that the same solution would be a valuable policy intervention in other jurisdictions. This is a question of social science, and attempts to undertake this kind of transplantation are rightly criticised as, at the very least, lacking sufficient attention to social context. The exercise here seeks to identify the frameworks through which answers can be reached, rather than answers themselves.[75]

Third, no reliance is placed on foreign or comparative law as a source of authority: that the law must be a certain way purely because it is thus elsewhere. The points made arise from a comparative exercise, but are made because they are themselves persuasive within the contexts under study, rather than because comparative or foreign law is authoritative (even if, as in some of these jurisdictions, it

[73] Bignami (n 47) 876.

[74] Dixon (n 65) 193.

[75] Khosla (n 51) 917.

could be said to have persuasive authority). Therefore, criticisms borne of legitimacy have little purchase here, although they may have strength in other contexts.

C. PRIVATE EDUCATION AND HUMAN RIGHTS IN THE JURISDICTIONS UNDER REVIEW

This section will review the law and practice of private education and the right to education in the jurisdictions. I will set out the way the right to education has been codified and implemented in the three jurisdictions, and then the ways in which there are features of the privatisation of education in each jurisdiction.

(1) Law and the Right to Education

(a) Conflicting Elements of the Right to Education

The right to education is not a singular right, but instead encompasses three distinct kinds of right: a liberty right, an equality right, and a social right.[76] These rights can sometimes be in tension or outright conflict with each other, the most obvious example of which being the conflict between an individual's right to start a private school, and the impact which the choices that individual makes might have on the realisation of children's equality or social rights.[77] In all of the jurisdictions under review, there is a protected right to education, which to a greater or lesser extent recognises these conflicting imperatives.

The **liberty right** protects the freedom to establish (private) schools, and, in the case of parents, to make decisions about their children's education. In the case of

[76] Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 355–365; 155–165.

[77] *Abidjan Principles* (n 35), Preamble.

England, A2-P1 of the European Convention on Human Rights (**'ECHR'**) (which has effect in English law by virtue of the Human Rights Act 1998 (**'HRA'**)) provides:

> *No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.*

The tensions between the child's right to education, and the liberty right protected in the second sentence of the provision, have been recognised in the case law of the European Court of Human Rights (**'ECtHR'**): in theory the rights of the former are *'dominant'* over the latter,[78] although there is some scepticism about whether this mantra is reflected in practice.[79] The right to operate a school is not unlimited, and states can regulate private education providers.[80]

Similarly, in South Africa, s. 29(3) explicitly guarantees the right to found educational institutions:

> *(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—*
>
> *(a) do not discriminate on the basis of race;*
>
> *(b) are registered with the state; and*
>
> *(c) maintain standards that are not inferior to standards at comparable public educational institutions.*
>
> *(4) Subsection (3) does not preclude state subsidies for independent educational institutions.*

[78] *Campbell and Cosans v UK* (1982) 4 EHRR 293, [40]; *Catan v Moldova and Russia* (2013) 57 EHRR 4, [138]; *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1979-80) 1 EHRR 711, [52].

[79] Jane Fortin, *Children's Rights and the Developing Law* (CUP 2009), Ch. 12.

[80] *Jordebo v Sweden* (1987) 51 DR 125, [4.2].

Like A2-P1 ECHR, this provision recognises that there may well be tension between the freedoms of individuals to establish schools as they see fit, and the realisation of the social and equality rights of children. Like the ECHR, it identifies the need for regulation of private providers.

In India, by contrast, the right to education protected by Art. 21A does not contain an explicit guarantee of the freedom to found private schools. Art. 30 guarantees that freedom in the case of minority educational institutions, but other private institutions must rely on the general occupational liberty provision of the Constitution. Art. 19(1)(g) provides that:

> *All citizens shall have the right […]to practise any profession, or to carry on any occupation, trade or business.*

The Supreme Court has held that this extends to the establishment and running of private schools, subject to the rule that profiteering and the commercialisation of education are prohibited.[81] Private schools may only make a *'reasonable surplus'*. Art 19(1)(g) is – like the liberty rights in s. 29 and A2-P1 – subject to reasonable restrictions, set out in Art. 19(6), and must therefore be balanced with the socio-economic right in Art. 21A when the two are in conflict.[82] The Supreme Court has in its case law recognised the potential tension between the freedom to run a private school, and the equality and social rights of children, and that resolving this tension will require regulation and intervention.[83]

[81] *TMA Pai Foundation vs State Of Karnataka* (2002) 8 SCC 481, AIR 2003 SC 355.

[82] Shruti Ambast, Akriti Gaur and Ajey Sangai, *Regulation of Private Schools in India* (Vidhi Centre for Legal Policy 2017) 9.

[83] *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1, AIR 2012 SC 3445; *T.M.A. Pai Foundation vs State Of Karnataka* (n 81).

The **equality right** is a right to equal access to and enjoyment of education, as well as equal treatment in education. It expressly or implicitly demands that the government makes educational provision available on an equal basis and takes steps to prohibit discrimination and inequality in education, including in and arising from private educational institutions. The South African and Indian Constitutions both have general and wide-ranging equality protections, which apply in the educational context, binding both public and private actors.[84] Under the ECHR, there is no general equality provision, but instead, Art. 14 guarantees equality in the exercise of the rights protected by the Convention, including the right to education.[85] Further, in English domestic law, the Equality Act 2010 imposes equality obligations on all schools, public and private.[86]

The **social right** is a right to receive education. It imposes a positive obligation on the state to provide quality public education. In terms of the legal protection which pertains in the jurisdictions under review, a divergence opens up between South Africa and India on the one hand, and England on the other. Both South Africa and India explicitly recognise a socio-economic right to education in their domestic law. S. 29 of the South African Constitution provides that:

> *(1) Everyone has the right—*
>
> *(a) to a basic education, including adult basic education; and*
>
> *(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.*

[84] *Indian Medical Association vs Union of India & Ors* (2011) 7 SCC 179, 2011 AIR SCW 3469; *Minister of Education (Western Cape) v Mikro Primary School Governing Body* [2013] ZACC 25; 2013 (9) BCLR 989 (CC), [209].

[85] *DH v Czech Republic* (2008) 47 EHRR 3.

[86] Equality Act 2010, Pt. 6.

> *(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. […]*

Similarly, in India, the Constitution guarantees the right to education in Art. 21A, which provides that:

> *The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.*

Prior to the introduction of this provision in 2009, the Supreme Court had recognised that a right to education could be derived from the right to life under Art. 21.

On the other hand, the socio-economic ECHR right is far weaker, providing only that *'No person shall be denied the right to education.'* A2-P1 is, generally, a negative liberty right, more focussed on the freedom of establishment than on the socio-economic right to have education provided. It is formulated negatively, and so does not impose any obligation to provide any particular funding, level, or quality of education.[87] There is (probably[88]) no obligation to provide educational facilities where they are not already in place.[89] The English Court of Appeal held in *Holub* that the first sentence of A2-P1 guarantees to learners three separate rights: the right of access to those educational establishments which exist; such ancillary rights as are necessary to make education *'effective'*; and the right to official recognition of qualifications. The

[87] *Belgian Linguistics Case* (1968) 1 EHRR 252, [27].

[88] See Ursula Kilkelly, *The Child and the European Convention on Human Rights* (2nd edn, Routledge 2017); for the view that a total absence of educational provision would fall foul of the right; and the recognition of (unspecified) positive obligations in *Catan v Moldova and Russia* (n 78).

[89] *Velyo Velev v Bulgaria* App no 16032/07 (ECtHR 27 May 2014) 34.

Court of Appeal has also held that education must meet a minimum standard, but that the right does not go beyond this.[90]

The tension between these three attributes of the right to education is yet another reason why the question posed in this Thesis is so pressing: how are these conflicting human rights to be managed, and what are the obligations which are owed by one private actor to another?[91]

(b) Statutory Implementation

In practice, this account of socio-economic educational rights gives an incomplete picture. That right is often provided for at quite an abstract level, and is generally concretised and complemented by statutes, which provide for the legal mechanics of the organisation of the education system to realise this right.

In England, the weak ECHR right is supplemented by statutory obligations to provide education.[92] The statutes governing education impose duties upon the government, schools, and parents, but do not grant a general civil right to education suitable to one's needs.[93] The obligation to provide education is a *'target'* duty, with judicial reticence to enforce it.[94] Responsibility for the provision of education is divided between four key actors in England: local authorities, the Secretary of State, parents

[90] *Holub v Secretary of State for the Home Department* [2001] 1 WLR 1359, [25].

[91] de Koning (n 18).

[92] Anthony Lester, David Pannick and Javan Herberg (eds), *Human Rights Law and Practice* (LexisNexis 2009) 671; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2nd edn, OUP 2009) 1835.

[93] *R (B & Ors) v Alperton & Ors* [2001] ELR 359.

[94] See e.g. *R v Inner London Education Authority ex p Ali* (1990) LGR 852.

and schools.[95] The responsibility is therefore split across different levels of government (although academisation, discussed below, has led to a significant increase in the power of the Secretary of State at the expense of local authorities[96]). The division between the role of central government and the local authority (which may be controlled by different political parties) has led to tension and even litigation.[97]

In South Africa, the constitutional guarantee in s. 29 is given effect by the South African Schools Act (**'SASA'**). Under SASA, schools are self-governing, run by elected school governing bodies (**'SGBs'**).[98] SGBs run admissions policies and set school fees, and where possible, manage the finances.[99] The power of SGBs is significant, although to an extent it is balanced with executive control.[100] The provision of most educational functions is devolved to provincial level, but there remain certain powers in the national Minister for Education.[101]

In India, the relevant statute, passed pursuant to the obligation in Art. 21A, is the Right to Education Act (**'RTE Act'**). It is the first national law to legislate for the right

[95] John Ford and others, *Education Law and Practice* (4th edn, LexisNexis 2016) 394, [17.4]; Clayton and Tomlinson (n 92) 1835, [19.06].

[96] Geoff Whitty and Emma Wisby, 'Education in England – a Testbed for Network Governance?' (2016) 42 Oxford Review of Education 316, 325.

[97] Famously, for administrative lawyers, in *Secretary of State for Education and Science v Tameside MBC* [1976] 3 All ER 665.

[98] Fiske and Ladd (n 16) 84.

[99] ibid 85.

[100] JD Gilmour, 'Intention or in Tension? Recent Education Reforms in South Africa' (2001) 21 International Journal of Educational Development 5, 11. ss14-16

[101] See the obligation of the provinces to provide education in s 12(1); and their power to subsidise private schools in s 48(2);and compare with the power of the Minister to lay down norms and standards for funding public and private schools in s 35 and s 48(1) respectively.

of all children to free and compulsory education at a neighbourhood school.[102] The Act lays down norms and standards for private schools: concerning infrastructure, minimum teacher qualifications, pupil-teacher ratios and curriculum standards.[103] The national Act leaves it to the states to make regulations to give effect to its mandate, meaning that the national rules are governed by supplementary state standards and inspections.[104] Multiple different local, state and national authorities therefore have input into how the RTE Act is actually applied.[105]

It is therefore possible to define, at a high level, a common approach: a broad right, given specific effect by statutory provisions across a (somewhat) fragmented state. This makes it all the more necessary to properly understand the way in which human rights law requires the state to interpose in the relationship between student and school: the statutory framework must give effect to the right in a way which is compliant with what the right requires, and may be subject to legal challenge if it does not.

[102] Amita Chudgar and Benjamin Creed, 'How Are Private School Enrolment Patterns Changing across Indian Districts with a Growth in Private School Availability?' (2016) 42 Oxford Review of Education 543, 547.

[103] Ambast, Gaur and Sangai (n 82) 2.

[104] ibid.

[105] Stephen J Ball, 'Following Policy: Networks, Network Ethnography and Education Policy Mobilities' (2016) 31 JEP 549, 562.

(2) Experience of Private Education

All three jurisdictions have experience of different kinds of private and privatised education. It is very hard to compare education systems,[106] but the following observations might be made.

(a) Private Actors in Public Schools

In all three jurisdictions, the public education system involves cooperation between public and private actors. There is no such thing as a purely public education system. In England, for example, recent years have seen significant privatisation of provision of inspections[107] and ancillary services,[108] including exams,[109] even though there is evidence some of these services – such as exams – are naturally oligopolistic and simply not susceptible to effective marketisation even through a purely economic lens.[110] There is also something of a privatisation of policy development, with the use of partnerships with private actors in policy formation,[111] long-term service contracts, and the presence of commercial actors in policy communities.[112] In South Africa, the

[106] Roger Dale, 'Conjunctions of Power and Comparative Education' (2015) 45 Compare 341, 348.

[107] Ford and others (n 95) 12.

[108] Rob Higham, 'Free Schools in the Big Society: The Motivations, Aims and Demography of Free School Proposers' (2014) 29 JEP 122, 124.

[109] Anthony Kelly, 'Monopolising the Examining Board System in England: A Theoretical Perspective in Support of Reform' (2014) 29 JEP 44.

[110] ibid 56.

[111] Richard Riddell, 'Changing Policy Levers under the Neoliberal State: Realising Coalition Policy on Education and Social Mobility' (2013) 28 JEP 847, 855.

[112] Natalie Papanastasiou, 'Practices of Boundary-Work in the Collaboration between Principals and Private Sponsors in England's Academy Schools' (2017) 32 JEP 82, 82.

autonomy of schools,[113] decentralisation of education,[114] and participatory democracy[115] are important aspects of school governance under SASA. The basic principle is that, even in purely public education, *'schools cannot be managed by the state alone, but that its power should be shared with other stakeholders'*.[116]

In addition, the influence of the private sector can seep into the public sector through managerialism. In all three jurisdictions, a shift in the conceptualisation of education is occurring, with greater parental responsibility, greater shifts of power to private actors, and markets for education. Indian education policy, for example, has seen a shift towards decentralised development redolent of that in SASA.[117] The governance of education in India has therefore become deeply heterarchical,[118] and private players have become de facto education policy makers, in the absence of a joined-up approach from central and state governments.[119]

It is important to note that the role of the private in public education has admirable roots. For example, in South Africa, it is a principle underpinning SASA that multiple stakeholders must be involved in education, and it does not rest with the state alone to

[113] Fiske and Ladd (n 16) 83.

[114] Roger Deacon, Ruksana Osman and Michelle Buchler, 'Education Policy Studies in South Africa, 1995–2006' (2010) 25 JEP 95, 102–103.

[115] Cycil Hartell and others, 'Principals' Perceptions and Experiences of the Role Parents Play in School Governing Bodies in Rural Areas' (2016) 13 Africa Education Review 120, 121.

[116] ibid 123.

[117] Yusuf Sayed and others, *Education Exclusion and Inclusion: Policy and Implementation in South Africa and India* (Department for International Development 2007) 75.

[118] Ball (n 105) 561.

[119] AR Vasavi, 'New Imperatives for Elementary Education' (2009) 3 Indian Journal of Human Development 133, 140.

provide education. Schools, governing bodies, parents, and the local community all have important roles to play. A major driver for this principle was the heavy state control which was exercised over schools under the apartheid regime. Similarly, under the ECHR, concluded in the shadow of the totalitarian regimes of twentieth century Europe, prohibitions on indoctrination through the guaranteed participation of parents in the philosophical direction of their children's education form a major underpinning of A2-P1.[120]

(b) Public-Private Partnerships

Education therefore is not and could not be an exercise of the state alone, but the level of private involvement in the public sector can be radically shifted through public-private partnerships. The paradigm form of public-private partnership is simply for the state to buy in the provision of education. In India, the RTE Act provides that 25% of seats in private schools must be reserved for disadvantaged students, with private schools being compensated for this at the government school rate.[121] This is in effect a large-scale public-private partnership, with private resources utilised for the provision of public education, which remains free and paid for by the state, but essentially directed and provided by the private sector. A much more limited system used to operate in England, whereby children could apply for aided places at private schools.[122]

There can of course be much more complex forms of public-private partnership, such as the academisation programme in England. An academy is a school which is

[120] *Kjeldsen, Busk Madsen and Pedersen v Denmark* (n 78).

[121] Right to Education Act 2009, s. 12(2).

[122] Geoffrey Walford, 'State Support for Private Schooling in India: What Do the Evaluations of the British Assisted Places Schemes Suggest?' (2013) 39 Oxford Review of Education 533.

non-fee charging and state-funded through a funding agreement with the Secretary of State for Education, but which is privately owned and operated. Academies are designed to be autonomous and have been given *'freedoms'* which amount to a shift of state-funded schools from the public to the private sector.[123] After the coming in to force of the Academies Act 2010 they multiplied, with the government policy being that academies should be the normal kind of public school.[124] The academisation of all schools remains the trajectory,[125] although it has suffered setbacks. A short-lived proposal to force academisation for all schools was abandoned in 2016.[126] Later, in 2022, the Government introduced, then abandoned,[127] a Schools Bill, one goal of which was that *"[b]y 2030, all children will benefit from being taught in a family of schools, with their school in a strong multi academy trust or with plans to join or form one"*.[128] Nonetheless, under successive administrations, academisation has been a guiding light[129] of English education policy: that treating students and parents as consumers

[123] Ruth Heilbronn, 'Freedoms and Perils: Academy Schools in England' (2016) 50 Journal of Philosophy of Education 306, 306.

[124] Anne West and David Wolfe, 'Academies, the School System in England and a Vision for the Future' (Clare Market Papers No 23, Education Research Group (LSE), June 2018) 11.

[125] Whitty and Wisby (n 96) 326.

[126] Stephen M Rayner, Steven J Courtney and Helen M Gunter, 'Theorising Systemic Change: Learning from the Academisation Project in England' (2018) 33 JEP 143, 158.

[127] House of Commons Education Select Committee, *Oral evidence: Accountability hearings* (7 December 2022) HC 58, Q237.

[128] Department for Education, *Opportunity for all: Strong schools with great teachers for your child* (White Paper, CP 650) (March 2022), 43.

[129] Chun-Ying Tseng, 'Changing Headship, Changing Schools: How Management Discourse Gives Rise to the Performative Professionalism in England (1980s–2010s)' (2015) 30 JEP 483, 483.

improves schools,[130] driven by the *'twin forces'* of (market) accountability and devolution/autonomy.[131] The government has ceased to see itself as wholly responsible for the education of English children,[132] instead seeing it as a public goal appropriately realised through private means.[133]

(c) Private Schools

Private or independent schools operate in all three jurisdictions, although the extent of their coverage and their nature varies significantly. In England, private schools are separate from the state education system, and are generally responsible for their own conduct and governance.[134] They are not, as such, bound by the national curriculum.[135] They are generally non-profit, although there exists an expanding private, for-profit sector,[136] which at present represents a small but not insignificant part of the market.[137]

[130] Andrew Wilkins, 'Citizens and/or Consumers: Mutations in the Construction of Concepts and Practices of School Choice' (2010) 25 JEP 171, 171.

[131] Amanda Keddie, 'Context Matters: Primary Schools and Academies Reform in England' (2019) 34 JEP 6, 7.

[132] Riddell (n 111) 855.

[133] ibid 851.

[134] Ford and others (n 95) 36.

[135] Julian Gizzi and Nicholas Hancox, *Butterworth's Education Law Manual* (Butterworths 2000), [3.166].

[136] Joy Martin and Lynda Dunlop, 'For-Profit Schools in England: The State of a Nation' (2019) 34 JEP 726, 732.

[137] ibid 729.

In South Africa, SASA recognises two basic kinds of school – public and independent.[138] Independent schools only account for around 7% of total schools,[139] a relatively low rate compared to nations such as India.[140] The sector has, however, expanded significantly recently,[141] and private schooling is more common in the wealthiest provinces.[142]

In India, there is also a clear trend towards private education,[143] and private schools are increasing their share of the education market at the expense of public schools.[144] There is, however, significant variation in the proportion of schools which are private amongst states – with some states having as high as 40% private schools, others as low as 10% in 2015.[145] The Indian educational landscape is marked by huge diversity of school types. Although there are, fundamentally, three kinds of school – state, private aided, private unaided (which may or may not be recognised)[146] – within this simple classification lies a huge amount of diversity. Vasavi, for example, has

[138] Fiske and Ladd (n 16) 84.

[139] Mark Hunter, 'Parental Choice without Parents: Families, Education and Class in a South African Township' (2017) 47 Compare 2, 4.

[140] Sonia Languille, '"Affordable" Private Schools in South Africa. Affordable for Whom?' (2016) 42 Oxford Review of Education 528, 529.

[141] ibid 532.

[142] ibid.

[143] Renu Singh and Colin Bangay, 'Low Fee Private Schooling in India – More Questions than Answers? Observations from the Young Lives Longitudinal Research in Andhra Pradesh' (2014) 39 International Journal of Educational Development 132, 142.

[144] Tanuka Endow, 'Low Cost Private Schools: How Low Cost Really Are These?' (2019) 13 Indian Journal of Human Development 102, 102.

[145] Ambast, Gaur and Sangai (n 82) 1.

[146] Martin Woodhead, Melanie Frost and Zoe James, 'Does Growth in Private Schooling Contribute to Education for All? Evidence from a Longitudinal, Two Cohort Study in Andhra Pradesh, India' (2013) 33 International Journal of Educational Development 65, 65.

identified eleven different kinds of school in India.[147] Schools can vary by ownership; management; level; fee level; affiliation;[148] quality; accessibility; registration status;[149] and whether they are aided or unaided.[150]

As set out above, it is important to distinguish between elite and low-fee private schools. While all three jurisdictions exhibit examples of elite private schools, low-fee private schools have become significant in the South African and Indian education systems. Elite schools have perceptions of high quality and prestige, charging substantial fees, with a clear gulf between their performance and the performance of public schools. They are often modelled, even in India and South Africa, on traditional English independent schools.[151]

Low-fee private education, on the other hand, aims to serve a wider market with less high-quality, but concomitantly cheaper, private education. This reflects a paradigm shift in the sector.[152] In South Africa, the vast majority of independent

[147] Vasavi (n 119) 134.

[148] Ambast, Gaur and Sangai (n 82) 1.

[149] Zoe James and Martin Woodhead, 'Choosing and Changing Schools in India's Private and Government Sectors: Young Lives Evidence from Andhra Pradesh' (2014) 40 Oxford Review of Education 73, 74.

[150] Chudgar and Creed (n 102) 544.

[151] Duncan Butler-Wheelhouse, 'Title: Perceptions of Risks to Elite Secondary School Education in South Africa.' 110, 8; Endow (n 144) 102; James Tooley, 'Extending Access to Low-Cost Private Schools through Vouchers: An Alternative Interpretation of a Two-Stage "School Choice" Experiment in India' (2016) 42 Oxford Review of Education 579, 592.

[152] Languille (n 140) 530; Chudgar and Creed (n 102) 543.

schools are low-fee,[153] and most private schools are non-profit.[154] Many (non-profit[155]) private schools receive public subsidy on a sliding scale depending on their level of fees, up to a cap of fees which are 2.5 time the average provincial per capita expenditure on public schools.[156] Minimum standards must be met to qualify for a subsidy, and they are in practice more stringent than those applied to public schools (but not vastly so).[157] In practice, independent schools in most provinces do not get the subsidies for which they are eligible.[158] There is also a huge variety in the level of formality associated with private schools. Urban private schools can spring up in apartment blocks, and look nothing like traditional schools.[159] There are many *'fly-by-night'* unregistered schools, which can be exploitative and inadequate.[160] In India, low fee private providers have increased significantly in recent years,[161] and increasingly targeted poorer households.[162] This trend has driven up the extent and heterogeneity of private

[153] Department of Environmental Sciences, University of South Africa, Pretoria, South Africa and others, 'Johannesburg's Inner City Private Schools: The Teacher's Perspective' (2018) 38 South African Journal of Education 1, 3.

[154] Languille (n 140) 533.

[155] Tony Bush, 'Professional Development: The Cases Of Sci-Bono Discovery Centre And The Matthew Goniwe School Of Leadership And Governance' in Maringe and Prew (eds), *Twenty Years of Education Transformation in Gauteng 1994 to 2014* (African Minds 2015) 263.

[156] Fiske and Ladd (n 16) 136.

[157] Servaas van der Berg and others, 'The Performance of Low Fee Independent Schools in South Africa - What Can Available Data Tell?' (Stellenbosch Economic Working Papers: 01/17, 2017) 14.

[158] ibid 12.

[159] Department of Environmental Sciences, University of South Africa, Pretoria, South Africa and others (n 153) 4.

[160] Bush (n 155) 268.

[161] Woodhead, Frost and James (n 146) 65.

[162] James and Woodhead (n 149) 74.

education.[163] Low cost private schools in India – to which a huge amount of attention in the private-schools-and-human-rights debate has turned – typically serve low income families and teach in English.[164] Demand for private education in India, as in South Africa, is driven by perceived and real deficiencies in government schools, and a desire for education in English.[165]

(3) Conclusion of Jurisdictional Review

This section has provided an extremely brief account of private (and privatised) education in India, England, and South Africa, and the educational rights which those phenomena might implicate. There is very much more which could be said. However, the following conclusions can be drawn from this analysis for the purposes of this Thesis. First, in each jurisdiction privatisation is common, but in different ways, and with different motivations. Second, this account should reinforce the point that privatisation (and *'the private'* more generally) is not a single concept or process, but rather a complex and heterogenous set of phenomena. Third, in all jurisdictions it is recognised that the existence of private education brings with it a need to balance competing rights, and a need to regulate the sector to do so. This Thesis will fill out the conceptual foundations of that regulatory approach, by considering the framework within which human rights law places obligations on states when they seek to undertake

[163] ibid 86.

[164] Endow (n 144) 103.

[165] Tanuka Endow, 'Inferior Outcomes: Learning in Low-Cost English-Medium Private Schools—A Survey in Delhi and National Capital Region' (2018) 12 Indian Journal of Human Development 1, 2.

that regulatory exercise, and the obligations which human rights law places on private actors themselves when they provide education.

D. SUMMARY CONCLUSION AND STRUCTURE OF THE ARGUMENT

The goal of this Thesis is therefore to explain the analytical basis for the human rights obligations of states and private schools, and the way in which responsibility is divided between them. The goal is not to specify the precise dictates of the right to education, as the Abidjan Principles seek to do in international law, but rather to identify the best way to conceptualise the interposition of human rights in the legal relationship between private schools, state, and children.

In Chapter 2, a common conceptual framework for children's rights will be developed, which would be acceptable in all of the jurisdictions under review, based on the UNCRC. Under that account, there are three key principles which are applicable in this context: that children are worthy of respect and value in and of themselves, that their vulnerability should be recognised, and that their capabilities should be nurtured. This account will show that whether the actor interfering with rights is the state or not is irrelevant to the application of these principles.

Chapter 3 will set out the contours of this problem by explaining the legal position, in particular, by setting out the circumstances under which private schools will and will not have direct human rights obligations by virtue of being (treated as) part of the state. It will be shown that this is not common, and that the boundary between state and non-state (or public and private) is unpredictable and unhelpful.

In Chapter 4, I will offer an account of the interaction between human rights law, and other law that regulates private relationships, including statutes giving effect to the

right to education, through the lens of children's rights in schools. A three-stage approach will be proposed: firstly, it must be determined what horizontal rights and obligations are required by human rights law in the private relationship. Then, it must be determined whether the ordinary law meets these requirements. Finally, if it does not, a court seized of the matter must ask itself whether it is constitutionally constrained from correcting this defect. This clears the way for the big question: in light of the approach defended in Chapter 2, how are human rights obligations in respect of children's rights assigned to the state, and, directly or indirectly, private schools?

Chapters 5 and 6 will attempt to answer this question. Chapter 5 will undertake a review of the law across the jurisdictions to determine, by considering direct horizontality, indirect effect, and the duty to protect, what principles govern the answer to the first question of the three-stage analysis proposed in Chapter 4. It will be shown that, in all three jurisdictions, the same factors have been relevant, to a greater or lesser extent, in deciding what duties private actors owe each other: the importance of the right and the correlative severity of the violation; private autonomy and countervailing rights; the power of the putative duty-bearer and its capacity to violate rights; the vulnerability of the beneficiary; the social role of the putative duty-bearer; and the public interest. Applied to education, these factors suggest that private schools should bear at least some human rights duties. This review will reveal three key analytical challenges which any coherent theory of horizontal effect must overcome. These three challenges are: overcoming generality and articulating choices; explaining how competing rights and interests, especially private autonomy, are to be factored in; and accounting for the division of responsibility between the state and different private actors.

Chapter 6 will propose a framework for assigning horizontal duties which attempts to overcome the analytical challenges set out in Chapter 5, and which is a fair reconstruction in light of principle and practice. It will be argued that a two-stage approach should be followed: first, determining the existence of private duties by reference to the private actor's *power* and *social role*, and the beneficiary's *vulnerability*; and then determining whether non-compliance with the duty can be justified, taking into account countervailing rights and autonomy interests. Even where horizontal duties are widely recognised, it should be noted, there remains a critical coordinating function for the state in realising rights in the context of the privatisation of education.

Applying this approach to private education leads to central conclusion of the Thesis, summarised in Chapter 7: private education is not simply an aspect of commerce, reflected in an atomised, bilateral, private law relationship unencumbered by any need to respect children's rights. Instead, the better approach is one which sees this relationship as giving rise to obligations on private schools which derive from human rights law. These obligations stem from the relationship of asymmetric power and the social role of educators in a democracy committed to human rights. It is the responsibility of the state, as recognised in the Abidjan Principles, to ensure that these obligations to respect children's rights are effective and enforceable. In this way, the Thesis reflexively makes contributions both to the specific question of children's rights in private schools, and also to the more general debate around the horizontal effect of human rights.

CHAPTER 2

A COMMON CONCEPTUAL FRAMEWORK: THE UN CONVENTION ON THE RIGHTS OF THE CHILD

A. INTRODUCTION

The overarching case in this Thesis is that rigorous focus on the human rights for which the law provides can lead to coherent and consistent answers to the difficult questions identified in Chapter 1. This approach must be guided by the principles which underpin children's rights law if it is to retain its rigour when put to the interpretative challenge of determining the applicability and scope of children's rights in private education.

This Chapter will set out (without any claim to exhaustivity) three such principles which can be derived from the UNCRC:[1] *first*, that children are worthy of respect and value in and of themselves, equal to any other person; *second*, that children are often vulnerable, often especially so, and that this vulnerability should be recognised and respected; and *third*, that children are at a formative stage of their lives, and their capabilities should accordingly be nurtured. These principles are interdependent and mutually supporting, although sometimes in tension with each other. Where tensions arise, they can be resolved by a firm commitment to the participation of children in decisions affecting them and a clear understanding of what is at stake in children's futures when decisions are made about them in the present.

[1] John Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking' in Michael Freeman (ed), *Law and Childhood Studies* (OUP 2012) 60–61.

This Chapter will start by setting out what the role of a common theoretical perspective is in my comparative methodology; and will then discuss the three principles identified above in detail. Consideration will be given to the ways in which there might be tension between those principles, and how that tension can be resolved. Finally, it will be argued that, in accordance with this approach, the principles underpinning the UNCRC are not dependent on the public or private nature of the actor alleged to be violating a child's rights.

B. THE ROLE OF THEORY IN ADOPTING A COMPARATIVE CRITICAL INTERNAL PERSPECTIVE

As outlined in Chapter 1, this Thesis will approach the comparative material from a critical internal perspective. That means that it will be necessary to, effectively, review legal doctrine in the three jurisdictions under consideration by reference to the claims of principle which children's rights law makes on the legal system. As I set out in Chapter 1, my goal here is to point to relatively abstract but hopefully generally agreeable principles which would find purchase in the three legal systems under review and enable the adoption of a common critical perspective. I defend this approach in this section. This is an important part of defending the comparative approach, the necessity of which was described in Chapter 1.

(1) Basic Elements of a Good Theory

It is first necessary to set out what it is that a *'theory'* (if that is not too grandiose a term) of children's rights is for. This Chapter is going to set out a conceptual approach, derived from the UNCRC, for argument about children's rights, and a set of principles which, it will be argued, should guide practice. A theory of children's rights must be

realistic, in two senses.[2] First, it must be grounded in the reality of childhood. Second, it must have a good (but by no means perfect) fit with the language and practice of children's human rights. However, such a theory does not need to explain everything, and much less, to provide a universal, easy algorithm for the resolution of questions of children's rights. It also does not need to set out the only way of understanding children's rights. It may be that the morality and practice of human rights is of such nuance, variety and complexity that no single theory can do it justice without either being too abstract to be useful in concrete cases, or too specific to be useful in guiding practice. That will be especially so where a theory proposed is intended to be acceptable in multiple jurisdictions.

(2) The Difference Between an Internal and External Perspective

Is it justifiable to adopt a common theory for a comparative review of this kind? It will be recalled that in Chapter 1, Möller's approach of adopting an entirely external critical perspective in comparative law was doubted.[3] However, the difference between an internal and external perspective is not binary. It might be doubted whether a wholly internal or external perspective is even possible: the study of a legal system will be influenced – to some degree – by the content of the legal system and pre-conceptions of the researcher. Comparative scholars are themselves *'participant observers'*.[4] The question is therefore not whether to undertake internal or external study, but rather

[2] Coady, 'Theory, Rights, and Children: A Comment on O'Neill and Campbell' (1992) 6 IJLPF 43, 44.

[3] Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012).

[4] Günter Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law' (1985) 26 Harvard International Law Journal 411, 441.

where on the spectrum between them it is appropriate to position an individual research exercise.

There can be no argument that what it means to be a child in England, India and South Africa will share important commonalities, but also important differences, and their precise contours lie outside the scope of this Thesis. A wholly external approach runs the risk of simply being incorrect if transplanted to a jurisdiction which does not share it. It would not therefore be safe to adopt a rigidly external approach.

Equally, it would be dangerous to adopt a wholly internal approach, not least because there are people better placed to write about these jurisdictions from a wholly internal perspective. *First*, as set out in Chapter 1, it is not really possible to approach a topic like children's rights from a position of moral neutrality and disinterest.[5] Accordingly, the most intellectually honest approach is to set out the critical framework through which the law will be reviewed, and explain why it is as useful one to compare these particular three jurisdictions. *Second*, the exercise in comparison will yield much more useful results if the jurisdictions share an at least somewhat *'common language'* of children's rights. The better the case can be made that this abstract framework at least approximates to the operating principles of children's rights law in the three jurisdictions, the more informative conclusions about one jurisdiction will be in the other.

[5] Priscilla Alderson, 'Common Criticisms of Children's Rights and 25 Years of the IJCR' (2017) 25 IJCR 307, 311–312.

(3) The UNCRC as a Source of Principles

Against that background, it is appropriate to draw on the UNCRC as a source of principles for this comparative critical approach, as a common frame of reference for all three jurisdictions.

First, all three jurisdictions have ratified the UNCRC, and in all three, to a greater or lesser extent, the principles underpinning it are treated as either directly applicable or at least as relevant by national courts. In all the jurisdictions, notwithstanding their (in general terms) dualist constitutions, near-direct application of the UNCRC can be observed, at least in some contexts.

With regard to **South Africa**, it has been commented that for the purposes of the UNCRC a shift has been made from dualism to monism, not through formal incorporation but through adoption of the spirit and principles of the UNCRC.[6] In *S v M*, considering the relevance of the best interests of the child when a court passes criminal sentence on primary caregivers, the Constitutional Court held that s. 28 of the Constitution (which requires respect for children's best interests):

> *...must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child [...] since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights.*[7]

[6] Julia Sloth-Nielsen and Helen Kruuse, 'A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007-2012' (2013) 21 IJCR 646, 648; Ann Skelton, 'Child Justice in South Africa: Application of International Instruments in the Constitutional Court' (2018) 26 IJCR 391, 398.

[7] *M v State* [2007] ZACC 18, 2008 (3) SA 232 (CC).

In **England**, certain of the rights in the ECHR form a part of domestic law. In that context, both the European Court of Human Rights and the English courts have recognised and endorsed the principles underpinning the UNCRC: the English judiciary draws *'liberally'* on the UNCRC,[8] as does the European Court of Human Rights.[9] That the *'spirit'* of the UNCRC forms part of English law is now a *'well-established'* proposition.[10]

In **India**, courts frequently cite the UNCRC.[11] It is given pride of place in a key text on Indian children's rights law,[12] and provides a powerful tool for litigation for children's rights in India.[13] The courts have held that the rights of minors must be read with the UNCRC, and the courts routinely hold that Indian children's rights law coheres with India's obligations under the UNCRC.[14]

[8] Elizabeth A Faulkner and Conrad Nyamutata, 'The Decolonisation of Children's Rights and the Colonial Contours of the Convention on the Rights of the Child' (2020) 28 IJCR 66, 70.

[9] Jaap E Doek, 'The Human Rights of Children: An Introduction' in Ursula Kilkelly and Ton Liefaard (eds), *International Human Rights of Children* (Springer Singapore 2019) 19.

[10] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, [23]; *Akhter v Khan* [2020] EWCA Civ 122, [2021] Fam. 277, [109]; *Hertfordshire County Council v NK* [2020] EWHC 139 (Fam), [2020] 1 F.L.R. 951, [25]; see also *R (on the application of DA and others) v Secretary of State for Work and Pensions* [2019] UKSC 21.

[11] *ABC v State (NCT Of Delhi)* (2015) (2015) 10 SCC 1, (2016) 1 SCC (Civ) 1 10, [9]-[10], [17]; *Salil Bali v Union Of India* (2013) 7 SCC 705, (2013) 3 SCC (Cri) 686, [44]; *Independent Thought v Union Of India* (2017) 10 SCC 800, (2018) 1 SCC (Cri) 13, [33], [42]; *Ajay Goswami v Union Of India* [2006] (2007) 1 SCC 143, (2007) 1 SCC (Cri) 298 22, [2]-[3]; *Gaurav Jain v Union Of India* (1997) 8 SCC 114, 1998 SCC (Cri) 25.

[12] Asha Bajpai, *Child Rights in India* (OUP 2017) 1, 34.

[13] Swagata Raha, 'Treatment of Children as Adults under India's Juvenile Justice (Care and Protection of Children) Act, 2015' (2019) 27 IJCR 757, 786.

[14] *Salil Bali v Union Of India* (n 11), [44]; *Independent Thought v Union Of India* (n 11), [33]; *Ajay Goswami v Union Of India* (n 11), [2]-[3]; *Gaurav Jain v Union Of India* (n 11); *ABC v State (NCT Of Delhi)* (n 11), [17].

Therefore, courts in all three jurisdictions openly acknowledge that external, international conceptions of children's rights are legitimate and of at least some value in domestic legal reasoning. These words are backed up by practice, with courts in the three jurisdictions frequently cross-citing each other in the context of children's rights. In *Kundu v Kundu*, for example, the Supreme Court of India cited English authority on the welfare of the child in habeas corpus applications.[15] This cross-citation is evident even in England, a jurisdiction which does not have a strong tradition of deploying comparative public law. Sachs J's judgment in *M* has been cited with approval by the Supreme Court as a judgment of *'especial child-sensitivity'* in *HH*.[16] In *Raqeeb*, McDonald J cited *Christian Education South Africa* while considering the relevance of the concept of dignity to decisions concerning the medical treatment of children.[17]

It is possible to go further than this. The UNCRC would be a highly persuasive source of principles in *any* jurisdiction, having been ratified by 196 states,[18] and *'remains the most comprehensive, widely known and generally accepted articulation of school children's rights across the world.'*[19] This reflects the *'internationalisation'* of children's rights.[20] The UNCRC has received near universal ratification and reflects

[15] *Kundu v Kundu* (2008) 9 SCC 413, 2008 SCC OnLine SC 1216, [20]-[21].

[16] *R (HH) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2013] 1 AC 338, [172].

[17] *Raqeeb v Barts Health NHS Trust* (2019) EWHC 2531 (Admin), [2020] 3 All ER 663, [137].

[18] Skelton (n 6) 393.

[19] Laura Lundy, 'Children's Rights and Educational Policy in Europe: The Implementation of the United Nations Convention on the Rights of the Child' (2012) 38 Oxford Review of Education 393, 395.

[20] Savitri Goonesekere, 'Introduction and Overview' in Unicef, *Protecting the Worlds Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (CUP 2007) 15.

concerns common across many different legal contexts.[21] It is therefore defensible to seek to develop a common framework derived from the UNCRC, subject to certain caveats set out below.

(4) Caveats in Adopting a Common Approach

First, it is important not to underplay the extent to which international diversity can affect conceptions of childhood and children's rights. This could be so for cultural, socio-economic,[22] or other reasons. Indeed, there is interesting evidence that the legal context in which children grow up influences their conceptions of their own rights (with US children showing a trend to understand rights as (roughly speaking) liberty-focussed, Estonian children's understanding demonstrating a strong emphasis on personal freedom (in a relatively young democracy), and South African children showing an understanding of rights which placed great emphasis on education and nurturing rights).[23]

Second, the UNCRC provides a powerful common statement of children's rights, but it has not been without criticism. *Firstly*, the UNCRC came about in a context where there was wide variety of views on the content and role of children's rights,[24] and

[21] ibid 27.

[22] Suman Khadka, 'Social Rights and the United Nations – Child Rights Convention (UN-CRC): Is the CRC a Help or Hindrance for Developing Universal and Egalitarian Social Policies for Children's Wellbeing in the "Developing World"?' (2013) 21 IJCR 616, 619; Faulkner and Nyamutata (n 8) 71.

[23] Ingrid A Willenberg, Harriet R Tenenbaum and Martin D Ruck, 'It's Not like in Apartheid' (2014) 22 IJCR 446.

[24] Doek (n 9) 8.

certain voices were excluded from the drafting of and discussion about the UNCRC.[25] Wide ratification does not necessarily equal acceptance, with other international political and economic pressures on states cited as possible reasons for ratification.[26] *Secondly*, the UNCRC has been said to adopt a *'Western ideal of an autonomous rights-bearing citizen'*,[27] as well as to stigmatise the lives of children who are homeless or sole carers/heads of family, who do not live up to the UNCRC's implicit stereotype of what it is a childhood must be and involve.[28] *Thirdly*, the UNCRC's *'apolitical'*[29] separation of children's socio-economic rights from political outcomes is keenly felt by children in poverty, especially in less wealthy nations.[30] *Fourthly*, childhood is to an extent a social construct, which different societies might construct differently.[31] It is also a construct which can be manipulated by powerful groups in society along ideological lines.[32]

However, it does not follow from these (arguably valid, at least in part) critiques that the UNCRC cannot be used as a source of common principles for critique across

[25] Philip E Veerman, 'An African and International Perspective on Children's Rights' (2017) 25 IJCR 672, 683.

[26] Faulkner and Nyamutata (n 8) 72.

[27] Roy Huijsmans, 'Decentring the History of the Idea of Children's Rights' (2016) 24 IJCR 924, 924; Tara Jones, 'Unsatisfactory Progress: Article 12 and Pupil Participation in English Schools' (2017) 25 IJCR 68, 80; Khadka (n 22) 622.

[28] Ashleigh Barnes, 'A Genealogy of the CRC' (2014) 23 Minn J Int'l L [1] 102.

[29] Khadka (n 22) 620.

[30] ibid 622.

[31] Savitri Goonesekere, 'The Interrelated and Interdependent Nature of Children's Rights' in Jonathan Todres and Shani M King (eds), Savitri Goonesekere, *The Oxford Handbook of Children's Rights Law* (OUP 2020) 72.

[32] Barnes (n 28) 145.

the jurisdictions under review. Arguments that the UNCRC is a *'Western'* imposition are not arguments against common principles as such: they are rather arguments against imposition of Western common principles which would otherwise not be applicable. If those proposed principles pass muster with the internal principles applicable in a jurisdiction, the Western origins of the UNCRC would not impact their applicability. It might also be said that more radical critiques which see it as impossible to universalise any elements of children's rights are somewhat belied by the internalisation of the children's rights agenda across the globe since the UNCRC was adopted, and nearly universally ratified.[33] It has in any event been argued that the UNCRC is one of the human rights treaties most responsive to social and cultural variation in its implementation.[34]

Further, the problems set out above can be, to an extent, ameliorated if the principles identified are of a fairly general nature, and leave room for diverse interpretation and application. This Thesis attempts to approach the discipline of comparative law in a way which recognises and permits in its comparative analysis significant variation between jurisdictions. This proposed common conceptual framework does not, therefore, close the space in which (fairly radical) differences in childhood and children's rights might exist between the three jurisdictions under review.[35] In particular, the principles set out below leave room for both communitarian

[33] Goonesekere, 'The Interrelated and Interdependent Nature of Children's Rights' (n 31) 73.

[34] Nico Brando, 'Universalism, Embeddedness and Domination: An Analysis of the Convention on the Rights of the Child' (2019) 15 Journal of Global Ethics 270, 272.

[35] Faulkner and Nyamutata (n 8) 81.

and individualistic understandings of children's rights – provided that it is recognised that the discipline is children's rights. [36]

Finally, it is also important not to essentialise or reduce the complexity of a society different to one's own – societies are not *'monolithic and atemporal',*[37] but rather subject to internal contestation and (sadly) domination by some groups over others, including of children by adults.[38] Caricaturing the principles implicit in the UNCRC as out-of-place, brute force impositions runs the risk of treating those societies said to have been excluded from its drafting or by its ideology as lacking in agency, complexity, or internal contestation and oppression.

(5) Summary of Approach

It is possible for an approach to children's rights to be strongly focussed on the rights of children so as to provide a principled framework for critique and comparison, while still being of sufficient *abstraction* and including enough *flexibility* to accommodate difference and diversity.[39] The remainder of this Chapter will argue that three key principles can be derived from the UNCRC to assist in the resolution of difficult questions of horizontality in the context of children's rights: (i) that children are independent moral equals whose choices matter, but (ii) who are vulnerable and (iii) require nurturing and support to fully realise their potential.

[36] Ann Quennerstedt and Zoe Moody, 'Educational Children's Rights Research 1989–2019: Achievements, Gaps and Future Prospects' (2020) 28 IJCR 183, 192.

[37] Brando (n 34) 280.

[38] ibid 281.

[39] Doek (n 9) 16.

For the avoidance of doubt, it should be observed that the Committee on the Rights of the Child has identified four general principles of the UNCRC: non-discrimination; the best interests of the child; the right to development; and the right to be heard.[40] Those four principles are different to the three principles identified here. There should, however, be no objection to seeking to home in on more particular principles which might of more use in respect of a particular context (as, for example, Tilson and Oxley do when discussing UK school exclusions,[41] or the UNICEF Child-Friendly Schools Initiative does when it develops a different set of four key principles *'grounded in children's rights concepts'*.[42]). The principles identified here are not intended to be rival to, or a means of critique of, the Committee's four general principles. Rather, they are the ones which, it is submitted, are of most use when discussing the privatisation of education and children's human rights.

[40] UN Committee on the Rights of the Child, 'General Guidelines Regarding the Form and Content of Initial Reports to Be Submitted by States Parties' (30 October 1991, CRC/C/5), [13].

[41] John Tillson and Laura Oxley, 'Children's Moral Rights and UK School Exclusions' (2020) 18 Theory and Research in Education 40, 42.

[42] Jonathan Todres, 'Making Children's Rights Widely Known' (2020) 29:1 Minnesota Journal of International Law 109, 130.

C. VALUING CHILDREN AS PEOPLE

The central animating principle of the UNCRC is that children are rights-holders: important, independent persons in their own right, rather than mere receptacles of care,[43] or, even worse,[44] the property of their parents or anyone else.[45]

As the Committee on the Rights of the Child has said, specifically in the context of young children's rights (where claims of lack of personhood or capacity have most force), *'young children are rights holders […] holders of all the rights enshrined in the Convention'*.[46] The UNCRC *'requires that children, including the very youngest children, be respected as persons in their own right. Young children should be recognized as active members of families, communities and societies, with their own concerns, interests and points of view.'*[47] In its comment on adolescents the Committee goes even further, stating that a *'human rights-based approach'* was required which included *'recognition and respect for the dignity and agency of adolescents; their*

[43] Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 IJCR 306, 307.

[44] Samantha Brennan, 'The Goods of Childhood and Children's Rights', *Family-Making: Contemporary Ethical Challenges* (OUP 2014) 30–31; John Tobin (n 1) 56–57.

[45] Elaine E Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (CUP 2016) 35.

[46] UN Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (20 September 2006, CRC/C/GC/7/Rev1), [3]; UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (29 May 2013, CRC /C/GC/14) 3.

[47] UN Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (n 46), [5].

empowerment, citizenship and active participation in their own lives[.]'[48] Even those parts of the UNCRC which might be said to be more paternalistic in nature, such as the best interests principle in Art. 3,[49] must be seen against the backdrop of the concept of the child as rights-holder.[50] Even concern for children's best interests cannot justify overriding the UNCRC rights.[51]

That children are capable of being rights-bearers has not always been universally accepted, even in modern times. It is therefore worth briefly explaining why this common core, applicable to all jurisdictions under review, is so important. The recognition of children's rights marks children out as rights-bearers worthy of respect. It makes clear that even from a young age, they are individuals deserving of empowerment.[52] It also matters for the self-worth of children themselves.[53] Rights indicate respect, and membership of humanity. [54] They also disrupt power and force

[48] UN Committee on the Rights of the Child, 'General Comment No. 20 (2016) on the Implementation of the Rights of the Child during Adolescence' (6 December 2016, CRC/C/GC/20), [4].

[49] Sutherland (n 45) 34.

[50] UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46), [4]; Ursula Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child* (CUP 2016) 59.

[51] UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 2.

[52] Federle, 'Rights Flow Downhill' (1994) 2 IJCR 343, 364–365.

[53] Carolyne Willow, 'Book Reviw: Children's Rights and the Capability Approach: Challenges and Prospects' (2017) 25 IJCR 265.

[54] Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 IJCR 5, 7–9.

consideration, pooling and accreting in the disadvantaged.[55] They do not bow easily to other interests. The rhetoric of rights is a catalyst for change and respect, which amplifies the voice of those who speak with it, even when, as with children, their voices are quiet(ened).[56] Rights are a tool for advocacy, and lend their legitimacy to those who push for change (which is particularly important since children are shut out of the political process).[57]

It follows from this that children do not only matter because of what they could become. They have important current interests, ideas, and desires. Peleg, for example, has argued that in the context of the right to development, the notion of children as *'human becomings'* should be replaced with one of children as human beings, who can make decisions about their own lives.[58] Granting people autonomy is central to their human worth.[59] It is therefore an important and welcome aspect of the Committee's *'human rights-based approach'* that children's current autonomy matters.

However, it is important not merely to throw around terms like *'autonomy'*, but to explain practically and precisely what is meant by them.[60] Respecting children's

[55] Katherine Hunt Federle, 'Looking Ahead: An Empowerment Perspective on the Rights of Children' (1995) 68 Temple Law Review 1585, 1595.

[56] Sutherland (n 45) 35.

[57] Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (n 54) 8.

[58] Noam Peleg, 'Reconceptualising the Child's Right to Development: Children and the Capability Approach' (2013) 21 IJCR 523; Noam Peleg, *The Child's Right to Development* (CUP 2019) 141.

[59] John Eekelaar, 'The Importance of Thinking Children Have Rights' (1992) 6 IJLPF 221-235, 227; Michael Freeman, 'Taking Children's Rights More Seriously' (1992) 6 IJLPF 52, 64.

[60] Christina McMellon and E Kay M Tisdall, 'Children and Young People's Participation Rights: Looking Backwards and Moving Forwards' (2020) 28 IJCR 157, 168.

current autonomy does not mean allowing their choices always to trump their best interests.[61] As set out below, the need to respect and recognise children's vulnerability, and nurture their capabilities, explains why children's choices can sometimes be overridden in their best interests, in a way which is compliant with their human rights. However, while their choice may be overridden, it is wrong to think of children's autonomy as a mere revocable licence.[62] Rather, the choices they make carry moral salience in the same way that the choices an adult makes do.

It is important to note, and is often overlooked, that there are many situations in which respect for children's autonomy is uncomplicated, and there is no good reason, *internal to the child*, to deny it. In such cases there must surely be a presumption that the child is to be treated as capable of making decisions: the burden lies with those who would want to deny children their rights on the ground of their supposed incompetence.[63] There may be good external reasons (such as cost), but such justifications for not respecting a child's autonomy do not seek to limit autonomy on the basis of childhood, and will not look different to respect for an adult's autonomy. Where there is deviation from the child's exercise of autonomy, treating them as a person may require certain procedural protections, such as the right to be heard and possibly the right to reasons, as discussed further below.

[61] Lowy, 'Autonomy and the Appropriate Projects of Children: A Comment on Freeman' (1992) 6 IJLPF 72, 72–74.

[62] John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 IJLPF 42, 50–51.

[63] Michael Freeman, 'Taking Children's Human Rights Seriously' in Jonathan Todres and Shani M King (eds), Michael Freeman, *The Oxford Handbook of Children's Rights Law* (OUP 2020) 59.

D. RECOGNISING AND RESPECTING VULNERABILITY

The CRC, while recognising children as rights-holders, also recognises that children are vulnerable,[64] and an account of their rights needs to reflect that.[65] The concern about children being *'abandoned to their rights'*[66] is a genuine one: it is unfair to expect children to be able to safeguard their future interests in the same way an adult could. The Committee on the Rights of the Child has observed that children find themselves in positions of vulnerability, and that this has implications for how their rights should be safeguarded.[67] As the Committee has recognised:

> *'Young children are especially vulnerable to the harm caused by unreliable, inconsistent relationships with parents and caregivers, or growing up in extreme poverty and deprivation, or being surrounded by conflict and violence or displaced from their homes as refugees, or any number of other adversities prejudicial to their well-being. Young children are less able to comprehend these adversities or resist harmful effects on their health, or physical, mental, spiritual, moral or social development.'*[68]

[64] Kirsten Sandberg, 'The Convention on the Rights of the Child and the Vulnerability of Children' (2015) 84 Nordic Journal of International Law 221, 245.

[65] Brando (n 34) 271.

[66] Hafen and Hafen, 'Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child' (1996) 37 Harvard International Law Journal 449.

[67] UN Committee on the Rights of the Child, 'General Comment No. 20' (n 49), [2], [26].

[68] UN Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (n 46), [36].

Further, the Committee has recognised that children are *'politically voiceless'*[69] and can have physical and emotional dependence on caregivers.[70]

However, vulnerability is a contested concept, and neither the UNCRC nor the Committee has provided a general definition of it. It is necessary to expand on vulnerability as a concept, in order to deploy it for the purposes of rigorous, cross-jurisdictional critique.

(1) Defining Vulnerability

Every single person experiences vulnerability, but its precise meaning is tricky to pin down. At the simplest level, it means exposure to the possibility of harm,[71] but that is clearly not sufficient as a principle of children's rights law: it is overly broad. The Committee has recognised that vulnerability is individualised, and each child's vulnerability requires unique assessment.[72] An account of vulnerability requires more specificity, on three counts. First, it must be clarified from whose perspective vulnerability is to be assessed. Second, it must be clarified what the source of vulnerability is: that is, whether it is intrinsic or social. Third, it must be explained to what exactly children are vulnerable. It is an empty concept unless the interests which are at risk are defined.

[69] UN Committee on the Rights of the Child, 'General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights' (17 April 2013, CRC/C/GC/16) 2.

[70] UN Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (n 46), [18].

[71] Oxford English Dictionary, https://en.oxforddictionaries.com/definition/vulnerable, last accessed 30/12/21.

[72] UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 9.

There is a distinction between objective vulnerability, where a person's resilience is insufficient to match an empirically verifiable external threat to an externally determinable interest, and the way a person conceives of their own vulnerability.[73] It is clear that both of these forms of vulnerability can be important,[74] but the former will be the subject of the discussion here. Objective vulnerability matters because it is a universal human condition. An assumption that vulnerability is something unique to children or any other group is patently false.[75] All humans are vulnerable. A useful distinction, which can help us understand the way law should respond to children's vulnerability, and the value of that vulnerability, is the distinction between intrinsic vulnerability and social vulnerability.[76]

Intrinsic vulnerability is risk to interests which stems from our biological make-up. We are all mortal, can all feel pain, and suffer catastrophic injury or emotional anguish. Children, simply by virtue of their stage of biological and intellectual development, and their size relative to adults, are vulnerable. Children are also emotionally vulnerable.[77] This kind of vulnerability is good where it is met with the sort of respect which exists in relationships of care or love. Where the freely given trust of children is met with hostility or indifference, as with other relationships of trust, it

[73] Jonathan Herring, 'Vulnerability, Children and the Law' in Michael Freeman (ed), *Law and Childhood Studies* (OUP 2012).

[74] It must be remembered that respect for children's autonomy requires attention be paid to their own views of what is valuable, and what vulnerabilities they consider pressing.

[75] Herring (n 73) 250–253.

[76] This draws on Fineman's distinction between embodied and embedded differences: Martha A Fineman, 'Equality and Difference – The Restrained State' (2014) 66:3 Alabama Law Review 609 618–622.

[77] Onora O'Neill, 'Children's Rights and Children's Lives' (1998) 98:3 Ethics 445.

can be damaging and hurtful.[78] A compassionate understanding of children's rights takes these relative vulnerabilities into account. As the Committee notes, *'young children are best understood as social actors whose survival, well-being and development are dependent on and built around close relationships.'*[79]

Structural vulnerability, by contrast, is not inherent; rather, it is created. There are two ways in which structural vulnerability can come about. The *first* is oppressive intervention of power. An example is children's vulnerability in the political process. They are often championed in political argument, but they have no vote.[80] This clearly presents risk to their interests, but those risks do not stem from anything inherent about children. They stem from denial of a capacity extended to other people, who are, for that reason, not vulnerable in the same way. The *second* way in which social vulnerability can arise is through the design of society in a way which plays on inherent characteristics of individuals or groups to disadvantage them. The Committee also recognises that vulnerability can come about by virtue of membership of a particular group which is subject to disadvantage, discrimination or oppression.[81]

Finally, vulnerability is only a useful concept if it is made clear what risks are being avoided. In Herring's work on vulnerability, for example, there is a curious lack of specificity on this point. He uses words like *'possibility,' 'risk,'* and *'weakness'* but

[78] Samantha Brennan (n 44) 43.

[79] UN Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (n 46), [8].

[80] Rosalind Dixon and Martha Nussbaum, 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (2012) 97 Cornell Law Review 549-594, 552.

[81] UN Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (n 46), [24]; UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 7.

these ideas are all value-neutral (in meaning if not rhetoric). It is clear from the examples Herring cites that he is primarily interested in vulnerability to risks to life and health. He uses examples such as mugging, mental ill-health, hospital admission, disability, and illicit drug use.[82] He does not, however, confine himself to such a health-based approach, citing also unemployment and low income. While both of these latter examples clearly can present health risks, they seem to point to a broader conception of human interest than avoidance of pain and death. This impression is reinforced in Herring's discussion of the kinds of *'hidden vulnerabilities'* we all have: he cites with approval the view that many facilities in life, such as extended open hours and cash machines, make our lives possible.[83] This suggests that Herring ties his conception of vulnerability to a broader understanding of human interest, but it is never clearly drawn out. The next step in this Chapter is to pin down exactly what that understanding might be.

(2) Engaging with Children's Vulnerability: Rights and Resilience

Vulnerability, for the reasons set out above, is highly individualised. Children endure a general form of vulnerability, in that short-term deprivations can have long terms effects, and rights violations early in life can echo through a person's entire lifetime.[84] However, children are not unique in experiencing vulnerability, and growing up is not

[82] Herring (n 73) 252–253.

[83] ibid 253.

[84] Jonathan Todres and Shani M King, 'Children's Rights in the Twenty-First Century: Challenges and Opportunities' in Jonathan Todres and Shani M King (eds), Jonathan Todres and Shani M King, *The Oxford Handbook of Children's Rights Law* (OUP 2020) 720.

a linear progression from a position of *'vulnerability'* to a position of *'power'* or *'resilience'*.[85] From this follows three points.

First, the UNCRC recognises in principle (although does not always live up to it in practice[86]) that the vulnerability of children is not a reason not to treat their present choices and personhood with respect.[87] Children must be seen as both vulnerable but also as *'capable actors in their own lives'*.[88] Children must not be defined by their vulnerability, but rather by rather by their equal personhood.[89]

Second, the UNCRC's response to vulnerability is to require that adults take steps to ensure children's resilience is developed.[90] The development of resilience is an important part of how vulnerability is to be reconciled with full personhood/dignity of children. Rather than essentialising them as incapable, the UNCRC recognises that it is the responsibility of those around the child to help develop their resilience and capabilities.[91] One of the critical ways this is done is through education.[92]

[85] Kate Wall and others, 'Look Who's Talking: Factors for Considering the Facilitation of Very Young Children's Voices' (2019) 17(4) Journal of Early Childhood Research 263, 265.

[86] Barnes (n 28) 116.

[87] UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 7.

[88] Sandberg (n 64) 246.

[89] Laura Lundy and Amy Brown, 'Revisiting the Three 'R's in Order to Realize Children's Educational Rights Relationships, Resources, and Redress' in Jonathan Todres and Shani M King (eds), Laura Lundy and Amy Brown, *The Oxford Handbook of Children's Rights Law* (OUP 2020) 397.

[90] Fineman (n 76) 624.

[91] Sandberg (n 64) 222.

[92] UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 9.

Third, recognition of the fact that vulnerability is individualised requires those working in children's rights to identify the precise nature of vulnerability faced in a particular case, and in particular, what kinds of interests a child might have which could justify deviation from the presumption that their autonomy be respected. As set out below, an important source for identifying such interests is the capability theory. The capability theory can (partially) explain what it is about children which is vulnerable, as well as the need to facilitate and nurture children's developing capacities and resilience.

E. NURTURING CAPABILITY

The third key principle is the need to nurture children's capabilities, in recognition of the fact that childhood is a special stage of life in which they develop as people more than at any other stage. The Committee on the Rights of the Child has recognised this. From 2013 onwards, the Committee has taken the right to development more seriously, addressing it independently and separately from the (mere) objective of promoting the child's development.[93]

Capability is of particular importance in the context of education, which is fundamental for the promotion of the child's development. [94] Capability theory can inform a children's rights approach: respect for children as people means recognising that they are vulnerable and that their decisions matter. The capability theory goes further and focuses on the development of genuine opportunity and choice,[95] and

[93] Peleg, *The Child's Right to Development* (n 58) 94.

[94] ibid 135–140.

[95] Sandra Fredman, *Human Rights Transformed* (OUP 2008) 10–12.

challenges the traditional, negative liberal view of autonomy as being an absence of interference, rather than positive development of capabilities.[96]

The capability approach is a theory of social justice emphasising human dignity and human flourishing.[97] It began life in the human development context, as a challenge to narrow, economic accounts of well-being, and attempted to place people, and their actual opportunities (or lack thereof), at the centre of development discourse.[98] It led to a *'paradigm shift'* in development ethics and normative economics.[99] It has since extended into the field of human rights law, with contributors such as Nussbaum attempting to distil specific valuable capabilities which are reflected in the protections of human rights law.

The capability theory is an account of human well-being which traditionally breaks down the process of generating well-being into two or three stages: first, endowment, which is understood to be the means to achieve a particular desired goal; second, capabilities, the positive freedom or option to achieve that goal; and then finally functionings – the goal itself.[100] In this sense, capability is particularly salient in the context of children's right to education.

[96] Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press 2011), Ch. 2.

[97] Monica Strømland and others, 'In Your Best Interest' (2019) 27 IJCR 517, 527.

[98] Solava Ibrahim, 'Introduction: The Capability Approach: From Theory to Practice — Rationale, Review and Reflections' in Solava Ibrahim and Meera Tiwari (eds), *The Capability Approach* (Palgrave Macmillan UK 2014) 2.

[99] ibid 3.

[100] Enrica Chiappero-Martinetti and Anna Sabadash, 'Integrating Human Capital and Human Capabilities in Understanding the Value of Education' in Solava Ibrahim and Meera Tiwari (eds), *The Capability Approach From Theory to Practice* (Palgrave Macmillan 2014) 215.

(1) Children

For **children,** the capability approach has especial resonance.[101] First, children are particularly vulnerable, because they are dependent on adults and because interference with capability at the stage of childhood could have particularly significant long-term effects.[102] Second, the capability approach provides a check on possible paternalism, with its focus on what the child in question has reason to value and the weight it places not on outcomes but on capability. [103] Third, the approach focusses on what children have reason to value, and so can accommodate diversity between children.[104] Fourth, Dixon and Nussbaum argue that the capability theory allows us to move on from the treatment of children as *'quasi-adults,'* and the social contractarian view, which have been so pertinent in the debate up to now, by recognising that all humans are entitled to respect for their full human dignity.[105] However, they nonetheless recognise the centrality of agency for the capability theory – arguing that this means that children should be *'afforded the maximum scope for decisional freedom consistent with their actual-or potential capacity for rational and reasoned forms of choice, or judgment.' 'Deferral'* of rights for children is permissible, on this analysis, where it promotes the long-term development of capabilities.

Two consequences follow from the fact that, under the capability approach, children are not merely inchoate adults. The first is that balancing current realisation

[101] Strømland and others (n 97) 527.

[102] ibid 531; Dixon and Nussbaum (n 80).

[103] Ibrahim (n 98) 16.

[104] ibid 5.

[105] Dixon and Nussbaum (n 80) 552–565.

against future realisation of these capabilities requires great care, and, as developed below, a commitment to children's self-determination and participation in decisions affecting them. The second is that there may be some functionings which children uniquely require, and which are uniquely important for them,[106] which shows the importance of treating children as people rather than adults-in-waiting.

(2) Education

Education can be both an end/functioning in itself, a means/capability by which a functioning is achieved, or a conversion factor allowing endowments to be converted into functionings in respect of some other goal, such as health.[107] It could also be conceptualised as an endowment for the achievement of other capabilities and functionings. As the Committee recognises,[108] education is one of the key ways in which capabilities are created and flourishing is made possible, especially for children.[109] In the context of education, capability theory goes beyond the human capital approach to education,[110] by requiring that future prospects are assessed by what the child in question has reason to value, rather than their potential economic value as

[106] Samantha Brennan (n 44) 42–43.

[107] Chiappero-Martinetti and Sabadash (n 100) 216–219.

[108] UN Committee on the Rights of the Child, 'General Comment No. 1 (2001), Article 29 (1), The Aims of Education' (17 April 2001, CRC/GC/2001/1), [2]; [12].

[109] *Salil Bali v Union Of India* (n 11), [41]; see also *Bandhua Mukti Morcha v Union of India & Ors* (1997) 10 SCC 549, AIR 1997 SC 2218; *Le Roux v Dey* [2011] ZACC 4, 2011 (3) SA 274 (CC), [212].

[110] Chiappero-Martinetti and Sabadash (n 100) 206.

assessed by the market.[111] The capability theory also permits recognition that experiences of education and the power dynamics within it might be different and affect different individuals in different ways.[112]

F. TENSION WITHIN THE FRAMEWORK

These three principles will not always sing in harmony. A key aspect of this conceptual framework is that children's choices cannot be brushed aside without careful consideration. However, it is sometimes necessary to force children to do things for their own good, and education is a notable example. Letting children choose not to become educated would be a perfect example of abandoning them to their rights. How is this to be explained within this framework?

The question here is how rights can be effectively operationalised in a way which maximally satisfies all three of these principles.[113] There is a need to balance autonomy, agency and evolving capacity with respect for the child's dignity, autonomy and personhood in a balanced and nuanced way.[114] This is especially important in the context of education, where decisions made by and about children can have lasting effects, and children develop their voices and resilience.[115]

[111] Caroline Sarojini Hart, 'Education, Capabilities and Sustainable Development' in Flavio Comim, Shailaja Fennell and PB Anand (eds), *New Frontiers of the Capability Approach* (CUP 2018) 629.

[112] ibid 627; Ibrahim (n 98) 9.

[113] Todres and King (n 84) 722.

[114] Goonesekere, 'The Interrelated and Interdependent Nature of Children's Rights' (n 31) 78; Varadan (n 43) 322.

[115] UN Committee on the Rights of the Child, 'General Comment No. 1 (2001), Article 29 (1), The Aims of Education' (n 108), [12]; Sandberg (n 64) 238.

(1) Evolving Capacities/Dynamic Self-Determinism

The Committee has found the beginnings of a solution to this problem in the principle of *'evolving capacities'*.[116] These words feature twice in the UNCRC, once in Art. 5 and once in Art. 14, both concerning the role of parents and guardians providing *'direction and guidance'* to the child. This principle has, over the lifetime of the UNCRC, developed into a more general (and potentially *'foundational'*[117]) principle which governs the way in which adults should interact with children, and give due respect to their autonomy and personhood.[118] Even in the application of the best interests principle,[119] and even in the case of the most vulnerable of children,[120] the Committee still recognises that the child's voice must be heard and their autonomy, at least prima facie, respected, in accordance with their understanding and maturity:

> *'The evolving capacities of the child (art. 5) must be taken into consideration when the child's best interests and right to be heard are at stake. The Committee has already established that the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for him or her have to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing. Similarly, as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests. Babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children. States must ensure appropriate arrangements, including*

[116] See e.g. UN Committee on the Rights of the Child, 'General Comment 20' (n 48), [18].

[117] Varadan (n 43) 309.

[118] ibid.

[119] UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 2.

[120] ibid 7.

representation, when appropriate, for the assessment of their best interests; the same applies for children who are not able or willing to express a view.'[121]

This requires a balance to be struck between the presumptive imperative to respect the child's autonomy, and the need to protect the child:

There might be situations where 'protection' factors affecting a child (e.g. which may imply limitation or restriction of rights) need to be assessed in relation to measures of 'empowerment' (which implies full exercise of rights without restriction). In such situations, the age and maturity of the child should guide the balancing of the elements. The physical, emotional, cognitive and social development of the child should be taken into account to assess the level of maturity of the child. [122]

In making this assessment, it is vital to be responsive to the needs and situation of individual children,[123] and:

...consideration should be given to a range of factors affecting decision-making, including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity.'[124]

The principle of evolving capacities tracks children's development. As a child gets older and more mature, greater weight should be given to their views in determining what is in their best interests.[125] The Committee has, for example, recognised that

[121] ibid 6; see also UN Committee on the Rights of the Child, 'General Comment 20' (n 48), [22].

[122] UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 10.

[123] ibid 5.

[124] UN Committee on the Rights of the Child, 'General Comment 20' (n 48), [20].

[125] UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46).

adolescents are at a different stage of development to very young children, and a different approach was needed.[126]

However, even very young children are entitled to respect for their autonomy and personhood. The principle of evolving capacities serves not to deny children autonomy,[127] but as an enabling principle to facilitate their participation and decision-making, with appropriate adjustments to take into account their best interests and capacities for autonomous decision-making.[128]

In academic commentary, Eekelaar's approach of dynamic self-determinism broadly reflects the approach which the Committee takes. This approach respects children as people while also understanding that their choices can have far-reaching impacts which they may not fully appreciate, reconciling a commitment to their future options with a commitment to the importance of their current autonomy.[129] Dynamic self-determinism requires that children are placed in an environment where they are subject to multiple influences, and are given scope to influence the outcome of what the optimal course is, rather than relying on an abstract, objectivised, best interests test.[130] This reflects the importance of treating children as people, whose autonomy matters. It does not, however, abandon children to their rights. Instead, it gives children

[126] UN Committee on the Rights of the Child, 'General Comment 20' (n 48), [1].

[127] ibid, [19]; UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 2; Varadan (n 43) 318.

[128] UN Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (n 46), [17].

[129] Eekelaar (n 59) 227.

[130] Eekelaar (n 62) 50–51.

space to develop, allowing them to shape what is important in their lives, without always giving them the final say.

(2) Balancing Future Capability and Present Autonomy

The recognition that children's development might, at different stages, require different balances to be struck between children's present autonomy and vulnerability, and future capability, is valuable, but it is incomplete. It is necessary also to have some way of striking that balance, a frame of reference through which the relative importance of competing interests can be judged.

The capability approach provides a useful frame of reference. When it comes to determining under what circumstances children's choice can be overridden, Eekelaar distinguishes between (a) self-interest and (b) broader conceptions of what is good, by taking a very narrow definition of self-interest which encompasses only biologically determined needs, and needs arising from *'matters of the mind'*. He states that self-determination as a principle should be disapplied where these needs are threatened. The capability theory, in the manner set out above, can help to identify a set of considerations weighty enough to rebut the presumption that children should be given the final say in a decision. This coheres with Eekelaar's view that a decision could be found to be *'incompetent'* where it *'risks serious conflict with a later stage of development.'* The capability theory provides a way of concretising what is under threat, while also defining children's future important functionings in a broad enough way to protect them from adult encroachment.

(3) The Importance of Participation

The centrality of the child's autonomy to a human rights approach means that, where this balancing exercise needs to be undertaken, the participation of the child in that decision will be vital.[131] Indeed, unless avenues are created for the child's voice to be heard, it may not be possible to know what the child's present choices would be.

The child's right to participate is one of the four key principles of international children's rights law, and the UNCRC provides for a range of *'participation rights,'*[132] most radically[133] Article 12(1), which provides:

> *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

Facilitating the participation of children requires positive action from adults. As the Committee has held:

> *'To achieve the right of participation requires adults to adopt a child-centred attitude, listening to young children and respecting their dignity and their individual points of view.'*[134]

[131] UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 10.

[132] McMellon and Tisdall (n 60) 159.

[133] Harry Shier, 'Pathways to Participation: Openings, Opportunities and Obligations' (2001) 15 Children & Society 107, 108.

[134] UN Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (n 46), [14](c).

A number of models have been developed for how children's participation in decisions might actually be operationalised.[135] These models tend to share the common core that children's opinions matter, and their involvement in decisions affecting them should be genuine, and not merely tokenistic. They all recognise that participation requires work from adults, and that this may be even more so when children are of ages or from groups who may find it harder to express themselves, or have their voices listened to and taken seriously.

The foregoing analysis provides at least two reasons why participation is so important. First, participation is important if children are to be treated as moral equals.[136] Their present choices and opinions matter. This approach therefore demands that children be very involved in decisions affecting them.[137] Participation is consequently at the core of treating children as people, and this applies even for very young children.[138] Peleg's analysis of the child's right to development under the UNCRC is helpful in this regard.[139] Peleg argues that the best way to realise the preferences people have is to respect their agency and allow them to be involved in the making of decisions. Participation can provide a route to concretise the child's best

[135] Wall and others (n 85) 265; McMellon and Tisdall (n 60); Shier (n 133) 108; Laura Lundy, '"Voice" Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 British Educational Research Journal 927, 933.

[136] Freeman, 'Taking Children's Human Rights Seriously' (n 63) 58.

[137] John Tobin (n 1) 63; Naffine illustrates how wrong insensitive attempts at participation can go: N Naffine, 'Children in the Children's Court: Can There Be Rights Without a Remedy?' (1992) 6 IJLPF 76.

[138] Wall and others (n 85) 264.

[139] Peleg, 'Reconceptualising the Child's Right to Development: Children and the Capability Approach' (n 58) 541.

interests.[140] The more participation children have, the less politically voiceless they are, and in turn the less dependant they are on adults.[141]

Second, participation is important if the tension between the different principles set out here is to be navigated. Participation is important to determine the capability of children,[142] and to determine what it is children have reason to value.[143] Listening to children also reveals more about their vulnerabilities, and stage of development, to permit the operationalisation of dynamic self-determinism. Participation can also assist in assessing when it is that it might be necessary to override the decisions which a child has made while also accommodating pluralistic visions of the good.[144] Accordingly, it is through the fruits of participation that an in-all-the-circumstances assessment of the weight to be accorded to the various principles, including respect for the child's autonomy and the potential need to override their decision-making, can be made, and thus a decision reached, in particular cases, about how conflict between best interests and present autonomy is to be resolved.

(4) Difficulties

The resolution of the tension between the principles in this way is difficult, for the following reasons. It is important to be alive to these difficulties so that they can be overcome.

[140] Strømland and others (n 97) 522.

[141] Sandberg (n 64) 246.

[142] Strømland and others (n 97) 538.

[143] ibid 532.

[144] Freeman, 'Taking Children's Human Rights Seriously' (n 63) 60.

First, one of the main critiques of the capability approach is difficulty in application.[145] This becomes especially acute with respect to children. It becomes necessary to understand children's aspirations, while recognising that they are formed in a social environment of unequal power relations,[146] within which children's wishes might be manipulated.[147] It is not simply a question of giving children resources, there must be recognition of moral agency and the *'heterogeneous transformation rates of resources into what is valuable to each individual.'*[148] It is one thing to say that it is necessary to be inclusive and mindful of how social power relations can permeate the classroom,[149] but how that is to be done in a practical, day-to-day sense, is very difficult.

Second, the approach is highly individualising, and focusses on the moral power of persons to frame their own conception of the good.[150] There are risks in such an approach, which might not pay enough attention to power within social structures and relationships which permeate past inequalities.[151] Not everyone gets to participate equally.[152] It is important that groups in positions of less power in society are not

[145] Ibrahim (n 98) 1.

[146] Joan G Dejaeghere, 'Reconceptualizing Educational Capabilities: A Relational Capability Theory for Redressing Inequalities' (2020) 21 Journal of Human Development and Capabilities 17, 29.

[147] Rutger Claassen, 'An Agency-Based Capability Theory of Justice: An Agency-Based Capability Theory of Justice' (2017) 25 European Journal of Philosophy 1279, 1282.

[148] Antoinette Baujard and Muriel Gilardone, 'Sen Is Not a Capability Theorist' (2017) 24 Journal of Economic Methodology 1, 4.

[149] Dejaeghere (n 146) 24.

[150] Baujard and Gilardone (n 148) 3.

[151] Dejaeghere (n 146) 22.

[152] McMellon and Tisdall (n 60) 170.

essentialised as less capable or dismissed as less worthy of being heard. This risk is especially great where it is necessary for additional support to be provided in order for the children in question to participate.[153] Further, the risk of adaptive preferences may be particularly acute in children, and in that way respect for their immediate choices might serve to reinforce oppression in the present and future.[154]

Third, participation is no panacea. The decision-maker is still faced with the complex question of how to determine what functions the child will find valuable *later*, in order to guide the *present* nurturing of capabilities.[155] This question will be all the more complex for children whose capacity to make choices is constrained by adaptive preference, age or ability. [156] One possibility is to adopt a list, as Nussbaum does, settling on a general conception of what most humans find valuable, but such an approach would be somewhat paternalistic.[157]

How these concerns are to be accommodated in the in-all-the-circumstances judgement in particular cases is not a question of broad principle but one of practical operation, and it may be that this is the point at which the cross-jurisdictional approach in this Chapter runs out. All these jurisdictions might accept these principles, and the rough relationship between them, as a matter of principle, but it does not follow that they would all agree on their practical operation. It is in any event not necessary to go

[153] Wall and others (n 85) 271.

[154] Jonathan Bradshaw, 'Subjective Well-Being and Social Policy: Can Nations Make Their Children Happier?' (2015) 8 Child Indicators Research 227, 233.

[155] Strømland and others (n 97) 533.

[156] ibid 531.

[157] ibid 533.

so far. As will become apparent, the precise operation of these principles matters less to this Thesis than defending the starting point that principles of children's rights are to be centred in determining to what human rights law entitles children in the classroom of their private school.

G. PRIVATE ACTORS AND CHILDREN'S RIGHTS

The critical final point in this analysis is that, as should be clear from the principles set out above, the moral force of these principles does not depend on the *'public'* or *'private'* nature of the person who deals with a child. This is reflected both in the UNCRC and in the comments and proceedings of the Committee.

In the UNCRC, it is anticipated that children's rights are not solely the responsibility of the state.[158] Partnership between state and non-state actors in realising children's rights – with concomitant accountability for failure to do so – is *'intrinsic to [its] rights-based approach'*.[159] This is reflected explicitly in some of the articles of the Convention, with *'parents'*, *'legal guardians'* and *'social welfare institutions'* explicitly singled out for duty-bearing.[160] In respect of the term *'public or private social welfare institutions'* the Committee has determined:

> *These terms should not be narrowly construed or limited to social institutions stricto sensu, but should be understood to mean all institutions whose work and decisions impact on children and the realization of their rights. Such institutions include not only those related to economic, social and cultural rights (e.g. care, health, environment, education, business, leisure and play,*

[158] Goonesekere, 'Introduction and Overview' (n 20) 25.

[159] Savitri Goonesekere, 'Law Reform and Children's Rights in Plural Legal Systems: Some Experiences in Sub-Saharan Africa' in Unicef, *Protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems* (CUP 2007) 211.

[160] ibid 210.

> *etc.), but also institutions dealing with civil rights and freedoms (e.g. birth registration, protection against violence in all settings, etc.). Private social welfare institutions include private sector organizations – either for-profit or non-profit – which play a role in the provision of services that are critical to children's enjoyment of their rights, and which act on behalf of or alongside Government services as an alternative.*[161]

The Committee appears to recognise that educational institutions are *'social welfare institutions'* within the meaning of Article 3(1); and that private educational actors are bound by the obligation to treat the best interests of the child as a primary concern.[162]

The ideology of the Convention accordingly goes beyond a narrow understanding of *'public'* duty-bearing and stretches to civil society, including business.[163] Todres and King have recently called for child rights scholars and advocates to engage with the private sector in a constructive way to ensure that their business practices are rights-compliant.[164]

Further, in the opinion of the Committee, states are under a direct obligation to ensure that non-State service providers operate in accordance with the provisions of the Convention, and this creates indirect obligations on those actors,[165] including of child-

[161] UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 5.

[162] UN Committee on the Rights of the Child, 'General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights' (n 69) 3; UN Committee on the Rights of the Child, 'General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (n 46) 3.

[163] Goonesekere, 'Law Reform and Children's Rights in Plural Legal Systems: Some Experiences in Sub-Saharan Africa' (n 159) 256.

[164] Todres and King (n 84) 724.

[165] UN Committee on the Rights of the Child, 'General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child' (27 November 2003, CRC/GC/2003/5), [43].

rights due diligence.[166] This does not, however, detract from the state's primary obligation to ensure that children's rights are respected, protected and fulfilled.[167]

The topic of the private sector has received substantial attention from the Committee on at least two occasions. In 2002, the Committee held a *'Day of General Discussion'* on the topic of *'the private sector as service provider and its role in implementing child rights'*.[168] The Committee recognised that business could impact children's rights in lots of ways, but chose to confine its analysis to the privatisation of traditional state functions – a category into which the privatisation of education readily fell.[169] The Committee – as is the case with this Thesis – was not concerned with the question of whether privatised services were better (and international law was agnostic on the question[170]), but rather with the question of how it can be ensured that appropriate services are delivered to all children.[171] The participants pointed out that the primary focus should be on *managing* the process of privatisation in a way which ensures child rights.[172] It was recognised that there could exist *'accountability gaps'* as

[166] UN Committee on the Rights of the Child, 'General Comment 20' (n 48), [48].

[167] UN Committee on the Rights of the Child, 'General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights' (n 69) 2; see also UN Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (n 46), [32]; UN Committee on the Rights of the Child, 'General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child' (n 165), [44].

[168] UN Committee on the Rights of the Child, 'Report on the Thirty-First Session' (4 October 2002) CRC/C/121, [630]-[653].

[169] ibid, [633]; [640].

[170] ibid, [641].

[171] ibid, [639].

[172] ibid, [644].

a result of privatisation.[173] The conclusions reached were that States have an obligation to ensure that non-state service providers operate in accordance with the provisions of the UNCRC, creating indirect obligations on those actors. The participants were therefore of the view that, although international law might not be able to reach private actors directly, the demands of the UNCRC did not change simply because a private actor, rather than a public one, was providing a service.[174] Further, the *responsibilities* owed to children went beyond the State to include individuals, parents, legal guardians and other non-state actors; and the Committee called upon those actors to respect the principles and provisions of the UNCRC.[175]

Subsequently, in General Comment 16, the Committee recognised that the outsourcing and privatisation of state functions can affect the enjoyment of human rights, and that, accordingly:

> *...that duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises. Therefore, all businesses must meet their responsibilities regarding children's rights and States must ensure they do so.*[176]

There can therefore be no doubt but that the *'private'* nature of an actor is not of (significant) importance under the UNCRC scheme. The UNCRC is avowedly child-focussed, and, as is clear from the analysis of the principles above, it does not matter

[173] ibid, [649].

[174] ibid, [653].

[175] ibid, [653].

[176] UN Committee on the Rights of the Child, 'General Comment No. 16 (2013) on State Obligations Regarding the Impact of the Business Sector on Children's Rights' (n 69) 2; see also UN Committee on the Rights of the Child, 'General Comment No. 7 (2005): Implementing Child Rights in Early Childhood' (n 46), [32].

for a child whether they deal with a public or private actor. What matters is that their personhood and autonomy are respected, their vulnerability recognised, and their capabilities and resilience built.

H. CONCLUSION

This Chapter has argued that there are (at least) three important principles when it comes to children's rights, which find or would find purchase in the three jurisdictions under review: valuing children as people; recognising and respecting their vulnerability, and nurturing their capabilities. These ideas will often be mutually supporting, but may be in tension. Where they are in tension, a strongly participatory and capability-driven approach to children's interests must be adopted to resolve the tension.

This has certain implications for children's rights in education. First, it requires a rejection of the human capital approach to education, or at least a reduction in its dominance.[177] Treating children as intrinsically valuable precludes treating children as mere future workers, consumers and voters, as has been a trend identified in some privately-run US charter schools,[178] and in commercialised education more generally.[179] Second, it requires that children should be listened to, and their choices

[177] Chiappero-Martinetti and Sabadash (n 100) 208.

[178] Nelson, Palonsky and McCarthy, *Critical Issues in Education: Dialogues And Dialectics* (McGraw-Hill 2013).

[179] Kishore Singh, 'Report of the Special Rapporteur on the Right to Education' (2014) A/69/402; Kishore Singh, 'Report of the Special Rapporteur on the Right to Education: Protecting the Right to Education against Commercialization' (2015) A/HRC/29/30.

respected. Tokenism is not sufficient.[180] Children must be actively involved in the decisions which affect them, including determining what it is education means.[181] It is not permissible to dismiss the ability of children to participate without evidence, as is often done.[182] Third, none of these principles draw any distinction between the position of a child in a public or private school. They are equally applicable to every educational context. That will have important ramifications if these principles are accepted: it will provide a powerful basis for critiquing, from a children's rights perspective, differences in the obligations of public and private schools which do not track the application of these principles.

It has been suggested that the real challenge for children's education rights is not the need to understand what those rights are or why they are necessary, but rather how they are to be effectively implemented in such a complex web of horizonal and vertical relationships.[183] That is a challenge to which the framework to be developed in this Thesis (partially) responds.

[180] Alison EC Struthers, 'Breaking Down Boundaries: Voice and Participation in English Primary Education' (2016) 24 IJCR 434.

[181] Hart (n 111) 630.

[182] Struthers (n 180) 460.

[183] Lundy and Brown (n 89) 388.

CHAPTER 3

'PRIVATE' AND 'PUBLIC' SCHOOLS

A. INTRODUCTION

This Chapter is about the circumstances under which a school will fall to be treated as part of the state, and so will have vertical human rights obligations.

Chapter 1 set out the basic problem that private schools may not have the same human rights obligations as public ones, creating an accountability gap. Chapter 2 showed that certain basic principles which underpin children's rights do not seem to require (and indeed tend against) a distinction between *'public'* and *'private'* actors in the kinds of obligation which might attach to them.

This Chapter will undertake a more in-depth review of domestic law, dealing with a preliminary legal question – when are private schools *'private'*? In other words, under what circumstances will they amount to *'the state'*, and thus there be no accountability gap? Each of the jurisdictions under review delineate between state actors, which bear the full panoply of human rights duties (*'vertical duties'*), and private actors, which bear either none (England) or only some (India and South Africa) (*'horizontal duties'*). In this Chapter, I therefore analyse the application of the law to heuristic[1] types of *'private'* educational actor which are present in the education sectors of the jurisdictions under review. This Chapter is not about the horizontal duties which private schools might owe, which will be discussed later (although the issues are linked,

[1] This approach is necessary because the privatisation of education is heterogenous and reflects a host of different kinds of interaction between different kinds of private and state authorities, rather than a simple binary between public and private.

in that if horizontal duties are owed, the absence of vertical duties might be less problematic).

In summary, private schools which are heavily subsidised, subsumed within the state education system and under significant state control may bear vertical duties. Otherwise, private schools are unlikely to be treated as part of the *'state'* in the three jurisdictions under review and so to bear vertical human rights obligations. A school's *'publicness'* is therefore (vertical) duty-defining, and because (as is trite) it is a test ill-suited to this task, the reasoning of courts in deploying the distinction is often unclear, or inadequately critical.

B. PRIVATE SCHOOLS AND HUMAN RIGHTS IN ENGLAND

In England, the statutory provision which governs the allocation of human rights duties is s. 6 HRA. S. 6 establishes two kinds of entity which are obliged to act compatibly with the rights guaranteed by the ECHR.

First, duties are imposed on what have come to be known as *'core public authorities'*. The determination of when a body will be a core public authority has received little attention in case law. A leading practitioner work suggests that this might be because whether a particular body is or is not a core public authority will often be *'fairly clear'*.[2] Needless to say, that is not a test of principle (although it will often suffice in practice). In the education context, local education authorities, maintained (public) schools and the Secretary of State are core public authorities, bound by the full

[2] Woolf and others, *De Smith's Judicial Review* (8th edn, Thompson Reuters 2018), [3-080].

panoply of Convention rights in all their actions. This will be so even if elements of marketisation are introduced into their functions.

The second kind of duty-bearer is the '*hybrid public authority*', which s. 6(3)(b) provides is an entity which is not a core public authority, but which carries out functions of a public nature.[3] Hybrid authorities are not bound by the ECHR when acting in a purely private capacity, pursuant to s. 6(5). Accordingly, the analysis is two-fold: *'first of the body's functions, and secondly of the particular act in question.'*[4] Once both the function of the body and the particular act are found to be *'public'*, the ECHR rights apply. In the educational context, the question of whether independent schools of various stripes might be hybrid public authorities remains unresolved, and so any answer to this question requires an application of more general case law.[5] The two types of independent school which will be considered here are academies, and independent fee-paying schools.

(1) Public Functions

A hybrid public authority is a person, other than a core public authority, who exercises functions, certain of which are of a public nature. There is no single test of universal application when determining whether a function is *'public'*.[6] It is a question of fact

[3] ibid, [3-082].

[4] *Parochial Church Council of the Parish of Aston Cantlow v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [85].

[5] Julian Gizzi and Nicholas Hancox, *Butterworth's Education Law Manual* (Butterworths 2000), [3.283].

[6] *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, [5]; [91].

and degree, taking into account all the circumstances of the case.[7] There are certain principles and factors which the courts have held are relevant to the question of whether a function is of a public nature (although no summary of factors could be comprehensive or exhaustive[8]). Relevant factors tending towards a finding that the function is public include, as discussed in more detail below: public funding, the existence of statutory powers or privileges; coercive or regulatory powers; delegation of a function by a core public authority; whether the function is a public service (as opposed to a contractual obligation); that the function is a *'core state responsibility'* or a responsibility which the state has assumed; an obligation to act in the public interest; democratic accountability; government control; and the risk that rights might be violated.[9]

Before attempting to apply this to private schools, some critical reflection on how this exercise is supposed to be undertaken is warranted. These factors will not necessarily sing in harmony. Indeed, they do not even stand up to a test of internal consistency: it is far from clear why *'public service'* and *'contractual obligation'* are mutually exclusive, or why the fact that a function is performed pursuant to a contract would *relevantly* change its nature.

A review of the leading case on the point (*YL*) illustrates this well. Ms YL required care. Statute provided that the local authority had to arrange for her to have a place in a care home, and this had been achieved through a contract with a private

[7] See an example list of relevant factors and questions at *R (Cornerstone) v Oftsed* [2020] EWHC 1679 (Admin), [240]-[243].

[8] *YL* (n 6), [13].

[9] Woolf and others (n 2), [3-097].

provider of care homes, Southern Cross. Southern Cross purported to terminate YL's residence at the home. YL argued that the provider was a hybrid public authority, and therefore the HRA imposed a duty on the provider to respect her Convention rights. The House of Lords held, by a majority (Lords Scott, Mance and Neuberger), that the provider was not a hybrid public authority. The minority, Lord Bingham and Lady Hale, disagreed. The reasons for the majority decision were not persuasive.

First, the majority were persuaded in part by the fact that, in their view, Southern Cross received no public funding. It was not *subsidised* (even if the source of its funding was public, in the sense that it contracted with and was paid by a public authority).[10] The majority placed great weight on the allegedly principled distinction between payment by the state for specific services, and subsidies;[11] with only the latter indicating *'publicness'*. However, it was not explained in terms why this distinction is relevant to the question of the imposition of human rights obligations – which after all, was the whole purpose of the exercise.

Second, the majority also considered it relevant that Southern Cross was operating in a commercial market.[12] The company was run for profit, and did not carry additional public responsibilities.[13] It was important to ask what the *motive* for the body's actions was: if the reason for acting the way it did was pursuant to contractual rather than statutory obligations, then that would tend against publicness.[14] The

[10] *YL* (n 6), [26].

[11] ibid, [27], [105], [148].

[12] ibid, [26].

[13] ibid, [29].

[14] ibid, [31].

relevance to the question of who should bear duties of the kind of public funding, or of public funding at all, was not explicitly considered, and the minority took a different approach. Baroness Hale, while recognising that not everything the state pays for is a public function, held that the state paying for the provision of a service directly to the public was public funding of the sort which would count in favour of that function being public. Lord Bingham held that, on the question of public funding, it would be relevant to consider whether the function would be one which, as a matter of course or last resort, the state would be willing to fund in one way or another.[15] The disagreement about public funding is particularly interesting: because it was never made clear why public funding might tend towards the imposition of duties, it was impossible for the judges to assess whether this was a case in which that justification might apply, and so they ended up talking past each other.

Third, the majority saw private law as the body of law which should naturally and appropriately govern the relationship between a care home and resident.[16] They felt that private law acts (such as termination of residency) were acts which affected no one but the parties to the relevant contract, and so an action taken under *'private law'* could not be a public act, even if the body in question were a hybrid public authority. Lord Neuberger was the most explicit in this regard, holding that private law was the best mediator of the relationship where a market is operating.[17]

[15] ibid, [10].

[16] ibid, [28].

[17] ibid, [168].

Fourth, all three judges in the majority gave explicit warnings that recognition of duties in this case would be a slippery slope,[18] and they were concerned about the burden which would be placed on Southern Cross. To the extent the latter was an empirical claim – as opposed to raw politics – it was unevidenced. Lady Hale (in the minority) was the only judge to point to any research on the effects of imposing duties.

Fifth, the majority were also at pains to dispose of the argument that it would be arbitrary for rights protections to vary depending on the public or private nature of the service provider. They held that a worse arbitrariness would arise if some publicly funded residents had greater rights against the care home than self-funders.[19] That both categories of individual might have rights, although equally consistent with this line of thinking, was not even considered.

There is one point in the decision in particular where the problems with the majority approach are laid bare. Lord Neuberger recognised that deciding whether care homes are public authorities (with all that follows from that under the HRA) is an intrinsically political thing to do. He held that:

> *Any reasoned decision as to the meaning of section 6(3)(b) risks falling foul of circularity, preconception and arbitrariness. The centrally relevant words, 'functions of a public nature', are so imprecise in their meaning that one searches for a policy as an aid to interpretation. The identification of the policy is almost inevitably governed, at least to some extent, by one's notions of what the policy should be, and the policy so identified is then used to justify one's conclusion.*[20]

[18] ibid, [30], [82], [135].

[19] ibid, [117], [119], [151], [169].

[20] ibid, [128].

However, he did not then heed his own warning. He held that while there was a policy argument (the need to protect human rights) justifying the extension of duties in a case such as this, there was also a policy argument tending the other way, namely:

> *It is thought to be desirable, in some circumstances, to encourage core public authorities to contract-out services, and it may well be inimical to that policy if section 6(1) automatically applied to the contractor as it would to the authority. Indeed, unattractive though it may be to some people, one of the purposes of contracting-out at least certain services previously performed by local authorities may be to avoid some of the legal constraints and disadvantages which apply to local authorities but not to private operators. I am in no position to decide on the relative strength of the two competing policy arguments: that is a matter for the legislature. However, the fact that there are competing arguments makes it hard to justify the courts resolving the instant issue by reference to policy.*[21]

There is a lapse in reasoning here, which leads to an abdication of judicial responsibility. Lord Neuberger's judgment sets out two premises, each of which is hard to disagree with:

a. The first is that the HRA is an Act of Parliament, which courts are bound to interpret and apply, in line with their constitutional function, and which imposes duties on those entities which are *'public'*.
b. The second is that deciding whether a function is public or not is an intrinsically and inevitably political, policy-driven decision.

But if both of those things are true, it must be the case that Parliament has left to the courts the job of making the *'political'* decision of who is public and who is not. Lord Neuberger's position that, effectively, it was not for him to decide was misguided.

[21] ibid, [152].

This error of principle was compounded by the fact that he apparently considered not recognising human rights duties to be the less political, more constitutionally appropriate, default option. There is no reason why that should be so, especially where (i) he openly accepted that the exercise is almost inevitably political; (ii) the Government (which had passed the HRA) *intervened on the side of the imposition of duties*, and (iii) the arguments in favour of his approach were consequentialist rather than doctrinal or textual.

By contrast, the minority at points imply that where an interest protected by an ECHR right is interfered with, there is scope for displacing the general position that no human rights duties apply. In considering the public nature of the function, they focused on whose benefit the function served.[22] They also focused on the state's voluntary assumption of responsibility for the discharge of the function.[23] Baroness Hale linked the public interest in the provision of social care to the vulnerability of those in the care home. Lord Bingham emphasised their vulnerability as a section of the community.[24]

The conflicting opinions between the majority and minority reveal that at the heart of the disagreement was a lack of consensus on what the word *'public'* means. There is also, arguably, a difference about what the *'default'* position is – duties, or no duties. The argument is not that the minority applied the *'publicness'* test correctly, simply that the way the judges spoke past each other shows it is no real test at all. It is just a vehicle for political preference.

[22] ibid, [62].

[23] ibid, [52].

[24] ibid, [19].

As a final general point, the textual limits of the HRA can also be seen from the approach of both the majority and minority, which relied very heavily on the Strasbourg jurisprudence concerning the applicability of Convention duties, limiting the scope for inventiveness. The Supreme Court has recently confirmed that there is no scope for the UK courts to go above and beyond the protection offered by the ECHR under the HRA.[25] This imposes a particular problem for cases like *YL*. The ECHR is a treaty, concluded between states, and so is necessarily more state-centric than a domestic statute. Falling back on it both defers the question of which actors should have which duties, and also passes it into the far more state-centric realm of international law, in which non-state actors are less likely to bear duties. The textual limits are also clear from the concerns the majority had about imposing excessive duties: in contrast to s. 8(2) of the South African Constitution, there is no provision in the HRA for the imposition of only *some* of the state's human rights duties.

(2) Public Functions and Private Schools

A few dicta in *YL* mention *'private schools'*,[26] suggesting that they would not be subject to an obligation to respect the ECHR rights.[27] This is not, however, a legal term of art: both academies[28] and fee-paying schools are *'independent schools.'*[29] As set out below, the shortly stated position is that while there is room for debate about whether

[25] See *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, and in particular [87].

[26] *YL* (n 6), [135], [164].

[27] ibid, [135], [164].

[28] Education Act 2002, s. 65.

[29] This is the statutory term: Education Act 2002, Pt 10.

academies are hybrid public authorities, independent fee-paying schools almost[30] certainly are not[31] (although neither point has ever come up squarely for determination).

First, a key question is whether the functions exercised by the entity are *'governmental'* functions.[32] Has a core public authority delegated an obligation to perform the function (such that the entity in question has *'stepped into its shoes'*)?[33] Confusingly, however, this does not mean, necessarily, *'functions which the government performs'*: it is a *'fallacy'* to assume that all such functions are public functions.[34] The mere fact that the function provides a public benefit is insufficient.[35] This confusing picture leaves the application of this factor somewhat unclear: probably the best understanding of how the courts would approach it is that while academies have stepped into the shoes of the state, on the ground that the gradual replacement of local-authority maintained schools through a process of direct contracting-out is their *raison de être*, the same is not true of independent schools, which exist outside the framework of government-provided education. Needless to say, if this is right, it is thinly reasoned: why should the nature of a function (*'providing education'*) – and the imposition of human rights duties – depend on the precise mechanism by which the state has left the discharge of that function to the private sector? On this analysis, a fee-

[30] Gizzi and Hancox (n 5), [3.283].

[31] ibid, [3.283]; Joint Committee on Human Rights, 'Ninth Report of Session 2005-2006' (HC 887), [23].

[32] *Aston Cantlow* (n 4), [159]; *R (Liberal Democrats) v ITV Broadcasting* [2019] EWHC 3282 (Admin), [2020] 4 W.L.R. 4, [72]; *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 W.L.R. 363, [35(2)].

[33] *YL* (n 6), [103]; *Cornerstone* (n 7), [245].

[34] *YL* (n 6), [30]- [31]; [110]; *Weaver* (n 32), [36].

[35] *YL* (n 6), [75].

paying independent school could provide exactly the same education as an academy (for free, if the school waived its fees as part of a scholarship) but the nature of that function would be different. That is an oddity which does not seem consistent with the statutory language's focus on the nature of the function.

Second, it will tend in favour of a body performing public functions if, in discharging those functions, it exercises coercive statutory or other powers.[36] Schools (both academies and independent schools) obviously exercise significant coercive control over children, and the children have no choice but to be there. That might be thought to be sufficient. However, the legal position is somewhat complicated by the fact that it is not enough that the power is not one any private citizen would have,[37] and all depends on why the power in question has been conferred (i.e. not for private, religious or purely commercial purposes).[38] That principle throws the whole exercise back to impressionistic understandings of the nature of the function, rather than any clear test. For independent schools, particularly, it is likely that a court would not consider such powers as they do have to have been conferred for public purposes.

Third, if the entity in question is commercial, profit-making, or entering into private law contracts in the commercial market, that will tend powerfully against the entity exercising public functions.[39] There is a *'fundamental distinction'* between an entity charged with public law responsibility, and a private operator who contracts with

[36] *Aston Cantlow* (n 4), [59], [61]; *YL* (n 6), [63], [166] - [167].

[37] *Aston Cantlow* (n 4), [147].

[38] *Weaver* (n 32), [35(7)].

[39] *YL* (n 6), [26].

that entity to provide a service.[40] This argument would apply also to non-profits (such as fee-paying schools with charitable status) that operate for some private purpose or within the commercial market (although it should be noted that the position of charities is not entirely clear: there are arguments both ways[41]). This is likely to point against private schools performing public functions (less so for academies, which are integrated into the state-funded education system – as to which see immediately below).

Fourth, this is closely tied in with the extent to which the body is supported or subsidised from public funds.[42] The case law is clear that subsidy is to be distinguished from paying for a service (as would probably be the analysis where a public authority funds a place at an independent school). The argument could be made that the tax incentives and charitable status some independent schools enjoy would amount to public funding (although that would depend on the willingness of the court to look beyond a simplistic conception of subsidy-as-financial-aid, and there is no indication in the case law that courts are minded to do so). For academies, which are funded through funding agreements with the Secretary of State,[43] the position is clearer: it seems likely that this is more in the way of subsidy than fee. They are not analogous to *YL*, where the local authority essentially paid a fee for the provision of an individual

[40] *Ali v Serco* [2019] CSIH 54, 2020 S.C. 182, [54].

[41] Ian Alderson, 'R (Weaver) v London and Quadrant Housing Trust' (2013) 16 The Charity Law & Practice Review (2013-4) 129; but this should now be read in light of *R (Cornerstone) v Oftsed* [2020] EWHC 1679 (Admin), [248].

[42] *YL* (n 6), [10]; *TH v Chapter of Worcester Cathedral* [2016] EWHC 1117 (Admin), [67(d)].

[43] Gizzi and Hancox (n 5), [3.164].

service to the residents (although it should also be noted that the case law has been inconsistent on this factor[44]).

Fifth, it will be relevant to what extent the school is democratically accountable.[45] In the case of academies, this accountability is indirect, through the Secretary of State, but it is there. For independent fee-paying schools, there is next to no democratic accountability. There is an argument that this factor might include whether the body is amenable to judicial review,[46] but even then, there is clear authority for the proposition that independent schools are not amenable to judicial review.[47] Even in cases where a private school hosts a state-operated assisted places scheme, there is authority that the school's decisions will only be judicially reviewable insofar as they concern that scheme.[48] Where the state pays for a pupil to attend a private school outside of such a scheme, decisions of the school in relation to that child will not be amenable to judicial review.[49]

Sixth, the purpose of s. 6 is to identify those bodies which engage the UK's state responsibility under the ECHR,[50] but only in respect of negative obligations.[51] This is

[44] *Cornerstone* (n 7), [248].

[45] *YL* (n 6), [103].

[46] *Cornerstone* (n 7), [249].

[47] *R v Fernhill Manor School ex parte B* [1994] 1 FCR 146.

[48] *R v Cobham Hall School ex parte S* [1998] ELR 389.

[49] *R v Muntham House School ex parte R* [2000] E.L.R. 287.

[50] *Weaver* (n 32), [31(1)]; *Aston Cantlow* (n 4), [6], [44], [163]; *YL* (n 6), [87] - [88].

[51] *YL* (n 6), [99].

a question answered in part by reference to the other factors.[52] However, in light of ECtHR decisions like *Costello-Roberts v UK*, which (on one reading) analysed a complaint of violent discipline in an independent school as a negative obligations case,[53] an argument might lie that a private school could engage the UK's state responsibly in Strasbourg for breach of a negative obligation. (The limit that the HRA is not intended to avoid state responsibility for breaches of positive obligations is itself not properly defended in the case law, but that is an argument for another day.)

(3) Private Acts

It must be borne in mind that, under the HRA scheme, even a body certain of whose functions are functions of a public nature will not be bound by the ECHR if it is performing a *'private act'*. This is likely to be significant for schools which have contracts with parents (*even if* such schools were hybrid public authorities). The act of enforcing a private law right will often be a private act.[54] So if the school is enforcing a contractual right or power, an argument will lie that even if it were a hybrid public authority, it was not, by exercising that right or power, performing a public act.

C. PRIVATE SCHOOLS AND HUMAN RIGHTS IN SOUTH AFRICA

Under the South African Constitution, it is necessary to distinguish between two classes of human rights duty-bearer. The first class of duty-bearer bears their human rights duties vertically under s. 8(1) of the Constitution; the second horizontally under s. 8(2). It matters which section applies: all the rights in the Bill of Rights apply to vertical

[52] *Cornerstone* (n 7), [250].

[53] *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112, [27] - [28].

[54] *Aston Cantlow* (n 4), [63]; *YL* (n 6), [54].

duty-bearers, while the rights only apply to horizontal duty-bearers to the extent they are *'applicable'*.[55] The question of who bears duties under s. 8(1) (and whether independent schools do) is – like the analysis in English law – tightly bound up with the notion of *'public'*-ness.

(1) Organs of State

Section 8(1) of the Constitution provides that the Bill of Rights binds *'the legislature, the executive, the judiciary and all organs of state'*. Section 239 defines *'organ of state'* as:

> *(a) any department of state or administration in the national, provincial or local sphere of government; or*
> *(b) any other functionary or institution—*
> *(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or*
> *(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;*

There are therefore two ways in which a notionally private party (that is, one which is not part of the administration) can fall within s. 8(1). The first is to be part of government, and for parastatal industries, it may be possible to argue that they fall within this category.[56] It is clear that public schools and national and provincial education ministries are *'organs of state'*.[57]

[55] *Du Plessis v de Klerk* [1996] ZACC 10, 1996 (3) SA 850, [62]; *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401, [31].

[56] Stu Woolman, 'Application' in S Woolman, *Constitutional Law of South Africa* (2nd edn, Kenwyn: Juta & Co), [31-102].

[57] *Minister of Education (Western Cape) v Mikro Primary School Governing Body* [2013] ZACC 25; 2013 (9) BCLR 989 (CC), [20] - [21].

The second is to be some *'other functionary or institution'* which is either performing a function in terms of the Constitution or exercising a public power or performing a public function in terms of any legislation. A list of factors relevant to the question of whether an entity is an *'organ of state'* in this latter category has been developed, and the list is very similar to that which applies in England. In *AAA Investments v The Micro-finance Regulatory Council*, Yacoob J held that the definition of organ of state was relatively broad, and that it was necessary to consider both the *nature* of the body in question and the *function* it performs.[58] This is a contextual analysis, and relevant factors include the purpose of the power, the source of the power, the level of state control, public impact, whether the institution's functions are *'governmental'*, and whether the power in question forms part of a regulatory scheme.

Two significant decisions help to understand s. 8(1). In *Allpay (No 2)*, it was held that a government contractor, Cash Paymaster, was the operational arm of government for the purposes of the payment of social security grants. The Constitutional Court held that although the extent to which state actors exercised control over a public body could be relevant to the question of whether that body was an organ of state, it was not determinative. The real question was held to be whether the functions of the entity were fundamentally public in nature.[59]

Allpay (No 2) was distinguished in *City of Cape Town v Khaya*. In that case, the City of Cape Town sought a declaration that the contractors and subcontractors

[58] *AAA Investments v The Micro-finance Regulatory Council* [2006] ZACC 9; 2006 (11) BCLR 1255 (CC), [41]; *Chirwa v Transnet* [2007] ZACC 23; 2008 (4) SA 367 (CC), [186] - [191].

[59] *Allpay v Chief Executive Officer of SASSA (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC), [52].

working for the City to build low-cost housing were bound by the Constitution to produce good quality housing. There seems to have been some confusion about whether the basis of the claim was s. 8(1) or s. 8(2), and the SCA resolved it by reference to s. 8(1). The City argued that Khaya (the subcontractor) was subject to constitutional duties, as well as its contractual duties. The SCA rejected this analysis,[60] holding that unlike Cash Paymaster, which was the operational arm of the entire administration, Khaya *'cannot be described as the operational arm of the City for the entire administration of housing projects or indeed for the entire nation as was the case with Cash Paymaster.'*

There are two big problems with the SCA decision in *Khaya*, which inject quite a lot of difficulty into the law on contracting out and organs of state. First, the SCA appears to have considered the question of whether recitals in contracts can be binding to be important, as the recitals (but not the terms of the contract) referred to the constitutional obligation to provide housing. This was an error of law leading to a lot of undue technicality: the Constitutional Court made it very clear in *Allpay* that the source of constitutional obligations is the Constitution, and not any applicable contract.[61] The contract provides only part of the background facts, which might give rise to a constitutional obligation or might not. Second, the SCA sets a disappointingly high benchmark for a private company being an organ of state: it seems to require entire branches of government to be contracted out before s. 8(1) obligations apply. This approach is inconsistent with the Constitutional Court's repeated admonitions that the definition of *'organ of state'* should be broad and context-sensitive. The SCA reminds

[60] *City of Cape Town v Khaya* [2016] ZASCA 107; 2016 (5) SA 579 (SCA), [24] – [25].

[61] *Allpay (No 2)* (n 59), [47] – [60].

itself of the state's obligations,[62] but then suggests that the very existence of these obligations is a factor tending against the imposition of duties on a private contractor. That cannot be consistent with the jurisprudence of the Constitutional Court, which was scathing of the state's abdication of its responsibilities in *Allpay*, yet still did not allow the state's oversight function (in which it had failed) to provide an excuse for Cash Paymaster. It also presumes that duties cannot be shared between two actors, a presumption for which it is hard to see any justification. The difference in approach between the Constitutional Court in *Allpay* (which of course is binding precedent insofar as *Khaya* is inconsistent with it) on the one hand; and the House of Lords in *YL* and SCA in *Khaya* on the other, where similar factors pertained, brings out particularly clearly that the determination of whether an entity is *'public'* or not is down to feel and hunch rather than concrete doctrine.

(2) Application to Private Schools

The question therefore becomes how this framework is to be applied to independent schools, which can usefully be divided into non-subsidised and subsidised independent schools. For the former category, there is clear High Court consensus that they are *not* organs of state, and (implicit) acceptance by the Constitutional Court of this position. What case law there is on point is replete with examples of the failure of the *'public-ness'* test to act as a consistent test of principle. For the latter category, there is no direct authority on the point, but for the reasons below, it is unlikely that – outside of special circumstances – a subsidised independent school would be an *'organ of state'*. That

[62] *Khaya* (n 60), [33].

said, the outer boundaries of the concept of organ of state have not been much tested,[63] and the unpredictability of the *'public-ness'* test is itself an indication of its (lack of) doctrinal value.

(a) Fully Independent Schools Receiving no Subsidy

The first paradigm to consider is that of the fully independent school which receives no state subsidy at all. It seems quite clear that such schools are not organs of state.

In *Pridwin,* two parents brought a claim against an unsubsidised independent school alleging breaches of that school's constitutional obligations to their children. The preliminary question was therefore whether the school owed constitutional obligations at all. The case eventually went to the Constitutional Court, which resolved the case by applying s. 8(2), but the High Court considered the case (wrongly) through the lens of s. 8(1), and concluded that the school was not an organ of state.

The High Court in *Pridwin* held that the *'only manner in which Pridwin could perform a function in terms of the Constitution or perform a public power in terms of legislation would be for it to contract with the State to perform such a function…. There is thus no obligation on Pridwin to provide a basic education in terms of s 29(1) as it is fully funded privately by its parents'* [emphasis added]. There is slippage here: the basis of the reasoning has moved from a *'contract with the state'* to Pridwin being *'fully-funded privately'*. While there is overlap between the two ideas, the source of funding and the source of obligation are different questions.

[63] Woolman (n 56) 106.

The case was on that basis distinguished from *Juma Musjid,* in which the Constitutional Court held that a land-owning trust had negative constitutional obligations not to interfere with the realisation of the right to education by a public authority occupying its land, on the ground that in *Juma Musjid*, private power was being exercised for *'public purposes'*. There are two implications of this distinction. Firstly, both the power of trustees to exclude and the power of the school to suspend pupils are apparently *'private'*. Whether this conclusion is correct or not, it is barely articulated and certainly not defended. Secondly, the Court's confusion over the difference between s. 8(1) and s. 8(2) led to a serious mistake. The Court held that:

> *[25] In that the primary positive obligation to provide a basic education falls upon the State and not on private individuals (section 12(1) of Act 84 of 1996; Juma Masjid) and whilst this right must be negatively protected from invasion by private individuals or entities exercising private powers for public purposes, as were the facts in Juma Masjid, it must first be established that the private individual is in fact exercising private powers for public purposes.*

This is a simple error of law. If the school is an organ of state, it falls within s. 8(1) and is bound by all the obligations in the Bill of Rights (as explained above).

The status of independent, non-subsidised schools has been considered in the context of the application of Promotion of Administrative Justice Act 2000 (**'PAJA'**) (which imports the definition of organ of state from the Constitution) in a series of High Court decisions, which held that independent schools were not organs of state and/or exercising a public function.[64] The most recent is *Mlawuli*,[65] an extremely perfunctory judgment which in two paragraphs (§§5-6) provides an example *par excellence* of the

[64] *Klein v Daifern* [2005] ZAGPHC 102; 2006 (3) SA 73 (T); *Khan v Ansur NO And Others* 2009 (3) SA 258 (D); *Brink and Others v Diocesan School for Girls and Others* [2012] ZAECGHC 21; *Indrajith v St Charles College, Pietermaritzburg* [2014] ZAKZPHC 3.

[65] *Mlawuli v St Francis' College* [2016] ZAKZDHC 17.

problems to which the public-ness test gives rise. There are logical conflations: for example, in paragraph 6, it is said that *'privately owned and operated'* is the opposite of *'public function'*. This is problematic: the Constitution and PAJA clearly anticipate that ownership and control are not determinative of what amounts to a public function, and on an ordinary reading of the words, these ideas are not opposites. Further, there are at least six different public-private distinctions operating (in beneficiary, funding, control, *'context'*, function and purposes), and many of them are circular, or at least undefended. These various points of distinction *might* be relevant to the question of what duties an unsubsidised independent school should bear, but refracting them through the notion of public-ness leads the Court to make draw dubious, poorly-reasoned distinctions.

Accordingly, it can be said with some confidence (in the result, if not in the reasoning), that unsubsidised independent schools are not organs of state and do not bear duties under s. 8(1).

(b) Low Fee, Subsidised Schools

Given that the vast majority of independent schools in South Africa fall into this category (96%, at the time of the Constitutional Court judgment in *Pridwin*[66]), it is surprising that the question of whether they are organs of state has never even been argued in court, so far as it is possible to tell, during democracy. There are (very questionable) dicta which suggest that schools which receive a state subsidy are bound by s. 8(1). The High Court in *Pridwin* held (emphasis added):

> *Pridwin can similarly not be deemed to be a quasi-organ of State* ***as would apply to a low fee independent school which is subsidised by the State.*** *In*

[66] *AB v Pridwin Preparatory School (CC)* [2020] ZACC 12, 2020 (5) SA 327 (CC), [6].

> *such a subsidised independent school, there would indeed be an obligation to provide a basic education, as were the facts in Juma Masjid.*[67]

This suggests that a subsidised private school would be an *'organ of state'*. The term *'quasi-organ of state'* injects uncertainty, but the Court does not seem to have intended to introduce a new concept from that in s. 239 (but such liberties with terminology in such a tricky area are regrettable). The scheme for the subsidy of independent schools was considered at length in *KwaZulu-Natal Joint Liaison Committee v MEC*, but the Court did not decide the question of whether subsidised independent schools are an organ of state.[68]

In the absence of clear statements, it is necessary to return to first principles. Both the nature and function of the body must be considered, in accordance with *AAA Investments v The Micro-finance Regulatory Council*.[69] The question is whether a subsidised school is *'an entity that performs a public function in terms of'* the Constitution or national legislation. While each case must be decided on its facts (since the level of state control and level of subsidy can vary and are both relevant to this question), it seems unlikely that an argument that a subsidised independent school was an *'organ of state'* would be successful, unless the level of subsidy or control by the state were overwhelming. For the avoidance of doubt, the argument is not that this is right, but that it is what a court seized of the matter would be likely to decide. As will be seen, the arguments below suffer from much the same flaws as those discussed in relation to *YL*.

[67] *AB v Pridwin Preparatory School (HC)* [2017] ZAGPJHC 186, [28].

[68] *KwaZulu-Natal Joint Liaison Committee v MEC* [2013] ZACC 10; 2013 (4) SA 262 (CC).

[69] *AAA Investments* (n 58).

First, an individual independent school is very different to the paradigm case of s. 239(b) *'functionaries or institutions'*. Those have generally been bodies under the total control of the state, established under statute exercising statutory powers, or associations with de facto regulatory power.[70] The function of an independent school is not *'exclusive, comprehensive, compulsory and coercive'*, as FIFA's (regulatory) function was over football players in *Ndoro v SAFA*.[71] This is not to deny the practical power which schools exercise over children, but that power is of a different kind to that exercised by a regulator over a sector.

Second, it is not clear that education is a *'public function.'* Indeed, since non-subsidised schools established in accordance with s. 29 do not owe obligations under s. 8(1), and since they do provide basic education as defined in the Constitution just as subsidised ones do,[72] it must follow that the provision of basic education is not *inherently* a public function. Further, although they are regulated by statute, it is far from clear that they perform this function *'in terms of'* a statute.

Third, it is likely not in the nature of independent schools that they are *'public.'* The Constitution grants a specific right to establish independent schools, and makes explicit that their *'independent'* status is not impugned by the award of subsidy. Sections 29(3)-(4) of the Constitution provide that everyone has the right to establish and maintain, at their own expense, independent educational institutions meeting certain criteria; and that the Constitution does not preclude *'state subsidies for*

[70] Woolman (n 56) 107.

[71] *Ndoro and Another v South African Football Association* [2018] ZAGPJHC 74; [2018] 3 All SA 277 (GJ), [33].

[72] *Pridwin (CC)* (n 66), [83].

independent educational institutions'. It does some violence to the language of the Constitution to hold that, in general, the grant of a subsidy (without more) converts an *'independent'* school into an organ of state.

Fourth, in *AAA Investments* itself, Yacoob J drew a distinction between a private company and Council at issue in that case, holding that the former, '*while it has to comply with the law, is autonomous in the sense that the company itself decides what its objectives and functions are and how it fulfils them'*. By contrast, the Council was effectively a regulator, with its functions '*closely circumscribed by the ministerial notice'* and lacking the *'autonomy'* of the private company.[73] In light of s. 29(3), there is a strong argument that independent schools are closer in nature to the private company than the Council – they must abide by the law governing their conduct, but they arguably exercise the type of autonomy which is inconsistent with organ of state status.

Fifth, the statutory framework tends against a finding that independent schools are organs of state. Schools neither exercise coercive *statutory* powers over students, nor are they themselves subject to significant government control. Chapter 5 of SASA deals with independent schools, and s. 48 with subsidies to the same. S. 48(1) empowers the minister to promulgate norms and standards for the granting of subsidies to independent schools. S. 48(2) empowers the payment of subsidy by the MEC out of duly appropriated provincial funds. The National Norms and Standards For School Funding prescribe, in r. 176-179, the conditions under which subsidies will be payable. Those conditions do impose some obligations of state control over the school: it must be *'managed successfully'* (as defined in r. 179), and must agree to unannounced

[73] *AAA Investments* (n 58), [45].

inspection. Under this framework, the award of subsidy imposes no special power on independent schools in receipt of subsidy. They exercise no coercive statutory authority. They are not under particularly onerous government control.

Finally, since non-subsidised independent schools are not organs of state, if subsidised schools were properly so described, it would follow that the funding of the institution adopted central importance in the analysis. But the case law does not support granting such a central role to public funding, which is rarely (if ever) emphasised relative to other factors. It would also raise the tricky issue of precisely how much funding made the difference, and whether other grants of favour (such as the favourable arrangement of contract law to the benefit of such schools) counted as similar support. It is hard to imagine a small subsidy would make the difference.

These are the reasons why it is likely a court would reject such an argument. But it is not a defence of the reasons themselves, which suffer from much the same flaws as those discussed in relation to *YL*. The notion of public-ness is loaded with more weight than it can bear. It apparently follows from the Constitutional Court's holding in *Pridwin* that both independent and public schools provide *'basic education'* under the Constitution, that education is not an inherently public function, since it can be provided by an (unsubsidised) independent school. But if education is not a public function, given the numerous examples of soaring judicial rhetoric about the public importance of education, it is difficult to see how that term can have sufficient substantive content to guide judicial decision-making.[74]

[74] See, as only one example of many, *Pridwin (CC)* (n 66), [1].

D. PRIVATE SCHOOLS AND HUMAN RIGHTS IN INDIA

In India, the vertical applicability of the rights contained in the Constitution is determined by Art. 13, which provides that the fundamental rights contained in Part III bind the *'state'* as defined in Art.12. As in South Africa, *some* rights under the Indian Constitution are horizontally applicable, but this section is concerned with the circumstances under which a notionally private school will be bound vertically. The short position is that unaided independent schools will almost certainly not bear duties vertically, and the same is probably true for aided schools, unless (exceptionally) they are subject to a very high level of control by the state.

(1) 'State'

Article 12 defines *'State'* as follows:

> *In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities […].*

There are therefore a number of entities which form part of the state and thus bear all the duties set out in Part III: the governments and legislatures of India and the States, as well as *'local or other authorities'*. The former would clearly include government-run schools, and the central and state-level education ministries. It should be noted (and has been recognised by the Supreme Court[75]) that this list is non-exhaustive, but there does not seem to have been any attempt to recognise as the *'state'* any entity which does not fall within any of the enumerated categories.

[75] *Pradeep Kumar Biswas vs Indian Institute of Chemical Biology* (2002) 5 SCC 111, 2002 SCC (L & S) 633, [6].

The potentially relevant part of Art. 12 for these purposes is the definition of the term *'other authorities'*. The Indian case law on the meaning of this term has, in the words of the Lahoti J, *'zig-zagged'*,[76] encompassing two different kinds of approach: functional and institutional.

In *Rajasthan State Electricity Board ('RSEB')*, the Supreme Court first flirted with a functional approach. The issue was whether the RSEB was an *'other authority'*. A five-judge bench held that the term *'other authorities'* was not to be interpreted *eiusdem generis* – in other words, by reference to attributes shared with the other enumerated forms of *'state'* in Art. 12. Instead, great emphasis was put on the statutory powers conferred on the Board by law, and the commercial nature of the Board's activities was disregarded in favour of a broad, functionalist interpretation of *'state'*.[77]

The functional trend started by *RSEB* was continued in two further judgments: *Sukhdev Singh* (by a five-judge bench) and *RD Shetty* (by a three-judge bench).[78] In *Sukhdev Singh*, the Court had to consider whether various statutory corporations fell within Art. 12.[79] The majority held that the corporations did fall within Art. 12. The judgment focussed on the intertwining of criminal law and the functioning of the corporations, which is, in effect, a functional analysis (criminalisation being a state function).[80] Mathew J's concurring judgment took an even more explicitly functional

[76] ibid, [67].

[77] *Rajasthan State Electricity Board vs Mohan Lal* (1967) SCR (3) 377, 1967 AIR 1857.

[78] *RD Shetty v IAA* (1979) 3 SCC 489, AIR 1979 SC 1628.

[79] *Sukhdev Singh v Bhagatram* (1975) 1 SCC 421, 1975 SCC (L & S) 101.

[80] ibid, [63] - [67].

approach,[81] but noted that the governmental/non-governmental distinction is exceptionally difficult, if not impossible to apply.[82] By contrast, Alagiriswami J, in a dissenting judgment, rejected Mathew J's conclusions, and argued that his approach would give rise to an inconsistency between the treatment of workers at public service corporations owned by the Government and other public service corporations.[83] Just as in *YL*, that equality of rights should be achieved by extending rights to the employees of other corporations was not considered.

The Supreme Court then began a gradual retreat from its functional approach. A three-judge bench concluded in *Som Prakash Rekhi v Union of India* that an oil company taken over by the central government was an *'other authority'* within the meaning of Art. 12.[84] The Court shifted subtly from the functional approach of *RSEB* to focus on the control which the central government exercised over the company. The Court reiterated that *'the true test is functional'*, but the reasoning makes it clear that this was meant in a narrow sense: whether in exercising its functions the body was an *'agency or instrumentality of the state.'*

In the same year, *Ajay Hasia* was decided. There the Indian Supreme Court laid down six principles which inform the judicial enquiry into whether an entity falls within Article 12 or not. The principles are:

[81] ibid, [98].

[82] ibid, [104].

[83] ibid, [194].

[84] *Ajay Hasia v Khalid Mujib* (1981) 1 SCC 722, 1981 SCC (L & S) 258.

'(1) One thing is clear that if the entire share capital of the corporation is held by Government it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.

(3) It may also be a relevant factor.....whether the corporation enjoys monopoly status which is the State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.

(5) If the functions of the corporation of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference of the corporation being an instrumentality or agency of Government.

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12.'[85]

It can be seen that three of these factors (3, 5 and 6) go to the *function* of the body, and the others go to the *control* which a branch of government exercises over the body.

The next relevant case is *Pradeep Kumar Biswas*, where the question was whether the Council for Scientific and Industrial Research was a *'state'* body. A seven-judge bench of the Supreme Court focussed almost entirely on the question of whether the body was an agency or instrumentality of government. The functions of the CSIR were considered, in a short paragraph, to be to *'further the economic welfare of the*

[85] ibid, [14] - [18].

society,' and that was held clearly to be a public function.[86] However, the perfunctoriness of this point, coupled with the extensive analysis of the way in which the Government controlled the CSIR, demonstrates what the Court considered important. Similarly, in *BALCO,* the Court gave no consideration to function in determining whether a company was part of the state: it focussed only on the extent of shareholdings.[87]

This interpretation is supported by *Zee Telefilms*, in which the majority focussed only on the question of whether the Board of Control for Cricket in India was an agency or instrumentality of the state, and explicitly disregarded any public functions which the Board exercised.[88] The Court rejected *'functional'* cases like *Sukhdev Singh* and *RSEB* as of a different time, and held that:

> *…in a democracy there is a dividing line between a State enterprise and a non-State enterprise, which is distinct and the judiciary should not be an instrument to erase the said dividing line unless, of course, the circumstances of the day require it to do so.*[89]

Yet another analogy may be drawn with *YL*: this is not dissimilar to Lord Neuberger's view that the non-imposition of duties was taken to be the default, *'non-political'* option in an admittedly political decision.

[86] *Pradeep Kumar Biswas vs Indian Institute of Chemical Biology* (n 75), [45].

[87] *BALCO Employees' Union v Union of India* (2002) 2 SCC 333.

[88] *Zee Telefilms vs Union of India* (2005) 4 SCC 649, 2005 SCC OnLine SC 213, [29].

[89] ibid, [35].

(2) Educational Establishments Under Art. 12

Turning to particular types of school, private schools can be divided into aided or unaided, and minority or non-minority. The categories overlap – there are both aided and unaided minority and non-minority schools. Minority schools present an additional complication for the purposes of this exercise, since they have special protection under Art. 30 of the Constitution.[90] This analysis will focus (non-exclusively) on non-minority aided and unaided schools.

(a) Unaided Schools

The position is stark for unaided schools. It is highly unlikely that they would meet the test of *'state'*. Indeed, in cases which deal with the amenability of unaided schools to the Art. 226 writ (discussed below), it has effectively been assumed that such schools do not fall within Art. 12. In *Committee of Management, Delhi Public School v M K Gandhi*, in which teachers sought by writ to challenge their dismissal by the respondent school, the Supreme Court ordered as follows:

> *Hence we are of the view that no writ is maintainable against a private schools as it is not a 'State' within the meaning of Article 12 […] The proper remedy for the teachers was to file a civil suit for damages, if there were any.*[91]

[90] As summarised in Debarshi Chakraborty, 'Minority Educational Rights and the Supreme Court's Madrasah Judgment' (*Indian Constitutional Law and Philosophy*, 29 September 2020) <h*ttps://indconlawphil.wordpress.com/2020/09/26/guest-post-minority-educational-rights-and-the-supreme-courts-madrasah-judgment/*> accessed 22 December 2021.

[91] *Committee of Management, Delhi Public School v M K Gandhi and Others* (2015) 17 SCC 353, [5].

Similar conclusions were reached by the Supreme Court in *Satimbla Sharma* (which concerned minority schools),[92] and by multiple High Courts.[93] In light of the test set out above, this should be no surprise: such schools are clearly not an *'instrumentality or agency of government'* as the Supreme Court has understood it.

(b) Aided Schools

As for aided schools, there are many different ways in which schools might be aided. However, the level of subsidy would be high to bring the school within *Ajay Hasia*: it would be necessary for the school to be financially, functionally and administratively dominated by or under the control of the Government.

What little case law there is supports this analysis. In *Trigun Chand Thakur vs State of Bihar*, a two-judge bench held (perfunctorily, and without reference to relevant case law) that an aided independent school was not *'state'* for the purposes of Art. 12.[94] In *Sumit Mandal*, although it was not clear whether the school in question was aided, it was said, peremptorily, *'no writ petition will lie against any private school as it is not 'State' within the meaning of the said Article'* [emphasis added].[95] In *Unni Krishnan*, the Supreme Court held:

[92] *Satimbla Sharma v St Paul's Senior Secondary School* (2011) 13 SCC 760, (2012) 2 SCC (L & S) 75.

[93] See (by way of example only) the judgment of the Allahabad High Court in *Sheikh Mohd Ayyub v State of UP* 2018 SCC Online All 5880, [33]; and the judgment of the Meghalaya High Court in *Smt Sudipta Dhar v State of Meghalaya* [2019] High Court of Meghalaya Writ Petition (C) 43 of 2017, [8].

[94] *Trigun Chand Thakur v State of Bihar* (2019) 7 SCC 513, (2019) 2 SCC (L & S) 378.

[95] *Sumit Mandal v Union of India* [2020] High Court at Calcutta Writ Petition 19898 (W) of 2019.

> *Private educational institutions may be aided as well as unaided. Aid given by the Government may be cent per cent or partial. So far as aided institutions are concerned, they have to abide by all the rules and regulations as may be framed by the Government and/or recognising affiliating authorities in the matter of recruitment of teachers and staff, their conditions of service, syllabus, standard of teaching and so on. […] The reason is simple: public funds, when given as grant and not as loan carry the public character wherever they go; public funds cannot be donated for private purposes. The element of public character necessarily means a fair conduct in all respects consistent with the constitutional mandate of Articles 14 and 15. All the Governments and other authorities in charge of granting aid to educational institutions shall expressly provide for such conditions (among others), If not already provided, and shall ensure compliance with the same.*[96]
>
> *[…] Since the recognising/affiliating authority is the State, it is under an obligation to impose such conditions as part of its duty enjoined upon it by Article 14…The State cannot claim immunity from the obligations arising from Article 14 and 15. If so, it cannot confer such immunity upon its affiliates.*[97]

Chandrachud, Subramani and Banerjee's *Commentary on the Constitution of India* takes the view that the effect of *Unni Krishnan* is that aided private schools are subject to review for compliance with Art. 14.[98] That might be the practical effect, but it is respectfully submitted that *Unni Krishnan* is no authority for the proposition that aided schools are necessary *'state'* within the meaning of Art. 12. First, it is important to be clear that this passage does not say that aided schools fall within the definition of state under Art. 12. It does describe (some of) them as *'affiliates'* – but that falls some way short of the level of control required under *Ajay Hasia*. Second, the passage might be said to recognise that they are *unlikely* to do so, given that this passage is framed as a constitutional obligation on the Government to create conditions requiring conduct

[96] *Unni Krishnan v State of AP and Others* (1993) 1 SCC 645, AIR 1993 SC 2178, [195].

[97] ibid, [204].

[98] Chandrachud, Subramani and Banerjee, *Commentary on the Constitution of India* (Wadhwa Nagpur 2007) 1460.

consistent with the constitutional mandate of Art. 14 (which arguably would not be necessary if the Constitution already imposed such a requirement). It is a recognition of a positive, vertical obligation on the Government, not a negative obligation on the aided school. Third, to the extent it can be inferred that aided schools are not necessarily likely to be part of the *'state'*, that is, again, perhaps unsurprising. The Art. 12 test is a difficult one to meet. While each case will – to an extent – turn on its facts, there are accordingly likely to be many schools which, although in receipt of some support, do not fall under the financial, functional or administrative control of the state.

It should be noted that in *Jeyapaul vs SRM University*, a two-judge bench of the Supreme Court held, in one paragraph, that the respondent was a deemed university and accordingly, like other universities, was *'state'* under Art. 12.[99] The general authorities referred to above were not cited. In those circumstances, it is difficult to find any assistance in dealing with the question of aided schools in this judgment.[100]

In those circumstances, although there is no clear authority on the point, the test for *'state'* set by the Supreme Court is so stringent that it would not catch a large number of aided schools.

(3) Educational Establishments under Article 226

It should be noted that the *'publicness'* of private schools has arisen in the context of the maintainability of the writ under Art. 226. Art. 226(1) provides:

[99] *Jeyapaul vs SRM University* (2015) 16 SCC 530, 2015 SCC OnLine SC 1321, [22].

[100] Shrikrishna Upadhyay, 'Expanding Article 226 - Public Functions Test: Zee Telefilms v Union of India and Aftermath' (2018) 4.1 Comparative Constitutional Law and Administrative Law Journal 32, 38.

> *Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.*

The term *'authority'* is more liberally construed in Art. 226.[101] These writs generally are available against private schools, since the provision of education is a public function,[102] assuming that there is some applicable public law obligation or right at issue (as there might be, for example, under the RTE Act).[103] They are especially likely to be available against aided schools.[104] The factor determining the availability of the writ is whether there exists a relevant public duty owed by the respondent in question, not the nature of the respondent.

The writ is a procedure which opens up certain remedies. It does not create its own set of substantive legal rules. Insofar as private schools are not *'state'*, they will not owe the same obligations as state actors which might be subject to enforcement. Whether the writ is maintainable and whether it should be issued are entirely different questions:[105] it will be maintainable against a private school in certain circumstances, but insofar as it is said the writ should be issued to enforce a duty imposed by Part III

[101] *Jeyapaul vs SRM University* (n 99), [20].

[102] *Sheikh Mohd. Ayyub v State of U.P.* (n 93), [19].

[103] *Satimbla Sharma v St Paul's Senior Secondary School* (n 92), [25]; see the summary of the case law in Upadhyay (n 100); the writ is not available to enforce private law contracts or any other rule of law without direct nexus to a public duty: *Roychan Abraham v State of UP* [2019] Allahabad High Court W.P No. 63708 of 2014.

[104] *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v VR Rudani* (1989) 2 SCC 691, AIR 1989 SC 1607, [15].

[105] *Sheikh Mohd. Ayyub v State of U.P.* (n 93), [32].

only on the *'state'*, the application will fail.[106] Art. 226 is therefore not directly relevant to this analysis. However, it must be observed that even in that context, the concept of publicness has proved *'multifacial'*[107] and difficult to apply.[108]

E. CONCLUSION

As this review has shown, in every jurisdiction under review, a division is recognised between *'public'* and *'private'*, and this is the starting point in deciding which actors (and which schools) should bear (vertical) human rights duties. The effect of this is that a large number of private schools – even when in receipt of state subsidy – do not bear human rights obligations vertically. That bears out the proposition in Chapter 1: that the law treats private and public schools differently. Four trends, beyond this central one, can be identified through a comparative review of the case law.

The first is that the autonomy of private actors is generally considered relevant to the exercise, and that the divide is taken to in some way illuminate the distinction between those whose autonomy matters, and those whose autonomy does not matter (and thus can be subject to human rights duties). The other side of this coin is that courts tend to consider there to be something especially restricted about the *motives* for which public actors can act. In the business context, the concern for private autonomy also sounds in a different way: through cost concerns. The alleged economic cost of rights compliance for businesses is often taken at face value (contrary to e.g. the

[106] ibid, [33]; the contrary has been suggested, but that is misguided for the reasons set out here: see Upadhyay (n 100) 42.

[107] *Roychan Abraham v State of U.P.* (n 103), [24].

[108] Upadhyay (n 100) 37.

evidence-based approach of Baroness Hale in *YL*). This commitment to autonomy is rarely subject to much introspection or scrutiny: it is taken as a self-evident good.

The second trend is that the publicness test seems to lead to quite a lot of perfunctory or sloppy reasoning, and slippage between ideas, even in higher courts, perhaps brought on by the confusing nature of the divide, or by unspoken assumptions about the proper place of human rights law. An excellent example is the relevance almost universally ascribed to the way in which bodies are funded, which is almost never justified. The purpose of the exercise is often lost sight of: it is forgotten that the practical issue is the assignation of duties – and *only* that. Where a body is found to be public, that does not necessarily mean it has breached any duty, it means merely that it needs to account and justify itself where it is alleged to have done so. Judges sometimes implicitly assume that declaring a body public means finding it in breach of an obligation, when that does not necessarily follow at all.

The third trend is that courts are bound and constrained by the texts with which they work. In the UK, for example, courts have considered themselves bound by the origin of the HRA as a device for incorporating the ECHR into UK law to import a state-centric approach from international law into the domestic context. However, sometimes, text is used to limit the list of duty-bearers in contexts where that is simply not necessary. For example, Art. 12 of the Indian Constitution defines *'state'* non-exhaustively, but courts have acted as though bound to its enumerated forms.

A fourth central theme is the way in which judges approach the *'political'* nature of the divide. Judges explicitly recognise that the task which they are being asked to perform is a political one, and that deciding who bears these duties is necessarily political. However, judges tend also to assume the existence of a *'non-political'* option,

the one most in-keeping with the role of a judge, which seems to involve the non-imposition of duties. It is rarely explained in any detail why this should be so.

That leads to a circumstance where the human rights obligations which schools owe depend on whether the school is *'public'* – a term with no apparent concrete meaning which seems to cause a huge amount of practical and conceptual confusion. As the analysis in Chapter 2 shows, it is *at best* not obviously consistently with the theoretical underpinning of their rights, and *at worst* flatly inconsistent with it, for children's rights to depend on the notional public or private nature of their school.

a. Schools which are *'public'* do not suffer from the accountability gap identified in Chapter 1, but it must be borne in mind that even for students in schools properly falling within the class of vertical duty-bearers, the legal uncertainty may well give rise to practical problems in asserting those rights against the school, especially in the absence of legal representation.
b. For children at schools which are not *'public'*, this could give rise to a problem of human rights accountability. The school's obligations to learners are left to be resolved by (i) doctrines of horizontality, where they apply; and otherwise (ii) the general law – such regulatory provision as is made in educational statutes, and beyond that, the ordinary private and criminal law.

The rest of the Thesis is directed to the position of that latter class of children. The next Chapter will consider how human rights law interposes in that ordinary law, where there are no directly applicable horizontal obligations. The final two Chapters will then be dedicated to a study of the horizontal demands of human rights law in the educational context.

CHAPTER 4

THE EFFECT OF HUMAN RIGHTS LAW ON THE LAW APPLICABLE BETWEEN CHILDREN AND PRIVATE SCHOOLS

A. INTRODUCTION

The previous Chapter explained that it is unusual for *'private'* schools to bear obligations *'vertically'* – that is, as a (notional) part of the state. It was suggested that this was not consistent with the principles underpinning children's rights set out in Chapter 2, and therefore gave rise to the accountability gap described in Chapter 1. The question of whether private schools might owe direct human rights obligations horizontally was reserved for later Chapters.

This Chapter deals with a question that arises where there are no (or no applicable) direct human rights duties owed by a private school. In such a situation, the law which governs the relationship between school and child will be the *'ordinary'* law: statutory education law, tort/delict, and the criminal law. There exists the potential for human rights law, although not binding private schools directly, to affect the rules of law governing their relationship with their learners. This is sometimes referred to as the *indirect* effect of human rights law.

It is important to deal with this issue for two reasons. First, the literature dealing with horizontal human rights has concerned itself greatly with this issue, and it is necessary to explain how the approach to horizontal human rights set out here relates to that debate (and why, for these purposes, that debate is not especially important). Second, Chapters 5 and 6 will go on to analyse the horizontal obligations of private schools, drawing on literature and cases dealing with both direct and indirect horizontal

effect. They seek to answer (or provide a framework for answering) the following basic question: what obligations does human rights law require in the relationship between learner and private school? It is important to defend framing the question in this way, and this Chapter provides an opportunity to do so.

The basic justification for asking the question in this way stems from the approach set out in this Chapter. It is suggested that this approach is a legitimate one to adopt – and, tentatively, that it is one which should be adopted more generally, beyond the confines of the academic inquiry in this Thesis. The proposed approach comprises of three stages of analysis:

(a) *Firstly*, it is necessary to determine what human rights law demands of the relationship between learner and private school – whether there is a relevant right, and if so, whether any interference with it can be justified as a proportionate means of achieving a legitimate aim. The final two Chapters of this Thesis will be dedicated to this issue, but this Chapter clears the ground by defending the focus on this question and dealing with how the answer to that question affects the ordinary law governing the relationship. In principle, the fact this question might be formulated in terms of state duties to create or change ordinary law (rather than the direct application of human rights law) does not change the underlying nature of this enquiry.

(b) *Secondly*, what the applicable ordinary law provides (properly interpreted, perhaps with the assistance of human rights values) must be tested for compatibility with the demands of human rights law, as identified at the first stage.

(c) *Thirdly*, if there is incompatibility, the question arises what the court can do about that, within the constitutional limits on its power. In deciding what to do, the court must undertake a contextual analysis, in light of the *'constitutional constraints'* it is under, and decide to what extent, if at all, the development of the ordinary law is warranted.

This approach is a model for translating the vertical demands of human rights law into the horizontal plane. It finds increasing echoes – but not full application – in all of the jurisdictions under review.[1]

This Chapter also explains why it is appropriate, for the purposes of this Thesis, not to be drawn into the debate about direct and indirect effect. The question to which Chapters 5 and 6 seek answers through reflexive study of each issue are (a) how are horizontal obligations to be identified and analysed on a general level; and (b) as a matter of principle, what (if any) horizontal obligations might private schools owe their learners? The analysis in this Chapter shows that, even in jurisdictions which do not recognise direct horizontal effect, there must be an implicit conception of what human rights law requires in private relationships, and it is accordingly defensible to ask what that conception is, regardless of whether it finds expression through state duties to create or change ordinary law or direct application of human rights law. In short, *direct* horizontal obligations are not special. They do not require significantly different reasoning to other kinds of case: the approach should be basically the same between

[1] See e.g. *AB v Pridwin Preparatory School (CC)* [2020] ZACC 12, 2020 (5) SA 327 (CC), [130]; *Fearn v The Board of Trustees of the Tate Gallery* [2020] EWCA Civ 104, [88].

claims based on the duty to protect, direct constitutional claims, and challenges to legislation which purports to regulate the affairs of individuals *inter se*.

After a quick review of the debate so far, the stages can be taken in turn. The argument summarised above will be set out in more detail in respect of the first stage. Discussion of the second and third stages will show how the concerns which are often raised in the debate can be factored into the analysis, without undermining the validity of the key question of what it is human rights law requires in private relationships.

B. THE TRADITIONAL DEBATE: A VERY, VERY BRIEF OVERVIEW

There is voluminous literature on the direct and indirect effect of human rights, especially as it relates to private law. The bulk of this Chapter is dedicated to a defence of avoiding this debate, and a gentle suggestion that, when it comes to horizontal human rights, that debate has become a little stale. The more interesting question is that addressed in Chapters 5 and 6: lifted from the procedural and constitutional complexities of *application* in a particular jurisdiction, how can the demands of horizontal human rights law be approached and analysed? It is for questions like this that comparative law comes into its own.

In order to deal with that, however, a brief overview of the traditional debate is necessary. A distinction can first be drawn between *'horizontalists'* and *'verticalists'*.[2] The former would see human rights as applicable between private actors. The latter would confine them to the context of relations between the state and the citizen, although would probably recognise that the state has obligations to regulate private

[2] Murray Hunt, 'The 'Horizontal Effect' of the Human Rights Act' (1998) PL 423 424–425.

conduct. There is, obviously, a spectrum between these positions,[3] including, for example, those who would directly import human rights law through general clauses or provisions of private law.[4] For the purposes of this Thesis it should be noted that whichever approach is adopted, human rights law and ordinary law will still be operating in the same legal space, and an account is required of how they interact with each other. Either individuals owe each other human rights duties that sit alongside their other legal rights and obligations, *or* ordinary law is a creation of the state,[5] and when the state makes law, it is bound by the requirements of human rights law.[6]

It is in this context that the majority of the discussion has focussed on what courts should do when faced with *private* law which in some way implicates human rights law. Some argue that new causes of action should be created to give effect to rights,[7] while others argue that existing ones should be developed.[8] Some argue that the effect of human rights law on common law should be mediated through *'values'*,[9] whereas

[3] ibid 426; Alison L Young, 'Remedial and Substantive Horizontality: The Common Law and Douglas v. Hello! Ltd' (2002) PL 232 234; Stephen Gardbaum, 'The 'Horizontal Effect' of Constitutional Rights' (2003) 102 Michigan Law Review 387, 394.

[4] Heldrich and Rehm, 'Importing Constitutional Values through Blanket Clauses' in Daniel Friedmann and Daphne Barak-Erez, *Human Rights and Private Law* (Hart Publishing 2001).

[5] Hunt (n 2) 425.

[6] Mattias Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German Law Journal 341 352–359.

[7] HWR Wade, 'Horizons of Horizontality' (2000) 116 LQR 217 221–222; Deryck Beyleveld and Shaun D Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) 118 LQR 623 634.

[8] Anthony Lester and David Pannick, 'The Impact of the Human Rights Act on Private Law: The Knight's Move' (2000) 116 LQR 380 333–334.

[9] Gavin Phillipson, 'The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper?' (1999) 62 MLR 824 837.

others argue that the rights should apply directly.[10] Commentators raise arguments concerning the language of the relevant legal texts,[11] the value of autonomy in private relations,[12] the importance of rights,[13] the integrity of private law,[14] the content of rights,[15] the applicability of rights to private parties,[16] duties to protect,[17] the separation of powers,[18] the limits of private law reasoning,[19] concerns about whether common law and statute should be treated differently,[20] the instability of the public-private divide,[21]

[10] Beyleveld and Pattinson (n 7) 626.

[11] Hunt (n 2) 439–441; Phillipson (n 9) 828, 835; Andrew J Bowen, 'Fundamental Rights in Private Law' (2000) Scots Law Times 157; Young (n 3) 240.

[12] Phillipson (n 9) 846–847; Roderick Bagshaw, 'Unauthorised Wedding Photographs' (2005) 121 LQR 550, 554; Gardbaum (n 3) 431–433; Max Du Plessis and Jolyon Ford, 'Developing the Common Law Progressively - Horizontality, the Human Rights Act and the South African Experience' (2004) 3 EHRLR 286, 288.

[13] Bowen (n 11) 157–158.

[14] Phillipson (n 9) 839; Lester and Pannick (n 8) 384; Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75 CLJ 86, 107.

[15] Phillipson (n 9) 834.

[16] Beyleveld and Pattinson (n 20); Richard Buxton, 'The Human Rights Act and Private Law' (2000) LQR 48, 13

[17] Bowen (n 25) 159–160; Jonathan Morgan, 'Privacy, Confidence and Horizontal Effect: 'Hello Trouble'' (2003) 62 The Cambridge Law Journal 444

[18] Gavin Phillipson and Alexander Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74 MLR 878, 887–888.

[19] Phillipson (n 9) 839; but see Beyleveld and Pattinson (n 7) 642.

[20] Nicholas Bamforth, 'The True 'Horizontal Effect' of the Human Rights Act 1998' (2001) 117 LQR 34, 36–37.

[21] Dawn Oliver, 'The Human Rights Act and Public Law/Private Law Divides' (2000) EHRLR 343 355; Phillipson and Williams (n 18) 895; Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality: The Horizontal Effect of the EU Charter' (2015) 21 ELJ 657, 669–676.

legal certainty,[22] legislative debates,[23] the state-centric nature of international law,[24] and what it means for new causes of action to be created.[25] There is also debate about how to characterise the debate,[26] as well as a further debate about whether either of these debates matters in practice[27] or assists courts in resolving disputes.[28]

The approach defended by this Chapter is one which seeks to cut through this complexity. Of course, *within each particular jurisdiction*, the debates outlined above will be very important in litigation against a private school – it will help to illuminate what causes of action might be available, and what arguments are likely to find favour. However, for the reasons set below, this debate is somewhat obscuring what, it is suggested, is the key question: what are the demands of human rights law in the private

[22] Lester and Pannick (n 8) 384; but see Morgan (n 17) 467–473; Thomas DC Bennett, 'Judicial Activism and the Nature of 'Misuse of Private Information'' (2018) Communications Law 74.

[23] Hunt (n 2) 440; Phillipson (n 9) 826.

[24] Buxton (n 16) 50–51; but see Wade (n 7) 218.

[25] Ivan Hare, 'Verticality Challenged: Private Parties, Privacy and the Human Rights Act' (2000) 5 EHRLR 526, 534; Nicole Moreham, 'Privacy and Horizontality: Relegating the Common Law' (2007) 123 LQR 373; Thomas DC Bennett, 'Horizontality's New Horizons - Re-Examining Horizontal Effect: Privacy, Defamation and the Human Rights Act: Part 1' (2010) Entertainment Law Review 96, 98, 101; Bennett (n 22).

[26] Hunt (n 2); Bennett (n 25) 98; Phillipson and Williams (n 18) 900–902.

[27] Jonathan Morgan, 'Privacy in the House of Lords, Again' (2004) 120 LQR 563, 565–566; PJ Sutherland, 'Ensuring Contractual Fairness in Consumer Contracts after *Barkhuizen v. Napier* 2007 5 SA 323 (CC) - Part 1' (2008) 19 Stellenbosch Law Review 390, 396.

[28] Mary Arden, 'Human Rights and Civil Wrongs: Tort Law under the Spotlight' (2010) PL 140 140–142; Richard Clayton and Hugh Tomlinson, 'The Human Rights Act and Its Impact on the Law of Tort' in Arvind and Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing 2013) 439.

school-learner relationship? The approach proposed in this Chapter centres this question, as the first of its three stages.

C. THE FIRST STAGE: WHAT DO HUMAN RIGHTS REQUIRE BETWEEN PRIVATE ACTORS?

The major question with which this Thesis deals is *whether children's rights in principle impose any requirements on their private school*. Chapters 5 and 6 deal with the substantive answer to this question. This Chapter explains why this question is a legitimate one to ask, and why it would not be helpful to attempt to deal with this issue through the lens of the direct/indirect effect debate. Rather, it is preferable (or at least legitimate, for the purposes of this Thesis) simply to ask the question, and analyse the case law to determine which principles militate in finding an answer.

In defending that position, this section first analyses two *'routes'* to private actor duty-bearing (which broadly map onto direct and indirect effect, although those terms are deliberately avoided, since what is considered direct effect in one system may be considered indirect effect in another[29]), and explains that, *for the purpose of this question*, there is little difference between them. It then deals with objections arising from the alleged indeterminacy of human rights law, and tentatively defends the application of this approach more broadly.

[29] Dawn Oliver and Jörg Fedtke, 'Comparative Analysis' in Dawn Oliver and Jörg Fedtke, *Human Rights and the Private Sphere* (UT Austin Studies in Foreign and Transnational Law 2007) 470.

(1) Two Alternative Routes to Private Obligations

(a) The Routes to Private Obligations

There are two, non-mutually exclusive routes by which what is required of private actors by human rights law can be determined. The first route is that the obligations of human rights law bind private actors directly: the *'private actor obligation approach'*. The second route is that duties imposed on the state by human rights law might require the ordinary law to make or not make certain provision, which indirectly imposes obligations between private actors: the *'state obligation approach'*.

The distinction between the two approaches is illustrated by the Indian case of *People's Union for Democratic Rights v Union of India.*[30] In that case, the People's Union approached the Supreme Court under the epistolary jurisdiction to enforce the minimum wage rights of workers on certain projects associated with the Asian Games. These workers were employed by private contractors, who had in turn been contracted by the (state) defendants. The defendants mounted preliminary objections to the writ petition which gave the court cause to investigate the scope of the obligation in Art. 23, which prohibits human trafficking and forced labour.[31] Both approaches set out above can be seen in the Court's judgment.

[30] *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235, 1982 AIR 1473.

[31] Article 23 provides that: '*Traffic in human beings and begar [a form of forced labour] and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.'*

The private actor obligation approach formed the main rationale for the decision. The Court held that Art. 23 was horizontally applicable and effective, in that it could be enforced against both the contractors and the state. Reasoning that no worker would voluntarily accept less than the minimum wage, the Court held that where there is a failure to pay the statutory minimum wage, there is also a breach of Art. 23 by the employer, public or private.[32] The employers were directly bound by that provision, the obligations it imposed arose directly from the Constitution, and those obligations were enforceable through the Art. 32 writ petition.[33]

People's Union also provides an insight into the state obligation approach, whereby, rather than imposing duties directly on private providers, human rights law imposes limits on what ordinary law might provide, and thus indirectly imposes duties on private actors. The Court held that, where an employee is compelled by economic pressure to accept exploitative terms of employment, courts will not enforce that contract.[34] This is a requirement for contract law to be a certain way, in addition to the requirement on a private actor set out above. It prohibits the enforcement of certain terms concluded under conditions of economic exploitation. That is a limit on the range of ways in which the state's ordinary law may govern the relationship between the two contracting parties. However, as this Chapter will develop, those state duties which set out the limits of what the ordinary law may provide must themselves be underpinned

[32] *People's Union for Democratic Rights* (n 30) 491; 484–485.

[33] ibid 492; see also *Consumer Education & Research Centre vs Union of India* (1995) 3 SCC 42, 1995 SCC (L & S) 604.

[34] *People's Union for Democratic Rights* (n 30) 490.

by a conception of what is (implicitly) required by human rights law between private actors.[35]

Contrary to the tenor of much of the debate in this field, it should not make a significant difference as a matter of principle whether a jurisdiction recognises horizontal human rights obligations or not. *'Is X required to do Y?'* and *'Must X be required by the ordinary law to do Y?'* are analytically and formally distinct questions, but the substantive reasoning required to assess human rights law's demands of the relationship between X and a beneficiary must be largely the same. So, for example, in the UK, no private duties of the sort recognised in *People's Union* have been recognised, outside of cases where a private actor performs public functions.[36] However, the courts are still required to determine what human rights law requires in private relationships. The ECHR – to which the HRA gives effect in English law – contains no explicit provision for horizontal effect, but nonetheless requires the ordinary law to impose certain obligations or make certain provision.[37] There are, for example, limits in the ECHR to the circumstances in which the law may find a contract to have been concluded.[38] Further, under the ECHR, medical negligence must be at least tortious,[39] and medical law more generally must adopt a particular, positive

[35] John Knox, 'Horizontal Human Rights Law' (2008) 102 American Journal of International Law 1 12.

[36] Human Rights Act 1998, s. 6(3)(b).

[37] Dimitris Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (Routledge 2012) 72.

[38] *Storck v Germany* (2006) 43 EHRR 6, [97] - [98].

[39] *Šilih v Slovenia* 2009 49 EHRR 37, [194]; *Belenko v Russia* App no 25435/ 06 (ECtHR, 18 December 2014), [76]; *Işıltan v Turkey* App no 20948/92 (ECommHR 22 May 1995), [40].

conception of informed consent.[40] The law of remedies, where there is a cause of action permitting damages for breach of an ECHR right, must require that those damages be proportionate,[41] and probably must include compensation for non-pecuniary damage.[42] Family law must regulate the parent-child relationship, with a system of both care and respect for children,[43] and children born out of wedlock must not be discriminated against in the way the law organises their patrimonial rights or determination of legal parenthood.[44] Certain grave violations must be proscribed by the criminal law, and appropriately prosecuted, including rape,[45] modern slavery,[46] and violence.[47] The ECtHR has also found that the ECHR limits the permissible content of civil procedure,[48] (especially so as to allow the participation of children[49]), employment

[40] *VC v Slovakia* (2014) 59 EHRR 29, [106] - [107], [123] - [127].

[41] *Avram and Others v Moldova* (2015) 61 EHRR 24, [40] - [43] .

[42] *Edwards v United Kingdom* (2002) 35 EHRR 19, [98].

[43] *Diamante and Pelliccioni v San Marino* [2011] ECHR 1450, [170].

[44] *Marckx v Belgium* (1979-80) 2 EHRR 330, [52].

[45] *MC v Bulgaria* (2005) 40 EHRR 20, [150].

[46] *Siliadin v France* 2006 43 EHRR 16, [89].

[47] *Janković v Croatia* App no 38478/05 (ECtHR 5 March 2009), [47].

[48] *Diamante and Pelliccioni v San Marino* (n 43), [150], [177]; *Janković v Croatia* (n 47), [65]-[70]; *Gasyak and Others v Turkey* [2009] ECHR 1524, [78]; *Storck v Germany* (n 38), [95].

[49] *CAS and CS v Romania* (2015) 61 EHRR 18, [78]; *Storck v Germany* (n 38), [177].

law,[50] the law of legal status,[51] inheritance law[52] and regulation.[53] There must be *some* conception of what human rights law requires in the particular private relationship at issue underpinning these limits on the ordinary law that regulates that relationship. Otherwise, there would be no basis on which it could be said that the legal rules applicable between those private actors fell below the standards required by the ECHR.

It is worth emphasising this: *even a jurisdiction which fully embraces a vertical-only model of rights needs a theory of what human rights law requires in interpersonal, 'private' relationships*.[54] This flows from the logic of the duty to protect: if states are required to protect individuals from rights violations by private parties, then latent in that obligation must be some kind of test for working out what amounts to a *'rights violation by a private party'*.[55] This does not depend on whether a jurisdiction plumps for indirect or direct effect as the manner in which such duties are to take effect: those labels, in and of themselves, tell us nothing about the substantive demands of human rights law.[56]

[50] *Redfearn v United Kingdom* (2013) 57 EHRR 2.

[51] *Goodwin v United Kingdom* (2002) 35 EHRR 18, [77].

[52] *Pla and Puncernau v Andorra* (2006) 42 EHRR 25.

[53] *Öneryildiz v Turkey* (2005) 41 EHRR 20, [89]; *Hatton and Others v United Kingdom* (2003) 37 EHRR 28, [98]-[100].

[54] Oliver and Fedtke (n 29) 507.

[55] David Bilchitz, 'A Chasm between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (CUP 2013) 111–112.

[56] Christoph Graber and Gunter Teubner, 'Art and Money: Constitutional Rights in the Private Sphere?' (1998) 18 OJLS 61, 70.

(b) Differences between the Approaches

This section sets out differences between the two approaches outlined above. It bears emphasis that the issues at play in each kind of case are not identical, and will not *necessarily* lead to the same outcome in any given case. However, the differences which do exist do not obscure the fundamental common question set out above, for the reasons given below.

First, the private actor obligation approach is likely to set only substantive limits on the content of ordinary law, whereas the state obligation approach could set procedural and remedial ones as well. So, for example, were human rights law to require that contractual disciplinary procedures not be available against schoolchildren for the exercise of their free speech rights, that would mean that ordinary law could not provide that such arrangements had legal effect. But what that would mean for the procedures and remedies which must be adopted when the court is faced with a purported contract of this sort is a question of the vertical obligations of the state and the courts. The existence of horizontal obligations may of course imply the court should respond to those obligations in a particular way, by altering its remedies or procedures. But that obligation of the court is, as Chapter 6 will argue, best treated as an analytically distinct obligation on the part of the state to organise the enforcement of human rights law in a particular way. That is more appropriately a question of state obligations and the constitutional constraint. The separateness of the question of enforcement and substance underlines that, when the question *is* one of substance, it does not matter which of the approaches is adopted – the fundamental question of the demands of human rights law in the private relationship is the same.

Second, the approach adopted may make a difference to the level of deference which is appropriate. Where there are clear horizontal human rights obligations, the scope for deference to the existing legal ordering of affairs is less than where more general vertical provisions, with their implied horizontal obligations, are relied upon.[57] It is important, however, not to overstate the extent to which the distinction between the private actor obligations approach and the state actor obligations approach would map onto increased deference. This would depend on the extent to which the *reasons* for deference bite. King sets out possible grounds for deference: relative expertise, alternative accountability, polycentric and complexity, the nature of the interest or right at stake, democratic legitimacy, vulnerability, the need for social science evidence in some social rights, and the risk of judicial error.[58] So where the legislature has provided for a certain horizontal arrangement, especially in complicated fields of economic and social policy, there is clearly a good reason for courts to be wary of substituting their judgment. This does not mean, however, that vertical and horizontal cases do not involve the same fundamental question. On one level, this is because whichever approach applies, the decisions of the expert, democratic organs will still be owed respect on almost all of the grounds set out above. But on another, more important level, this is because a finding that the balance struck by the legislature or courts fell within the acceptable bounds imposed by human rights law still requires a conception of what those bounds are.

[57] Compare, for example, *McDonald v McDonald* [2016] UKSC 28, [2017] AC 273; and *Daniels v Scribante* [2017] ZACC 13, 2017 (4) SA 341 (CC).

[58] King, *Judging Social Rights* (CUP 2012) 144.

Third, the different approaches may well have different constitutional consequences. As a matter of doctrinal law, it may be that different provisions apply: for example, in South Africa, the private actor obligations approach takes one through s. 8(2) of the Constitution, while the state obligations approach takes one through the s. 8(1) and s. 7(2) route.[59] It may also be, as set out below, that the constitutional constraint for a court in remedying a defect in ordinary law may apply differently. But that difference does not detract from the fundamental common question. Identifying a defect in the ordinary law still requires a conception of what human rights law requires in the private relationship at issue.

It can be seen from these latter two points that the differences there may be between direct and indirect effect (as those terms have been used in the traditional debate) relate to the question of *remedying defects* within the constraints of the legal order, which is a separate (and logically subsequent) question from the question of *whether there is a defect at all*. That is a question of the demands which human rights law imposes on a private relationship – which is why it is appropriate to start with that question.

(2) The Determinacy of Human Rights Law

A common charge is that human rights law is too indeterminate to regulate private relationships.[60] It simply is not possible, it is said, to interpret from the general and open-textured principles of human rights law clear and specific rules. This is an

[59] See Chapter 6, *infra*. S. 7(2) provides (emphasis added): *"The state must respect, protect, promote and fulfil the rights in the Bill of Rights."*

[60] Phillipson and Williams (n 18) 897 and commentary cited there.

important point, and it might be said that legal certainty is particularly important in such private relationships, especially commercial ones. However, it is respectfully suggested that this concern has been somewhat overplayed.

First, and perhaps most importantly, as set out above, this analysis is already being undertaken. The ECHR, despite being a classical civil-and-political international text, imposes some clear requirements on the ordinary law. Further, it is uncontroversial that this exercise – or one like it – must be conducted to assess the compliance of private law *statutes* with human rights law.[61] In that sense, the approach taken here is one which is, at least implicitly, already being conducted. It can only aid legal certainty if what is currently implicit is made explicit. If it is truly *impossible* to determine the horizontal demands of human rights law, then it follows that decisions such as *Godin-Mendoza*[62] and *Bhe,*[63] which deal with the human rights compatibility of private law statutes, are incorrectly decided. Those cases identify clear limits on what rights and obligations may pertain, as a matter of human rights law, in the ordinary law governing private relations, and arguably appropriately leave it to the state to provide the means to achieve these ends.

Second, insofar as this is a valid concern, it is not unique to horizontal human rights. Human rights texts (even in the vertical context) are usually general, and require

[61] As they were in *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC), which dealt with a challenge to a statute governing inheritance; and *Wilson v First County Trust (No 2)* [2003] UKHL 40, where the House of Lords had to deal with the compatibility with Article 1 Protocol 1 ECHR of a statute regulating consumer credit agreements.

[62] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

[63] *Bhe v. Magistrate Khayelitsha* (n 61).

interpretation to discern their concrete meaning,[64] an exercise which can be a *'highly creative judicial function'*, based on the values underpinning the constitutional text.[65] Given that even vertical human rights texts are *'by their nature open-textured and general'*,[66] designed to allow adaption to changing circumstance, horizontal obligations are not *necessarily* any more indeterminate than vertical ones.

Third, such an argument might be based on a failure to distinguish between human rights law being *determinate*, and human rights law being *determinative*. Human rights law will be *determinate* where it is possible to define what the content of the duties it imposes is, with whatever implications that has for ordinary law.[67] It will be *determinative* where it entirely dictates the scope of the ordinary law applicable in a particular case.[68] While human rights law will often not be determinative in horizontal cases, it is certainly determinate enough for those demands it does make of horizontal relationships to be identified.[69] There are some relatively obvious examples of this: racially restrictive covenants[70] and contracts for slavery or forced labour should not be

[64] Sandra Fredman, *Human Rights Transformed* (OUP 2008) 71.

[65] Durga Das Basu and SS Subbramani, *Commentary on the Constitution of India* (9th edn, LexisNexis, Gurgaon, Haryana, India 2014) 237.

[66] Sandra Fredman, *Comparative Human Rights Law* (OUP 2018) 115.

[67] Fredman (n 64) 70.

[68] Fagan refers to this as '*determinatio*.' See Anton Fagan, 'The Right to Personal Security' in Elspeth Reid and Daniel Visser (eds), *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (Edinburgh University Press 2013).

[69] See the same point, in relation to the duty to protect, in Fredman (n 64) 76; Ursula Kilkelly, 'Protecting Children's Rights under the ECHR: The Role of Positive Obligations' (2010) 61 NILQ 245 260.

[70] *Shelley v Kraemer 334 US 1*.

enforced;[71] patriarchal, racist, or otherwise discriminatory testamentary laws should be struck down;[72] sexual harassment should be prohibited in the workplace; [73] murder and sexual assault should be criminalised.[74] It might be complained that these examples are a far cry from the really difficult cases, but once it is accepted that such cases fall outside the bounds of permissible ordinary law, it becomes apparent that the hard question is what those bounds are, not whether they exist. It is thus possible to *determine* the bounds of what is permissible between private actors, even if the sum total of those bounds is not *determinative* of what ordinary law should positively provide.

An example of the difference between the two can be found in the case of *Law Society v Minister for Transport*, where the Constitutional Court was faced with the question of whether the right to bodily integrity meant that a delictual action against negligent motorists had to exist.[75] The Court did not find this complaint well-founded, ruling that there were many ways in which the right to bodily integrity could be protected.[76] The Bill of Rights – and in particular s. 12 – was not, therefore, determinative of the content of ordinary law in either case. But that does not mean that

[71] *People's Union for Democratic Rights* (n 30).

[72] *Bhe v. Magistrate Khayelitsha* (n 61).

[73] *Vishaka vs State Of Rajasthan* (1997) 6 SCC 241, AIR 1997 SC 3011.

[74] *MC v Bulgaria* (n 45), [150].

[75] *Law Society v Minister for Transport* [2010] ZACC 25, 2011 (1) SA 400 (CC).

[76] ibid, [79]-[80].

a more extreme rule, such as the blanket exclusion of any kind of liability for medical negligence, would not be contrary to s. 12.[77]

For these reasons, notwithstanding that reaching an answer in particular cases may be difficult, human rights law's open-textured nature is no reason not to interrogate its demands in the context of particular private relationships. Indeed, it might be said that same open-textured nature makes clear and rigorous analysis all the more useful.

(3) A Tentative Proposal to Shift the Debate More Generally

In this section, it is tentatively suggested that there may be merits in the adoption of an approach which asks what it is human rights law requires in private relationships more generally – that is, for the resolution of disputes in particular cases, and in the direct/indirect effect debate. This case is only tentative for two reasons: first, this now becomes a question of what the positive law should be, which is jurisdictionally specific and would require development within a particular jurisdictional context; and second, because it is sufficient, for the purposes of this Thesis, to defend asking that question, without more broadly advocating for my conceptualisation of the relationship between human rights law and ordinary law. That said, there are five reasons why it might be valuable to adopt the approach of considering this stage first.

First, this approach ensures that rights are properly interpreted, and avoids irrelevancy in determining their scope. This is so because the way in which the system understands and internalises the demands of human rights law is logically posterior to

[77] This is implicitly accepted by Jafta J in his concurring judgment in *MEC, Health and Social Development, Gauteng v DZ* [2017] ZACC 37, 2017 (12) BCLR 1528 (CC). Such a rule would certainly be inconsistent with the guarantees of the ECHR.

what those demands actually are.[78] When this question is addressed first, the content of rights is assessed (as it should be) from the perspective of the beneficiary, rather than the vagaries of the system.[79] Further, this approach allows for a clear assessment, through the application of the proportionality test, of relevant competing concerns, including the rights of any putative private duty-bearer, and even the integrity of private law.[80]

Second, adopting this approach avoids conflating the content of human rights law with the other constitutional limits which are imposed on courts. The direct effect/indirect effect debate has involved a lot of discussion of those limits, but it should not, in determining *what* the limits of human rights law are, matter *whether* or *how* those limits are given effect in the ordinary law. Whether an incompatibility exists is separate to the question of the constitutional role of the courts in responding to it. The approach of courts to the review of private law statutes illustrates this distinction. In the UK, for reasons of institutional comity, courts are not permitted to interpret statute law beyond that which is *'possible'*.[81] In such a case courts may (but need not) declare

[78] Phillipson and Williams (n 18) 886. See also Gerhard Lubbe, 'Taking Fundamental Rights Seriously: The Bill of Rights and Its Implications for the Development Contract Law' (2004) 121 SALJ 395 395.

[79] Oliver Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't)' (2004) 17 Canadian Journal of Law and Jurisprudence 61 63. This is particularly important if the state is keen to avoid liability in international law, which does not tolerate excuses for international wrongfulness stemming from the way in which the domestic system has arranged itself: see for example Articles 3 and 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, and associated commentary: Yearbook of the International Law Commission, 2001, vol. II, Part Two, pp 36 - 42.

[80] *TK Ananda Sayanan v Joint Registrar, Co-op Societies* [2007] 2007 5 Madras Law J 637, [17].

[81] Human Rights Act 1998, s. 3.

the statute incompatible,[82] which – unlike equivalent remedies in India and South Africa – has no effect on the continuing validity of the statute. That is not because of the substance of the rights at play, but because other concerns of institutional comity and democratic legitimacy interpose. Determining the requirements of human rights law at the first stage, and leaving this issue to a later stage, avoids conflation.

The third (related) reason is that this approach avoids a problematic distinction between common law and statute. There is a significant trend of holding that there is something special about the way in which human rights law interacts with common law, which necessitates an attenuated rights analysis.[83] However, the need to assess the horizontal demands of human rights law is readily accepted in the context of private law *legislation*, in all three jurisdictions, as set out above. This insight has led commentators to refer to cases where legislation regulating private affairs is tested for compliance with ECHR rights by English courts as *'direct statutory horizontality'*.[84] The same is true in South Africa.[85] Likewise, in India, it is readily accepted that statutes governing private legal relationships are amenable to constitutional review: in *Bhau*

[82] *ibid.*, s 4.

[83] *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC); Phillipson and Williams (n 18).

[84] Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2nd edn, OUP 2009), [5.99].

[85] There is some debate about whether legislation dealing with ordinary law relationships is to be reviewed in terms of s. 8(1) or s. 8(2) of the Constitution. *Khumalo* seems to stand for the proposition that where legislation purports to regulate the relationship between private parties, that legislation is not, as such, subject to direct constitutional review under s. 8(1) in private litigation. Rather, reliance must be placed on s. 8(2). In *Daniels*, too, although the question concerned the constitutionally compliant interpretation of a statute, the Court reviewed the law through the lens of s. 8(2). This approach, has not, however, been consistent, as in *Bhe* itself and *Law Society*. See further Stu Woolman, 'Application' in S Woolman, *Constitutional Law of South Africa* (2nd edn, Kenwyn: Juta & Co) [31-50].

Ram v Singh, for example, the amenability of a series of pre-constitutional property law statutes to direct constitutional review was accepted by both majority and minority without any question or explicit discussion.[86] In *Hariharan*, a statute which provided that fathers would have priority over mothers in respect of guardianship rights over their children was interpreted – contrary to the ordinary meaning of the statutory words – so as to comply with the constitutional mandate of gender equality, by holding that this priority did not apply in the father's absence or inability to care for the child.[87] Subjecting private law statutes – but not the common law – to review for compliance with the demands of human rights law is difficult to justify. From the perspective of the children's rights approach, and indeed the international law of state responsibility, such a distinction can make no difference to what the horizontal demands of human rights law actually are.

Fourth, there are legal certainty advantages. There needs to be a sensible scheme for how human rights law is to affect ordinary law, which is predictable enough to allow parties to plan their private legal arrangements and clear enough that the underlying value judgments are overt.[88] Unstructured justice-in-the-case reasoning is one of the key concerns of those who want human rights law to play less of a role in (particularly) private law.[89] Focusing on the question of what human rights law requires

[86] *Bhau Ram v Singh* (1962) 1 SCR 358, AIR 1961 SC 1327.

[87] *Hariharan v Reserve Bank of India* (1999) 2 SCC 228, 1999 SCC OnLine SC 179, [22]-[25].

[88] Sutherland (n 27) 396.

[89] Michael Dafel, 'Curbing the Constitutional Development of Contract Law: A Critical Response to Maphango v Aengus Lifestyle Properties (Pty) Ltd' (2014) 131 SAJHR 271; see Mosekene DCJ's dissent in *Barkhuizen v Napier* (n 83), [98].

means that courts reason by reference to the applicable concerns of principle.[90] It is also important for litigating parties. Where the court is required to investigate the inequality of bargaining power between parties, for example, that should be made clear, so that relevant evidence can be adduced (rather than relying, as Bhana has suggested,[91] on judicial notice, which can import preconceptions and is unfair to parties, who are given no opportunity to properly scrutinise the basis for the decision).

The fifth (and final) reason is that this approach avoids problems where the ordinary law is *'silent'*. There is a strand of thought, exemplified by the judgment of Kriegler J in *du Plessis v de Klerk,* that the difference between the state obligation approach and the private actor obligation approach has the result that the former approach is more limited, and permits private conduct which would be prohibited under the latter, provided that this conduct does not rely on law.[92] This idea comes from the notion that under the state obligation approach the requirements of human rights law attach to law, and not to private individuals' conduct. This means that, where the law is silent, human rights can have no bite and persons are free to act as they see fit.

However, Kriegler J's approach relies on a difficult presumption that where ordinary law does not prohibit or control something, it does not operate at all: in other words, that the duty to protect says nothing about what the law may permit, only what

[90] IM Rautenbach, 'Constitution and Contract - Exploring 'the Possibility That Certain Rights May Apply Directly to Contractual Terms of the Common Law That Underlies Them'' (2009) Journal of South African Law 613 624, 635.

[91] Deeksha Bhana, 'The Law of Contract and the Constitution: Napier v. Barkhuizen (SCA)' (2007) 124 SALJ 269 278.

[92] *Du Plessis v de Klerk* [1996] ZACC 10, 1996 (3) SA 850, [135]. *Du Plessis* concerned the South African Interim Constitution: the subsequent insertion of s 8(2) means that as a matter of law this reasoning no longer applies.

it may prohibit. This is problematic for at least three reasons. *Firstly*, it makes the application of human rights law dependent on whether anyone attempts to enforce it, which is undesirable because the law should presume to command obedience even in cases where it is not directly enforced.

Secondly, the difference between law and non-law is almost non-existent. This can be illustrated with an example. Assume (for example) that a correct interpretation of the prohibition on inhuman or degrading treatment *requires* private law to contain rules imposing liability for violations of a child's bodily integrity by a private school, but that private law in fact does not comply with this requirement. A teacher then assaults a student, and the child sues the school in tort or delict. On Kriegler J's approach, this should go nowhere. No cause of action exists, and the teacher has not invoked the law to assault the child. Should the child attempt to sue, the teacher's response will be a plea for exception or strike out: there is no cause of action made out, and so the claim must be summarily dismissed. However, the teacher *is* invoking the law to seek to dismiss the claim, which must now be resolved in a constitution-compliant manner,[93] by, for example, requiring the judicial development of the law of delict.[94] If this is right, this means that the scope of the private conduct left untouched by the Constitution under such a dispensation is not where private law is *'silent'*, but rather where litigants are too vulnerable or poorly advised (as children at school may

[93] Johan Van der Walt, 'Horizontal Application of Fundamental Rights and The Threshold of the Law in View of the Carmichele Saga' (2003) 19 SAJHR 517 563.

[94] As, for example, in *Carmichele v Minister of Safety and Security* 2001] ZACC 22, 2001 (4) SA 938 (CC).

well be) to know about this convoluted route by which the ordinary law's omissions are in fact subject to constitutional review.[95]

Thirdly, on a more principled level, in its prohibitions and permissions, powers granted and duties imposed, relationships controlled and relationships left unconstrained, the law regulates and determines the distribution of power, vulnerability, wealth, poverty, influence and neglect in society. It must own its tacit permissions as much as it owns its explicit rules. Any other approach ignores the standard-setting role of law,[96] and its expressive function,[97] by failing to recognise that the absence of a rule can convey meaning and influence behaviour just as much as the existence of one.

(4) Conclusion

For the foregoing reasons, it is legitimate (and, tentatively, right) to approach the question of what obligations exist between the child and their private school through the lens of human rights law, and to ask what it is human rights law requires in that relationship. As set out below, this is increasingly something which courts in the three jurisdictions recognise, but it is a very difficult question, and the task of distilling an answer from the principles which have been applied in cases is the task of the next two Chapters.

[95] Dennis M Davis and Karl Klare, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 SAJHR 403, 445.

[96] ibid 444.

[97] Cass R Sunstein, 'On the Expressive Function of Law' (1996) 144 University of Pennsylvania Law Review 2021.

It is important to be clear that the assessment proposed at this stage is *'in-principle'* – in that it does not address the issue of whether there is any constitutional constraint limiting how the court may respond to an inconsistency between human rights law and private law. Further, it is within this stage that the proportionality test is deployed: and it is in fact there that a lot of the concerns which militate in the debate on direct/indirect effect are best dealt with. It is at this stage that the difficult questions of balancing private autonomy, the integrity of private law, and the functioning of the market against the protection of human rights takes place. This happens through the traditional judicial function of identifying the requirements of human rights law, and balancing their fulfilment proportionately against such competing considerations. Accordingly, this is the stage at which the bulk of the analysis should happen, but it is respectfully suggested that this has been somewhat obscured by the direct/indirect effect debate.[98]

The remainder of this Chapter will be dedicated to the final two stages of analysis, in order to show that the approach defended here is not one which neglects the important points raised in the direct/indirect effect debate, but rather treats them as distinct from the question of what substantive human rights law requires.

D. THE SECOND STAGE: DOES ORDINARY LAW PASS MUSTER?

At the second stage, what human rights law requires (the outcome of the first stage) is compared with what the ordinary law currently provides. This then becomes a question

[98] Lester and Pannick (n 8); Du Plessis and Ford (n 12); *Barkhuizen v Napier* (n 83).

of interpreting ordinary law, to determine whether, on its proper interpretation, it complies with the requirements of human rights law.

In each jurisdiction, the interpretation of the ordinary law has been infused – to a greater or lesser extent – with human rights values. This approach has had powerful influence in the jurisdictions under review. Some commentators even argue that values should be the primary vehicle for the effect of human rights law in private relationships.[99] However, the jurisdictional experience shows that, at least in England and South Africa, courts are increasingly comfortable grappling with the direct question of what human rights law requires in particular private relationships, rather than mediating it through values. After a review of that comparative experience, it will be explained why the application of human rights *values* is no substitute for asking that question directly.

(1) Jurisdictional Survey

(a) South Africa

In South Africa, there is explicit textual mandate to apply constitutional values in s. 39(2) of the Constitution:

> *When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*

This section is to be distinguished from s. 8(3), which provides:

[99] Phillipson and Williams (n 18).

> *When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -*
>
> > *a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and*
> >
> > *b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).*

The Constitutional Court has until recently expressed a consistent preference for human rights to take effect in private relationships through constitutional values pursuant to s. 39(2), rather than grappling with s. 8(2), which provides for direct horizontal effect, or s. 8(3), which applies only where there is an inconsistency between common law and the Bill of Rights (in contrast to s. 39(2), which is generally applicable).

In *Barkhuizen v Napier*, the Constitutional Court was faced with contractual clauses which limited access to court, a protected right under the Bill of Rights. It held that the correct approach was to give effect to the Bill of Rights in the contractual context through the doctrine of public policy. There was to be a two-stage approach: firstly asking whether the term offended against public policy on its face, in which case it would not be enforced, and then secondly asking whether, in the precise context in which the parties found themselves, the enforcement of the term would be contrary to constitutional values.[100] The majority decision in *Barkhuizen* has been much criticised.[101] A particular criticism has been that it is analytically flawed. Woolman criticises the decision for failing to analyse the case through the lens of s. 8(2).[102]

[100] *Barkhuizen v Napier* (n 83).

[101] See the dissent of Sachs J: ibid.

[102] Stu Woolman, 'The Amazing, Vanishing Bill of Rights' (2007) 124 SALJ 762 775.

Mediating horizontal rights through values, he argues, denudes and undermines the substantive rights themselves, which are, at least in some circumstances, intended to apply horizontally. *Barkhuizen* was, until *Pridwin*, applied consistently in contract cases. Values-based reasoning was also prevalent in delict: in *Carmichele*, the values underpinning the Constitution – especially the accountability of the state – were used to extend the application of the delict of negligence to situations where the police and prosecutors failed to prevent a person from physically attacking and seriously injuring another. The Constitutional Court held that the High Court had to consider developing the common law, in light of the positive state obligation to protect women from violence,[103] drawing on the Constitution's *'objective normative value system.'*[104]

However, there has been a significant recent shift in the Constitutional Court's approach to horizontal human rights. In *Pridwin*, the Constitutional Court explicitly abandoned its preference for indirect effect over direct effect, in light of criticisms such as Woolman's;[105] a step arguably portended by the strong application of direct horizontality in *Daniels*.[106] What this means for the approach in *Barkhuizen* is not entirely straightforward. The majority observed that whether *Barkhuizen* falls to be applied, or whether instead the direct application of rights is more appropriate, will often depend on how the parties have pleaded their cases. It is therefore clear that *Barkhuizen* remains good law, in the sense that a case based on the indirect effect of

[103] *Carmichele v Minister of Safety and Security* (n 94), [61].

[104] ibid, [55].

[105] *Pridwin (CC)* (n 1), [130].

[106] *Daniels v Scribante* (n 57).

the Constitution can be pleaded out in accordance with its requirements, but it is unclear why a party would ever choose this over direct effect.[107] It is also clear that the Constitutional Court is ready and willing, where necessary, to address the question of the horizontal demands of the Bill of Rights directly.

(b) England

In England, too, it is human rights *'values'* which have resulted in some of the most ground-breaking changes to private law, even though there is no explicit textual warrant for this of the sort applicable in South Africa. In *Campbell v MGN*, the House of Lords was faced with the question of whether to extend the tort of breach of confidence to protect a celebrity who had been photographed attending a Narcotics Anonymous meeting. Lord Nicholls held that:

> *The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence. As Lord Woolf CJ has said, the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action: A v B plc [2003] QB 195, 202, para 4. Further, it should now be recognised that for this purpose these values are of general application. The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.*[108]

One very recent Court of Appeal decision provides an interesting example of focus on the precise demands of human rights law, such that (if it is upheld) there would now arguably be a greater focus on the demands of human rights law, rather than the

[107] Tom Lowenthal, 'AB v Pridwin Preparatory School: Progress and Problems in Horizontal Human Rights Law' (2020) 36 SAJHR 242.

[108] *Campbell v MGN* [2004] UKHL 22, [2005] 1 WLR 3394, [17].

mediation of common law through human rights values. In *Fearn v Tate*, one of the issues was whether the tort of private nuisance should be developed by reference to Art. 8 ECHR to render overlooking of a property tortious. The Court of Appeal held:

> *In principle, the analysis should have been to ask whether, if the tort of nuisance does not otherwise extend at common law to overlooking: (1) there was nevertheless an infringement of Article 8; and (2) if so, whether it is appropriate to extend the common law in order to provide a remedy for the claimants and so avoid a breach of HRA 1998 s.6 on the part of the courts as a public authority.*[109]

This approach is clearly one which places the demands of human rights law in a private relationship front and centre, rather than mediating it through values. At the time of writing, permission to appeal to the Supreme Court has been granted. The hearing of the appeal took place on 7-8 December 2021 and judgment is awaited.

(c) India

In India, by contrast, there has been quite a lot of inconsistency, perhaps arising from a combination of the delineation between civil actions and writs under Art. 32 and Art. 226;[110] the relative reticence of judicial development of private law;[111] and the far broader acceptance of horizontal fundamental rights, with a correspondingly reduced need to consider private law the vehicle for the enforcement of rights.[112] This

[109] *Fearn* (n 1), [88].

[110] Balganesh, 'The Constitutionalisation of Indian Private Law' in Sujit Choudhry, Khosla Madhav and Pratap Bhanu Mehta, *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 687.

[111] ibid 685.

[112] MP Singh, 'India' in Jörg Fedtke and Dawn Oliver (eds), *Human Rights and the Private Sphere* (UT Austin Studies in Foreign and Transnational Law 2007).

inconsistency makes it difficult to identify the kind of trend identified above in respect of England and South Africa.

In *Zoroastrian Cooperative,* the Supreme Court held that where an entity was not part of the *'state'* within the meaning of Art. 12, its contractual rights and obligations could not be reviewed for compliance with the Constitution.[113] The Constitution was held to protect the right to contract freely (notwithstanding the absence of any explicit provision to this effect), even where to do so would limit the application of rights, and that the doctrine of public policy in s. 23 of the Indian Contract Act could not be used as a backdoor to open up contractual terms to constitutional scrutiny.[114] This seems to preclude a significant role for human rights and their values, at least as far as contract law is concerned.[115] However, it is not quite as simple as that. *Zoroastrian Cooperative* concerned the interpretation of a specific statute in light of its policy, rather than purporting to set out the *general* approach under the Indian Constitution, and even if it did so purport, a single two-judge decision is hardly overwhelming authority.[116]

In any event, there is certainly a significant role for constitutional values in the context of the interpretation of legislation. Firstly, the values and principles set out in

[113] *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632, AIR 2005 SC 2306, [26].

[114] ibid, [29].

[115] Stephen Gardbaum, 'Horizontal Effect' in Sujit Choudhry, Khosla Madhav and Pratap Bhanu Mehta, *The Oxford Handbook of the Indian Constitution* (OUP 2016) 608; Vardhan and Narayan, *Pollock and Mulla's The Indian Contract and Specific Relief Acts* (15th edn, LexisNexis 2017) 535.

[116] Gardbaum (n 115).

the Preamble to the Constitution and the Directive Principles of State Policy[117] are clearly important in the interpretation of the Constitution and legislation.[118] In addition, notwithstanding *Zoroastrian Cooperative*, it has been recognised that the values can be important in the application of public policy.[119] This is clearly an application of 'values' rather than 'rights', with the court refracting rights issues through public policy, and particularly, social and economic justice.[120]

Further, the substantive rights themselves have on occasion been effectively transplanted into private law, and it is left unclear whether this is through the medium of values or in some other way. In *Rajagopal*, the Court dealt with the question of whether a biography of a convicted murderer could be published by the press, where the prisoner did not wish to see the book published.[121] The Court distinguished between the tortious right to privacy and the constitutional one, but seemed to dictate the content of the former wholly by reference to the balancing of interests required by the latter.[122]

[117] What Bhatia terms *'structuring values'*, Gautam Bhatia, 'The Directive Principles of State Policy' in Sujit Choudhry, Khosla Madhav and Pratap Bhanu Mehta, *The Oxford Handbook of the Indian Constitution* (OUP 2016) 654.

[118] MP Jain, Ruma Pal and Samaraditya Pal, *Indian Constitutional Law* (6th edn, LexisNexis Butterworths Wadhwa Nagpur 2010) 1486–89.

[119] *CIWTC v Brojo Nath Ganguli* (1986) 3 SCC 156, 1986 SCC (L & S) 429; *Delhi Transport Corporation vs DTC Mazdoor Congress* (1991) SCC Supp (1) 600, AIR 1991 SC 101 133.

[120] *Balmer Lawrie & Co Ltd & Ors vs Partha Sarathi Sen Roy* (2013) 8 SCC 345, (2013) 3 SCC (Civ) 804, [19].

[121] *Rajagopal vs State of TN* (1994) 6 SCC 632, AIR 1995 SC 264.

[122] See Gautam Bhatia, *Offend, Shock or Disturb: Free Speech under the Indian Constitution* (OUP 2016) 224.

(2) Values are no Substitute for Law

The central role which values have played has, perhaps, obscured the importance of the first stage of analysis proposed here. At least in South Africa and England, the most recent authority shows a recognition that the concept of human rights values is no replacement for, and rather coexists with, a rigorous application of human rights law in determining whether the ordinary law complies with the demands of human rights law. For the following three reasons, that approach is the right one.

First, a focus on values might obscure that there is in fact no rights violation at all, in cases where that is so. If the ordinary law's provisions are either (a) not contrary to any duty owed by a private actor at all; or (b) justified as a proportionate means of achieving a legitimate aim, then no question of indirect or direct effect arises, because *human rights law simply does not require any change to the ordinary law in such a case*. In such a case, human rights values may help a court choose between different interpretations of ordinary law, but there is no inconsistency with human rights law: the rights simply do not bite.

Second, insofar as preference for values is really a vehicle for concern about existing common law doctrine, method, and its balance of interests,[123] or for the proper role of the courts,[124] these are not issues which are relevant to the in-principle demands of human rights law. They might justify judicial reticence to respond to an inconsistency between the demands of human rights law and ordinary law (as set out

[123] *Barkhuizen v Napier* (n 83); Du Plessis and Ford (n 12) 312.

[124] Phillipson and Williams (n 18).

below), or amount to a proportionate means of achieving a legitimate aim which justifies an infringement of a right (an issue for the first stage of the analysis). However, they are not relevant to the initial question of what human rights law – absent substantive or institutional justification – demands, and do not justify reducing those rules of law to *'mere'* values.

Third, insofar as the concern is determinacy, that had been addressed above. In any event, if the goal is to cure indeterminacy, it does not add determinacy to replace rules of law with the even more nebulous concept of values.[125] If the complaint is that rights allow unarticulated biases and political reasoning to seep into legal adjudication, values do so to a much greater degree.[126]

(3) Conclusion

For those reasons, it is suggested that recourse to values in interpreting and developing the ordinary law sits alongside, and is no alternative to, analysis of what human rights law requires in a particular private relationship. The outcome of that analysis must be compared with what it is that ordinary law provides – whether interpreted through human rights values or otherwise.

[125] Sutherland (n 27) 407; FDJ Brand, 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 SALJ 71, 86.

[126] Davis and Klare (n 95) 408.

E. THE THIRD STAGE: WHAT CAN COURTS DO IF ORDINARY LAW DOES NOT COMPLY

If the ordinary law is found to contain a rule or gap which human rights law does not permit, the question would then become whether the court can or should do anything about that.

There are constitutional limits on the powers of courts to correct human rights deficiencies in the ordinary law. The experience, across England and South Africa at least, has been that such a finding does not lead to an automatic change in the ordinary law, achieved by the judiciary. Rather, courts must weigh up certain factors in deciding whether, and to what extent, to change ordinary law. The court has to consider whether it is best placed to develop the law, or whether it should leave development to the legislature. This will be *'ultimately, a matter of legal and political philosophy'*,[127] one which leaves open the possibility that ordinary law will be applied by the court in a form which is impermissible as a matter of human rights law. Whether that will be so in any particular case is obviously a highly jurisdictionally specific question. There is likely to be great variation in the scope of the constitutional constraint, and in the extent to which courts can either correct defects themselves, or require the other branches of state to do so.

It is however possible to identify certain common constitutional constraints in the literature across the three jurisdictions under review. There are (at least) four such constraints: certainty and fairness to defendants; the separation of powers and

[127] Hunt (n 2) 441.

institutional competence; the integrity of private law; and the impermissibility of developing new causes of action. Each is briefly analysed below. For the avoidance of doubt, these factors relevant to constitutional constraint are not part of the rights analysis. They are different to the kinds of concerns which emerge during the rights analysis, and each kind of concern should be kept in its distinct domain, if errors and inconsistencies are to be avoided. It is accordingly at this stage, and not earlier, that concerns of *'constitutional constraint'* should come into play.[128]

(1) Certainty and Fairness to Litigants

The first concern, which may cause the court to feel constitutionally constrained and unable to develop the law, is that for it to do so would be too drastic and unfair a shift for the particular litigants in the case before it. There is a broad and a narrow version of this concern.

The broad concern is that human rights law might require the ordinary law to contain rules which are insufficiently certain. However, this is appropriately dealt with at the first stage of the analysis: certainty in ordinary law's application will clearly be relevant in determining its required form, and might justify deviation from human rights law's requirements as a proportionate means of achieving a legitimate aim.[129] Put shortly, human rights law is unlikely to require that ordinary law be intolerably uncertain, but in any event, whether it does or not is properly dealt with at the first stage, not as a matter of constitutional constraint.

[128] Phillipson and Williams (n 18) 902.

[129] Dafel (n 89) 285.

The narrow concern is fairness to the particular litigants in the particular case. The narrowness of this conception of fairness to litigants warrants some caveats about its significance. First, if this is the reason that judges are not bringing ordinary law into compliance, they should make this explicit, with the effect that, from then on, litigants will be on notice that the impugned doctrine of ordinary law will not be long for this world, reducing the unfairness of development in a later case. Second, this fairness must be assessed in a contextual way, always with one eye on the fact that avoiding the unfairness means leaving the other party without redress where a right has been violated. Third, it may be possible to limit the retrospective effect of remedies or law changes,[130] and if it is, then this point falls away. Fourth, the force of the principle against retrospective legal changes must be seen in context: where human rights are at stake, only so much protection from retrospectivity is available. In *SW*, the European Court of Human Rights held that the prosecution of a husband who had raped his wife at a time when a marital rape exception was thought to be part of the criminal law did not violate the Convention's prohibition on retrospective criminalisation. The Court was clearly particularly swayed by the human rights at stake, holding that:

> *...the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom*.[131]

[130] S. 172, South African Constitution; Jain, Pal and Pal (n 118)1726-30; *National Westminster Bank v Spectrum Plus* [2005] UKHL 41, [2005] AC 680, [39]-[42].

[131] *SW v United Kingdom* (1996) 21 EHRR 363, [44].

Where a change less than the imposition of criminal liability is at issue, the force of this concern diminishes even further.

(2) Separation of Powers and Institutional Competence

The second concern is the separation of powers. Overzealous judicial law-making is to be avoided,[132] and this holds true under transformative constitutionalism[133] as well as in more conservative jurisdictions, such as England[134] (although of course what counts as *'overzealous'* will vary[135]). There may also be constitutional limits on how such challenges are to be brought,[136] such as the doctrine of constitutional subsidiarity,[137] or rules of priority for constitutional resolution.

The extent to which remedying a defect in ordinary law should be left to the legislature is a deeply contested, jurisdictionally-specific question, and will turn on a whole variety of factors. Primarily, of course, it will turn on what the explicit limits imposed by the constitution are: for example, development of the law under s. 8(3) of

[132] Lubbe (n 78) 408; *Carmichele v Minister of Safety and Security* (n 94).

[133] For a definition of transformative constitutionalism, see Justice Pius Langa, 'Transformative Constitutionalism' (2006) 17 Stellenbosch Law Review 351; see also Davis and Klare (n 95).

[134] Langa (n 133) 375.

[135] Mark Tushnet, 'The Relationship between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect' in András Sajó and Renáta Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing 2005) 179, 180; Timothy Fish Hodgson, 'The Mysteriously Appearing and Disappearing Doctrine of Separation of Powers: Toward a Distinctly South Africa Doctrine for a More Radically Transformative Constitution' (2018) 34 SAJHR 57, 10.

[136] *SAMSA v McKenzie* [2010] ZASCA 2, 2010 (3) SA 601 (SCA).

[137] Tushnet (n 135) 168–170.

the South African Constitution must take place through the common law, and s. 4 of the HRA means that courts cannot declare statutes invalid.

There are two key angles commentators take, and, as they are different concerns, it is important to separate them out. The first is whether there are democratic reasons to leave the matter to the legislature,[138] perhaps because of the scale of the necessary change,[139] the political nature of the issue,[140] and the notion that the courts do not necessarily have a monopoly on the interpretation of rights.[141] The second is whether there are effectiveness reasons to leave it to the legislature: in other words, the legislature will make better law, perhaps because of the polycentricity of the issue, especially in the context of globalised commerce (such as large multi-national educational providers),[142] the complexity of the modern regulatory state,[143] the need for stability in society,[144] or the nature of judge-made law.[145]

This issue is of importance, but that must not be allowed to obscure the need for critical scrutiny where this constitutional constraint is at issue.[146] The fact that a failure

[138] Davis and Klare (n 95) 508.

[139] Tushnet (n 135) 179.

[140] David Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (2010) 57 Theoria 1 22; *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, [128].

[141] Hodgson (n 135) 26.

[142] Shiv Shankar Singh, 'Privacy and Data Protection in India: A Critical Assessment' (2011) 53 JILI 663 677.

[143] Tushnet (n 135) 180.

[144] *Zoroastrian Cooperative Housing Society v District Registrar* (n 113), [32].

[145] Tushnet (n 135) 177.

[146] Hodgson (n 135) 26.

to correct the defect leaves a human rights violation unremedied means that the court should critically examine claims that they are constitutionally constrained in either of these ways, with due regard given to the arguments which might tend against constitutional constraint, such as the existence of relevant international treaties,[147] or the appropriateness of judicial remedies.[148] At least three causes for concern, pointing towards the need for care in applying this constraint, might be noted. First, both of these reasons lose some (but not all) of their force if there is reason to think the legislature will not act.[149] Second, the constitutional allocation of responsibility for the protection of rights necessarily rebalances the relationship between judiciary and legislature,[150] and in the context of rights protection, more *'judicial activism'* may be expected than outside of that context.[151] Third, if there is only one permissible way ordinary law could comply with human rights law, then there will be little point in leaving that to the legislature, because there will be only one course of action open to it (although such cases are likely to be vanishingly rare, given the points about determinativeness made above).

The constitutional constraint is important, wherever it happens to lie in a particular constitutional landscape, and courts should respect it. Respect for the proper limits of constitutional power is not, however, one-way: it demands critical scrutiny to guard against attempts by opportunistic litigants to plead the constraint in order to deny

[147] *Vishaka* (n 73).

[148] *Consumer Education & Research Centre vs Union of India* (n 33) 31.

[149] See, for example, Sachs J's dissent in *Barkhuizen v Napier* (n 83), [184].

[150] Davis and Klare (n 95) 422.

[151] Sutherland (n 27) 402.

the court the role properly allocated to it.[152] The judiciary will generally have at least some constitutional role in curating the law for compliance with fundamental rights.[153] This has been especially so in India, where courts have carved out for themselves a very significant role: issuing directions to ensure respect for the fundamental rights contained in the Constitution;[154] in *Vishaka*, going so far as to set out a quasi-legislative code targeting harassment at work;[155] and in *Avinash*, ordering compliance with *'bare minimum safety standards'* for schools set out by the Court.[156]

(3) New Causes of Action

A huge amount of debate has gone in to whether new causes of action (or defences) should be created by courts. This is seen by many as the central distinction between direct and indirect effect, with advocates of judicial restraint arguing that courts should, at most, develop existing (tortious/delictual) causes of action to protect rights.[157]

It is respectfully suggested that the effort which has been expended on this question has been disproportionate. There is, at most, a *'paper-thin'* distinction between developing one cause of action and creating another.[158] This is best illustrated

[152] Davis and Klare (n 95) 508.

[153] *Carmichele v Minister of Safety and Security* (n 94), [36].

[154] *People's Union of Civil Liberties vs Union of India* (2003) 4 SCC 399, AIR 2003 SC 2363 10; *Parmanand Katara v Union of India* (1989) 4 SCC 286, AIR 1989 SC 2039.

[155] *Vishaka* (n 73).

[156] *Avinash Mehrotra vs Union Of India* (2009) 6 SCC 398, 2009 SCC OnLine SC 751, [35].

[157] Lester and Pannick (n 8) 333–334.

[158] Hunt (n 2) 432.

by the debate concerning whether the *Campbell* case developed a *'new'* tort in English law.[159] The mere fact that it is difficult to tell whether a new tort has emerged suggests that there is little separating the development of existing causes of action and the creation of new ones. The question is whether creating a new cause of action (as opposed to development of an existing one) engages any relevant constitutional concerns which *'development'* to similar effect would not.

There clearly are some relevant differences between development and creation of causes of action. For example, this issue might be important for civil procedure and private international law. For example, in *Vidal-Hall*, the English Court of Appeal had to decide, for the purposes of a conflicts of law issue, whether the cause of action developed in *Campbell* was a tort or an equitable action.[160] Further, it might be argued, from a practical perspective, that the important thing about having a new cause of action is that it can get a litigant before a court, which can then develop the cause of action to meet the case.[161] This argument is not without its problems. As discussed above, even if there is no cause of action which seems to currently apply, the way that is usually resolved is through a strike out or summary judgment application – an exercise of judicial power which gets the litigants in front of a court.

However, the question is whether these differences are constitutionally relevant. It bears emphasis that *'development'* of a cause of action can also lead to judicial overreach – and so the question is whether there is anything constitutionally special

[159] Bennett (n 25) 99.

[160] *Vidal-Hall & Ors v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003.

[161] Phillipson (n 9) 835.

about the creation of new causes of action specifically. It is hard to see how this could be so when there is so little formality involved in creating new causes of action,[162] and when courts have been willing to do so if a novel legal problem emerges.[163] In *Thomas v National Union of Mineworkers*, a group of miners sought to cross a picket line to return to work, and complained that the shouting of abuse at their bus as it crossed the picket line amounted to a tort. No previously recognised nominate tort seemed to cover this behaviour, but nonetheless, Scott J was prepared to recognise a new tort to cover their conduct. This was a novel development, a *'Dworkinian flight to principle.'*[164] The High Court has expressed some doubt about the approach adopted by Scott J,[165] and some commentators have expressed doubt about the wisdom of the creation of new torts,[166] especially in the context of the right to strike.[167] Nonetheless, the tort in *Thomas* seems to still exist,[168] and even some commentators concerned by Scott J's rather freewheeling approach to law do not complain that it was a *constitutional* problem.[169] It would be odd if new causes of action could be invented to render tortious

[162] Hare (n 25) 534.

[163] Deeksha Bhana and Marius Pieterse, 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' (2005) 122 SALJ 865, 871.

[164] Lee and Whittaker, 'Rights, Wrongs, Law and Non-Law' (1986) 102 LQR 35, 36.

[165] *News Group Newspapers Ltd v Society of Graphical and Allied Trades* [1987] ICR 181, 206.

[166] MI Tregilgas-Davey, 'Unnecessary Invention: A New Tort of Trespass to the Person Should Be Left to Parliament' (1993) LS Gaz, 2 June, 90 (17).

[167] Roger Benedictus, 'The Use of the Law of Tort in the Miners' Dispute' (1985) 14 ILJ 176, 182–183.

[168] *Khorasandjian v Bush* [1993] QB 727, 738.

[169] Lee and Whittaker (n 164).

behaviour arguably protected by the rights to free assembly, association and expression; but not to safeguard rights in private relationships. In that light, it becomes very hard to defend the notion that there is anything special about the creation of new causes of action. (It is a matter for another day under what circumstances new torts *should* be recognised in English law – and *Thomas* is a salutary reminder of the dangers of doing so without clear analysis and due regard for the rights and freedoms of others. The point here is simply that it has not been suggested by any commentator, so far as I can identify, that the development of a new tort was wrong or unlawful because it was a *constitutional* overreach.)

In short, there is no good reason to discover a specific constitutional constraint against the creation of new causes of action, *because* they are new causes of action, rather than because of their content and the desirability of the way they change the law. This is not to say that rapid or radical changes should not be carefully considered, but it is their radicalness and rapidity which lead to that conclusion, not the name given to the cause of action by which they are effected. Placing too much emphasis on the distinction between creating and developing causes of action could lead to arbitrariness: all will come to depend on whether an existing cause of action can be contorted to meet the requirements of human rights law, rather than consideration of any of the actual constitutional questions which might be attendant in a court's choice to develop the law.

For those reasons, it is suggested that this alleged constitutional constraint has been subject to disproportionate emphasis in the literature, and should not be a significant factor when a court decides how to respond to an inconsistency between human rights and ordinary law.

(4) The Integrity of Private Law

Finally, some commentators point to the integrity of private law as an important factor when courts are faced with the question of whether to develop the ordinary law or not,[170] and this tendency has been reflected in decisions across all three of the jurisdictions.[171] Du Plessis and Ford describe this as a requirement that *'the manner of transformation be legitimate according to the culture of the system.'*[172] In a related but slightly distinct guise, this manifests itself in concern for the *'common law method'*[173] – the idea being that *'legitimacy'* stems from the common law's incremental method. Similar arguments could be made about other bodies of law to which this analysis might apply, such as criminal or family law, but it is in the context of private, common law, that this concern seems to be most raised. In *Fearn*, the Court of Appeal expressed concern that an extension of the tort of nuisance would *'significantly distort the tort in some important respects'*.[174] There are two points to be made about this.

First, if these additional concerns are important, then the place for them is at the first stage, where what is required of private law is worked out. That balancing analysis should include these concerns. It is no answer to argue that human rights law does not have the same lexicon of principles as private law, and so scrutinising it for compliance

[170] Du Plessis and Ford (n 12) 305–306.

[171] *T.K. Ananda Sayanan v. Joint Registrar, Co-op. Societies* (n 80), [17]; *Carmichele v Minister of Safety and Security* (n 94), [55]; *Michael v The Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732, [102].

[172] Du Plessis and Ford (n 12) 311.

[173] ibid 305.

[174] *Fearn* (n 1), [91].

with human rights loses these valuable private law principles.[175] Human rights law has always recognised the need flexibly to balance its claims against other, competing, and genuinely incommensurable concerns, some of which are external to the logic of human rights law. There is no reason the values and interests which led to the existing structure of private law could not be considered there.[176] To the extent this is a concern of constitutional constraint, concerns such as those expressed by the Court of Appeal in *Fearn* are really just questions of the separation of powers, as is made explicit in paragraph 94: *'if there is a legal lacuna as to remedy, that is best left to the legislature rather than to the courts fashion to fashion.'*

Second, this concern has been over-emphasised relative to its importance. There are two categories of concern which can be identified.

Firstly, concern is expressed that the addition of human rights principles might undermine the coherency of private law. For example, Du Plessis and Ford argue that that treating *'reasonableness'* as a portal for the direct importation of human rights values is problematic, on the ground that in approaching the cost-benefit analysis of reasonableness, there may be concerns at play which are not part of the lexicon of human rights principles.[177] However, in circumstances where the current state of private law will have been found to be violative of human rights, it is odd to argue that the balance it has struck between competing interests has intrinsic merit. It would surely

[175] PJ Sutherland, 'Ensuring Contractual Fairness in Consumer Contracts after Barkhuizen v Napier 2007 5 SA 323 (CC) - Part 2' (2009) 20 Stellenbosch Law Review 50, 51.

[176] Davis and Klare (n 95) 412.

[177] Du Plessis and Ford (n 12) 310.

be desirable to jettison those parts of private law which violate human rights.[178] Insofar as it is suggested that private law is shielded from critical scrutiny by hiving it off to its own domain, it might be retorted that law handed down and developed from that applicable many decades ago is precisely the kind of law warranting such scrutiny. The common law reflects the status quo, and ingrained assumptions about the distribution of power in society.[179] That status quo is not self-legitimating, but is rather a collection of *'historically and culturally encased practices.'*[180] Human rights scrutiny would provide a salutary basis for expunging from private law those aspects which have ceased to be desirable but linger, having passed into preconception and axiom.[181]

Secondly, it is suggested that by drawing excessively on human rights law, common law solutions to problems are neglected.[182] This concern is addressed by distinguishing between the three stages of analysis proposed here. The need to develop the common law arises only if the incompatibility with human rights law cannot be resolved from within private law itself. If private law has the internal solutions to bring itself in line with human rights law, no question of the constitutional constraint arises.

Finally, as a concluding point on this topic, it should be noted that a lot of the debate about *'horizontality'* presumes that *'horizontality'* refers to the situation where a private law cause of action directly matches the content of the right in question. As

[178] Bhana and Pieterse (n 163) 894.

[179] Davis and Klare (n 95) 411.

[180] ibid 426.

[181] Langa (n 133) 353.

[182] Van der Walt (n 93) 524.

we have seen, this presumption is built into the South African constitutional scheme, and rife in the English commentary. However, this is not, of course, the only way in which rights could be horizontally applicable: this could also take place through direct on-the-constitution claims,[183] or criminal or regulatory or family law.[184] This raises the fascinating question (to which an answer will be proposed in Chapter 6) of how the answer to the question of what human rights law requires in a private relationship interacts with state obligations to respect, protect and fulfil human rights. This may point towards the need to develop or adopt rules, remedies, and processes which go beyond the paradigm of ordinary private law litigation, if children's rights are to be realised through law and the accountability gap set out in Chapter 1 is to be closed.

For those reasons, it is suggested that the integrity of private law is not an important constitutional constraint, and certainly not as important as its role in the literature and case law would suggest.

F. CONCLUSION

For the reasons given above, it is legitimate to approach the question of the human rights obligations of private schools by asking directly what it is that human rights law requires in the relationship between private school and student. Whether one approaches the human rights implications of this relationship as one of direct horizontality, or one of control of ordinary law by human rights law, the foundational

[183] Davis and Klare (n 95).

[184] Joanna Krzeminska-Vamvaka, 'Horizontal Effect of Fundamental Rights and Freedoms - Much Ado About Nothing? German, Polish and EU Theories Compared after Viking Line' [2009] Jean Monnet Working Paper 11/09 10.

question of principle is more or less the same: what does human rights law demand between child and private school? This is so regardless of the constitutional constraint, or the content of the ordinary law. This approach is one centred on the beneficiary, consistent with the analysis set out in Chapter 2, which did not identify, within children's rights law's lexicon of principles, any which would suggest that the identity of the actor or vagaries of the system are important for the purposes of determining what obligations children are owed.

This approach unlocks the potential of horizontal human rights law. It is, as will be shown in Chapters 5 and 6, an untapped source of principle. Even in jurisdictions with vertical-only texts, fully developing the duty to protect could reveal an expansive lexicon of principles which might go some way towards meeting determinacy concerns, and allow for the progressive development of human rights law, in the manner in which it has been developed in India.[185] First, Chapter 5 will review the approach taken in the three jurisdictions to this question and the analytical challenges attempting to answer it has thrown up. Then, Chapter 6 will defend a framework for the principled resolution of the question which overcomes these challenges.

[185] Brice Dickson, 'Positive Obligations and the European Court of Human Rights' (2010) 61 NILQ 203 206.

CHAPTER 5

HORIZONTAL HUMAN RIGHTS DUTIES: COMPARATIVE DOCTRINE AND ANALYTICAL CHALLENGES

A. INTRODUCTION

It is an unremarkable observation that every child has a right to education. One might therefore expect that there is a ready and sensible answer to the obvious correlative question of who is responsible for giving effect to this right, or, to put it another way, who bears the duties associated with it, and how those duties are allocated between different actors. One would be disappointed.[1]

This Chapter is therefore the first of two dealing with the question of how to analyse the horizontal duties of private schools, through reflexive study of (a) the specific question of the obligations of private schools and (b) the general question of how the duties of private actors are to be determined.

As discussed in Chapter 1, private schools are as able to interfere with children's human rights as public/state schools.[2] However, as shown in Chapter 3, a private school, at least if it is independent and fee-charging, is probably going to be able to convince the court that it should not be treated as part of the state, and thus subject to

[1] David Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (2010) 57 Theoria 1.

[2] Strictly, it is question-begging to describe private schools as interfering with children's rights, as this presupposes that they have a duty not to. However, for ease of reference, this is the language used here to refer to the protected interests with which, in classical, vertical human rights law, the state is not permitted to interfere, unless that interference is justified.

the full panoply of human rights obligations. The question of the private school's horizontal obligations therefore assumes critical importance.

Chapter 4 defended the approach of answering that question by simply asking what it is that human rights law requires in the relationship between private school and learner. That is a beneficiary-centred approach, which best gives effect to the principles analysed in Chapter 2, pursuant to which the normative starting point, in the context of private education must always be the rights of the child. As argued in Chapter 4, the question of what human rights law requires can be answered independently of whether the mechanism by which this requirement is fulfilled is indirect effect, direct effect, or the duty to protect (although for ease of reference, I refer to the duties which are required between private actors as *'horizontal'* duties, without regard to the particular mechanism by which they are imposed).

This Chapter will accordingly analyse when, as a matter of comparative doctrine, the law imposes (or requires the imposition of) duties on private schools, and identify the analytical challenges which have arisen where the question of the duties of private schools has fallen for determination.

In summary, in all jurisdictions examined here, to a greater or lesser extent, courts take into account six key factors: (i) the nature of the right, its importance, and the correlative severity of the violation; (ii) private autonomy and countervailing rights; (iii) the power of the putative duty-bearer and its capacity to violate rights; (iv) the vulnerability of the beneficiary; (v) the social role of the putative duty-bearer; and (vi) the public interest. This Chapter will argue that, applied to the context of private education, these factors suggest that private schools should bear at least some human rights duties.

This review of case law also identifies three key analytical challenges which any coherent account of horizontal human rights must overcome. These three challenges are: (i) overcoming generality and articulating choices; (ii) explaining how competing rights and interests, especially private autonomy, are to be factored in; and (iii) accounting for the division of responsibility between the state and different private actors. The argument will be developed in this Chapter by first, sketching out the basic approach to direct horizontal effect in the jurisdictions under review (and showing them to be insufficiently precise); second, attempting to remedy that lack of precision by unpacking the factors which are relevant to the allocation of duties; and third, identifying the analytical challenges revealed by this review of the comparative case law.

The goal in this Chapter is thus to review the law in each of the jurisdictions under review, and attempt to distil principles which govern the answer to the question of when private (educational) actors will bear duties. As explained in Chapter 1, comparative law provides an excellent lens through which to approach the question of private duty-bearing in education, given the three jurisdictions under review. These jurisdictions cross-cite regularly, especially in the often historically contingent context of the boundary of the public and the private, which makes comparative analysis not just permissible but necessary.[3] It is also important because direct horizontal effect of human rights remains something of a '*terra incognita'* – while indirect effect (a flawed term used for convenience only) has a significant body of global practice behind it,

[3] P Ishwara Bhat, 'Comparative Method of Legal Research: Nature, Process and Potentiality' (2015) 57 JILI 147 158. This is particularly salient because the public-private divide is an excellent example of historical contingency.

direct effect does not,[4] meaning that cross-jurisdictional learning from the few examples there are is even more important. Further, identifying common issues on a high level of abstraction allows better understanding of the spectra along which the jurisdictions differ, which is particularly important given the globalised education industry, and the need for lawyers to develop a robust response to this globalisation,[5] including by, should it come to it, deciding where to litigate against transnational actors.[6]

However, as set out in Chapter 1, different legal systems operate in different social contexts, and this will have even more force in such a politically charged field as this. The exercise in the next two Chapters is not therefore to dictate or presuppose what, contextually, the answers to these difficult questions should be, or to undertake the exceptionally risky task of *'transplanting'* solutions from one constitutional order to another.[7] The answers reached in the different justifications may well end up being different – indeed, one would expect the answers to be different, given the need to tailor different constitutions to different histories, cultures, political traditions, and socio-economic circumstance[8] – but this does not necessarily mean that similar questions are not posed, or answered in similar ways, especially where a basically similar problem

[4] Dawn Oliver and Jörg Fedtke, 'Comparative Analysis' in Dawn Oliver and Jörg Fedtke, *Human Rights and the Private Sphere* (UT Austin Studies in Foreign and Transnational Law 2007) 488.

[5] Bhat (n 3) 152.

[6] ibid.

[7] *Wittman v Deutscher Schulverein, Pretoria* 1998 (4) SA 423 (T) 73.

[8] Oliver and Fedtke (n 4) 519.

prompts these difficult questions in all jurisdictions: the growth of private power.[9] It is vital to acknowledge the significant difference that there is,[10] but equally vital not to overstate it, and hence lose the opportunity for valuable cross-jurisdictional learning. The argument is that all jurisdictions face similar analytical challenges and apply similar principles in approaching these questions: but of course, constitutional adjudication is an inherently value-laden task,[11] and it does not follow that all jurisdictions would or should reach the same answers in particular cases.

The analysis in this Chapter will pave the way for the development in Chapter 6 of an approach to horizontal human rights which, hopefully, is true to the insights of comparative principle in this Chapter, but overcomes the three analytical challenges. Chapter 6 will argue: (i) that the allocation of human rights obligations should be determined by the interplay of three factors: **power**, **vulnerability**, and **social role**; (ii) that the proportionality test is a useful tool for the reconciliation of competing horizontal rights claims and other interests; and (iii) that the existence of horizontal obligations in no way detracts from the centrality of the state, which, through its legislative, executive, and judicial arms, has the final responsibility to respect, protect and fulfil children's rights to education.

Accordingly, this Chapter and the next, taken together, will make a valuable contribution to the study of human rights law and privatisation, of education and more

[9] In a review encompassing all these jurisdictions and many others, Oliver and Fedtke conclude that this is the central notion which prevents wide polarisation between the different responses to private human rights in different jurisdictions: ibid 476.

[10] *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (7) BCLR 851, [24]; [42].

[11] *Salem Party Club and Others v Salem Community and Others* [2017] ZACC 46, 2018 (3) BCLR 342 (CC), [68].

generally. There needs to be a coherent approach to the allocation of horizontal human rights obligations, and the determination of the content of the duty to protect: there is *'too little theory, not too much'*.[12] This will be an attempt to develop such an approach. In addition, as of yet, no systematic assessment of the approach to duty-bearing in the jurisdictions under review has been done, and certainly not in the specific context of private education. This is important in its own right – but it is particularly important because of the conclusion in Chapters 1 and 3 that there exists an important accountability gap in respect of private schools. It is also important because, as argued in Chapter 4, *direct* horizontal obligations do not require significantly different reasoning to other kinds of case: the approach should be basically the same between claims based on the duty to protect, direct constitutional claims, and challenges to legislation which purports to regulate the affairs of individuals *inter se*. The issues discussed here are accordingly not limited to some niche aspect of human rights law, applicable only where a doctrine of direct horizontal effect is recognised. They are of general, wide-ranging application wherever human rights law recognises that the state has obligations in relation to the way in which it regulates private interaction,[13] which is one of the *'basic and natural functions of the modern state'*.[14]

[12] Virendra Kumar, 'The Right of Children to Free and Compulsory Education Act, 2009: A Judicial Critique of Its Constitutional Perspective' (2013) 55 JILI 21 44.

[13] Oliver Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't)' (2004) 17 Canadian Journal of Law and Jurisprudence 61 70.

[14] Dimitris Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (Routledge 2012) 47.

B. COMPARATIVE REVIEW: TEXTS AND TESTS

This section will sketch out the approach to allocating horizontal human rights duties in the jurisdictions under review, considering both direct horizontality and the duty to protect.

(1) South Africa

(a) Constitutional Horizontal Obligations

South Africa provides a natural starting point for considering the mechanism for assigning duties in human rights law, because its Constitution makes explicit provision for the existence of such duties, and how they are to be assigned. The textual basis for private duty-bearing in South Africa is s. 8(1)-(2) of the South African Constitution, which provide:

> *(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.*
>
> *(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.*

For the reasons set out above, private duty-bearing is implicated by both s. 8(1) and s. 8(2): s. 8(2) obviously directs itself to private conduct, but s. 8(1) directs itself to (some) legislation which regulates (or fails to regulate) the relationship between private individuals and implicates a provision of the Bill of Rights. S. 8(2) is a somewhat

awkward provision,[15] and little more than the most general possible statement how duties are to be assigned.

The first case to get to grips with this section was *Khumalo v Holomisa*.[16] In *Khumalo*, the question of whether South African defamation law was at odds with the constitutional guarantee of free expression was at issue. A newspaper appealed against a finding that an article which it had published was defamatory. It had accused a well-known politician of being involved with a gang of bank robbers. The politician sued in defamation, and the newspaper sought to resist the action by arguing firstly, that the politician had a direct obligation under the Bill of Rights not to interfere with their freedom of expression; and secondly, that the common law of defamation, if developed in accordance with s. 39(2) of the Constitution (as discussed in Chapter 4), would preclude the success of the action. The nub of the complaint about the law of defamation, as it stood, was that it did not require the claimant to plead the falsity of the statement in all circumstances. The applicants contended that the Bill of Rights required it to do so.

O'Regan J approached the issue by asking whether an *'appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other.'*[17] She held that the correct approach was to work out whether a natural person was bound under s. 8(2), by balancing the rights to free speech

[15] Max Du Plessis and Jolyon Ford, 'Developing the Common Law Progressively - Horizontality, the Human Rights Act and the South African Experience' (2004) 3 EHRLR 286, 291.

[16] *Khumalo v Holomisa* [2002] ZACC 12, 2002 (5) SA 401.

[17] ibid, [28].

and human dignity against each other. Once that was established, it would then fall to the court to apply s. 8(3) (discussed in Chapter 4) and develop the common law accordingly.

In undertaking the balancing exercise, O'Regan J relied primarily on two factors to determine whether the right to free expression was of direct horizontal application: the *'intensity'* of the right, and the risk that the right would be subject to *'invasion'* by persons other than the state.[18] The reasoning is perfunctory and opaque – little more is said other than that these factors demonstrate the right to be horizontally applicable.[19] O'Regan J then turned to consider whether this horizontally applicable right was appropriately protected by the common law of defamation, and concluded that it was. The newspaper's appeal was accordingly dismissed.

S. 8(2) fell into some desuetude after *Khumalo*.[20] It was next properly considered in *Juma Musjid*.[21] *Juma Musjid* concerned a private, landowning trust which leased land to a public educational authority to accommodate a school. The trust sought to evict the school. The Constitutional Court held that the trust was bound by a negative obligation not to interfere with the rights of the learners by evicting them, unless to do so was reasonable, which on the facts, it was. The Court's approach to the question of *why* such duties were owed by the trust was similarly opaque. It seemed to find that

[18] ibid, [33].

[19] Du Plessis and Ford (n 15) 311.

[20] Jörg Fedtke, 'South Africa' in Jörg Fedtke and Dawn Oliver (eds), *Human Rights and the Private Sphere* (UT Austin Studies in Foreign and Transnational Law 2007) 375.

[21] *Governing Body of the Juma Musjid Primary School v Essay NO* [2011] ZACC 13, 2011 (8) BCLR 761 (CC).

this duty was owed because of the importance of the right to education, but does not explicitly state that this is the basis of the reasoning, nor does it explain why education, as a right, is important in a way which lends itself to private duty-bearing, nor why the obligations owed by the trust were only negative in nature.

Much more clarity was brought to the law in *Daniels v Scribante.*[22] Ms Daniels occupied farmland under the Extension of Security of Tenure Act (**'ESTA'**), and wished to make improvements to the property, out of her own pocket. It was common ground that, without those improvements, the conditions of the property were such that they infringed her right to human dignity. Even so, the owner did not want the improvements carried out. The Court approached what was, strictly, a question about the interpretation of ESTA, by analysing the respective rights and obligations of the private parties under s. 8(2). It held that relevant factors in deciding whether a provision of the Bill of Rights imposes duties on a private party include: the importance (or *'intensity'*) of the right; its history, nature and purpose; how that purpose can best be achieved; the risk of violation posed by private actors, the nature of the duty, the interweaving of public and private actors, and whether failing to impose duties on them would rob the right of force; and finally the autonomy of private parties, in particular bearing in mind the special role of the state to be concerned for the wellbeing of society as a whole, and its access to public funds.[23]

This list is a fine general statement, but there remains confusion about how these factors are to be applied, and particularly, the relevance of private autonomy in

[22] *Daniels v Scribante* [2017] ZACC 13, 2017 (4) SA 341 (CC).

[23] ibid, [39] – [41].

horizontal effect cases. In *Pridwin*, the Supreme Court of Appeal held that, applying *Juma Musjid*, there was an obligation on private actors not to directly or indirectly interfere with the exercise of the right to education, but that:

> *While s 8(2) of the Constitution provides that the Bill of Rights applies horizontally, it was pertinently pointed out in Juma Musjid that its purpose is not to obstruct private autonomy or to impose the duties of the state on private parties.*

As such, the school was under no constitutional obligation to continue to provide education and thus refrain from terminating the contract. This is not consistent with *Daniels*, which explicitly rejected such an approach.[24]

The Constitutional Court reversed the decision of the SCA, and held that the private school did owe constitutional obligations, under s. 8(2), directly. The majority held that the *'substance of the applicants' claim is directed at upholding the constitutional rights of the boys'*, and approached the case on that footing. The majority therefore asked itself what kind of conduct would be constitutionally permissible for an independent school in the circumstances which arose in the case. The Court held that the relevant circumstances included the conduct of the applicants, as well as the content, context and purpose of the implicated constitutional rights. The majority also firmly rejected the suggestion that *'catastrophic'* consequences would follow for the law of contract: contracts for education were special, and it did not follow that what was decided in *Pridwin* would be replicated in other contractual contexts. On the facts before it, the majority held that there had been an impairment of the children's constitutional rights, and went on to consider whether that impairment was justified

[24] ibid, [47].

(although, as will be discussed below, the majority did not consider the general justification provision – s. 36 – to be applicable).

However, as welcome as the result in *Pridwin* may be, it still leaves the test for duty-bearing under s. 8(2) somewhat unclear.[25]

First, it was not entirely clear how the multi-factorial test from *Daniels* was being applied. The Court did not indicate which factors it considered pertinent and why they applied to the facts of the particular case. It is not really enough to describe s. 8(2) as *'fact-specific'*[26] without providing a principled basis for identifying which facts are relevant and which are not, by reference to which considerations of principles are to militate.

Second, there are some tantalising glimpses in the judgments of possible bases for assigning duties, but they are not fully brought out. The central basis for the reasoning was that the school was *providing a constitutional right*, and that those providing constitutional rights have an obligation not to interfere with the realisation of the right in question. If the school is providing a basic education, it cannot interfere with provision of that right by withdrawing it from the children. This does not, however, explain the basis for duty-bearing fully, since, as *Khumalo* makes clear, an actor does not need to be involved in the fulfilment of constitutional rights in order to bear duties. Further, there are references in both the majority judgment and dissent to *volition*, or the fact that the school represented itself as a provider of education. Since

[25] Tom Lowenthal, 'AB v Pridwin Preparatory School: Progress and Problems in Horizontal Human Rights Law' (2020) 36 SAJHR 242.

[26] *AB v Pridwin Preparatory School (CC)* [2020] ZACC 12, 2020 (5) SA 327 (CC), [200].

the school had voluntarily assumed responsibility for the provision of education, and held itself out as such, it was proper to recognise obligations flowing from that voluntary assumption. That is closer to a test for duty-bearing, but it was not fully explored, and the way in which the concept was deployed is not really replicable with confidence on future sets of facts. It is not explained what the link is between these approaches and the approach in *Khumalo* of inquiring into the right's *'intensity'*.

Third, the relevance and application of the distinction between positive and negative obligations remains somewhat unclear. In *Daniels*, the Court rejected the argument that s. 8(2) imposed *only* negative obligations. Critically, however, the Court did not deprecate the use of the distinction as, at the least, a useful heuristic for the level of burden a private actor would have to bear if fixed with the duty, and accordingly a relevant consideration when deciding whether to impose the duty.[27] *Pridwin* appears to recentre somewhat the positive/negative obligations distinction, but also somewhat complicates it. The decision in *Pridwin* was articulated by the Court as being one which fixed the school with a negative, procedural obligation. Of course, that categorisation is open to doubt. *Firstly*, it is not clear why an obligation to provide a certain procedure should properly be characterised as negative (even if, linguistically, it can be rendered as an obligation not to expel students without such procedure). *Secondly*, the contrast with *Daniels* is stark. In *Pridwin*, the *'negative'* obligation had the practical effect of requiring the school to continue to expend resources educating children; while in *Daniels*, granting consent to permit *someone else* to make improvements to property was treated as a positive obligation. If the positive/negative distinction is a proxy for

[27] *Daniels v Scribante* (n 32), para 40.

interference with the private autonomy of the putative duty-bearer (or at least, the onerousness of the obligation on them), *Pridwin* shows it to be a poor and malleable proxy.

Fourth, *Pridwin* provides clarification that s. 36 of the Constitution has no application where a private actor seeks to justify a rights infringement by reference to a contractual term, since it applies only to laws of general application (a point which had been debated in the literature[28]). Consideration of the justification for any interference must instead be subsumed within the s. 8(2) analysis. This opens up the question of whether and how the approach to justification under s. 8(2) is different, and how that difference might manifest in particular cases. Insofar as it reflects a proportionality test, *Pridwin* does not explain (a) how to identify the objective for which a private actors acts; (b) once an objective is identified, how to determine whether that objective is constitutionally permissible; and (c) how exacting any *'necessity'* test is, and whether it is a lower standard of justification than under s. 36.

It is therefore respectfully suggested that after *Pridwin*, there continues to be much that is opaque about the link between the revolutionary but rather abstract words of s. 8(2), and the conclusion that a particular private actor bears a particular obligation in a particular case.

(b) Duty to Protect

[28] Nick Friedman, 'The South African Common Law and the Constitution: Revisiting Horizontality' (2014) 30 SAJHR 63, 84; see also the more recent decision of *King v de Jager* [2021] ZACC 4; 2021 (5) BCLR 449 (CC), [99].

The South African state is under a specific constitutional obligation, pursuant to s. 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights. S. 7(2) imposes on the state an obligation to not merely refrain from interfering with rights, but to take positive steps to ensure they are realised.[29] This extends to an obligation to legislate,[30] to regulate private actors and provide effective legal remedies against them.[31] This obligation also applies to courts,[32] and can assist them in the interpretation of legislation.[33]

The precise scope of the duty to protect – and the obligations which it might require to be imposed on private actors – depends on the context, and the courts have yet to fully unpack the nexus between s. 7(2) and s. 8(2). There are usually a number of ways in which the state can discharge the obligation to protect.[34] What will be required *'must necessarily depend upon the nature of the right involved, the availability of government resources and whether there are other provisions of the Constitution that spell out how the right in question must be protected or given effect.'*[35] The precise

[29] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6, 2011 (3) SA 347 (CC), [189].

[30] ibid, [190].

[31] *Law Society v Minister for Transport* [2010] ZACC 25, 2011 (1) SA 400 (CC); Pierre De Vos, *South African Constitutional Law in Context* (OUP 2014) 672.

[32] *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC), [33].

[33] *Rail Commuters Action Group v Transnet Ltd* [2004] ZACC 20, 2005 (2) SA 359 (CC), [72].

[34] *Glenister v President of the Republic of South Africa and Others* (n 29) [191].

[35] ibid, [107].

terms of the right in question, and whether they indicate that private actors should be restrained, will be relevant.[36]

(2) India

(a) Constitutional Horizontal Obligations: 'Liability for Non-State Action'

The imposition of constitutional duties on private actors is an established part of Indian law.[37] Unlike the South African Constitution, the Indian Constitution has no general provision for the direct horizontal application of rights, and so, there has been no general test developed for when rights will be horizontally applicable. Instead, traditional doctrine holds that only some of the enumerated fundamental rights are directly horizontally applicable.[38] They are Art. 15(2),[39] Art. 17,[40] Art. 23(1),[41] and Art.

[36] *S v Baloyi* [1999] ZACC 19, 2000 (2) SA 425 (CC).

[37] MP Singh, 'Fundamental Rights, State Action and Cricket in India' (2005) 13 Asia Pacific Law Review 203 181–183; 187–188.

[38] Durga Das Basu and SS Subbramani, *Commentary on the Constitution of India* (9th edn, LexisNexis, Gurgaon, Haryana, India 2014) 855.

[39] Article 15(2) provides: *'No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to- (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.'*

[40] Article 17 provides: *'"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability rising out of 'Untouchability' shall be an offence punishable in accordance with law.'*

[41] Article 23(1) provides: *'Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.'*

24.[42] These provisions are horizontally applicable because the text of the Constitution does not limit their application to the state.[43] In addition, Art. 21[44] has been held to be horizontally applicable by implication.[45] To this list, a judgment of the Delhi High Court also adds Art. 19 (although without much analysis);[46] and controversially, it is implicit in *Vishaka* (again without analysis) that Art. 14 is also horizontally effective.[47]

Of course, the fact that these are the only explicitly horizontally applicable rights is not the end of the story, because the Indian Supreme Court has often gone beyond a narrow, technical and originalist interpretation of the text of the Constitution, in two ways. *Firstly*, it has adopted broad interpretations of existing provisions, for example by upgrading the right to education from a directive principle of state policy to a fundamental right encompassed in the right to life, protected by Article 21 and constitutionalised by amendment in Article 21A. *Secondly*, it is also making steps, after some vacillation, towards a jurisprudence of natural, unenumerated rights.[48] There is

[42] Article 24 provides: *'No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.'*

[43] Neeraj Tiwari, 'Vertical and Horizontal Fundamental Rights: An Effort to Locate India Between Two Poles' (2011) 2 Madras Law Journal 36.

[44] Article 21 provides: *'No person shall be deprived of his life or personal liberty except according to procedure established by law.'*

[45] Singh (n 37) 204; *Vishaka vs State Of Rajasthan* (1997) 6 SCC 241, AIR 1997 SC 3011.

[46] *Dr Sangamitra Acharya & Anr vs State (Nct Of Delhi) & Ors* W.P. (CRL.) 1804/2017 & CM No. 9963/2017. Article 19 protects certain rights including freedom of speech, assembly, association, movement and occupation.

[47] *Vishaka* (n 45).

[48] Anup Surendranath, 'Life and Personal Liberty' in Sujit Choudhry, Khosla Madhav and Pratap Bhanu Mehta, *The Oxford Handbook of the Indian Constitution* (OUP 2016) 760; Tarunabh Khaitan, 'Against Natural Rights—Why the Supreme Court Should NOT Declare the Right to Intimacy as a Natural Right' (*Indian Constitutional Law and Philosophy*, 17 July 2018) <*https://indconlawphil.wordpress.com/2018/07/17/guest-post-against-natural-rights-*

no reason why this generous approach to interpretation could not, in time, extend the field of application of more of the duties imposed by Part III to some private parties.[49] If such a shift takes place, a clear understanding of the basis for such an extension will be necessary, and as yet, no clear doctrine has emerged.[50] In principle, therefore, fundamental rights can be enforced against private bodies and individuals,[51] but what this means in practice is not clear, which is particularly problematic in the context of globalisation and privatisation in India.[52]

(b) Duty to Protect

The Supreme Court has provided no general explanation of the scope of duties to protect under the Constitution.[53] It can be said with certainty that where a right is horizontally applicable, in accordance with the above, that will bring with it state duties to enforce that right in the horizontal relationship. This is clear from *People's Union for Democratic Rights,* where it was held that *'it is the constitutional obligation of the State to take the necessary steps for the purpose of interdicting such violation and*

why-the-supreme-court-should-not-declare-the-right-to-intimacy-as-a-natural-right/> accessed 30 December 2021.

[49] Singh (n 37) 204.

[50] Tiwari (n 43), [48].

[51] *Bodhisattwa Gautam vs Subhra Chakraborty* (1996) 1 SCC 490, AIR 1996 SC 922 6.

[52] Amit Kumar Sinha, 'Human Rights in Era of Globalisation: Indian Perspective' (2009) 6 Madras Law Journal 124 fn 42.

[53] Stephen Gardbaum, 'Horizontal Effect' in Sujit Choudhry, Khosla Madhav and Pratap Bhanu Mehta, *The Oxford Handbook of the Indian Constitution* (OUP 2016) 606.

ensuring observance of the fundamental right by the private individual who is transgressing the same.'[54]

However, it is submitted that there is a duty to protect which goes beyond this, even if its form is yet to be fully developed.[55] In *Avinash*, the Court held that the state had an obligation to protect the life and safety of children in schools, in part through regulation.[56] Gardbaum has argued that *Vishaka* is an example of a constitutional duty on the state to prohibit sexual harassment, and *Victims of Uphaar Tragedy* an example of a positive duty to regulate to protect life.[57] The Court also seems to have recognised a duty to protect speech from hostile reception.[58] It is sometimes implicit in the orders given by the Court that the state is required to regulate private actors to ensure respect for fundamental rights.[59] In *Parmanand Katara*, for example, the Court directed that the state make all doctors, private and public, aware of their (newly-discovered) constitutional obligation not to withhold treatment.[60]

[54] *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235, 1982 AIR 1473, [15]; see also: *Bandhua Mukti Morcha v Union of India & Ors* (1997) 10 SCC 549, AIR 1997 SC 2218; *Occupational Health and Safety Association* (2014) 3 SCC 547.

[55] Oliver and Fedtke (n 4) 478.

[56] *Avinash Mehrotra vs Union Of India* (2009) 6 SCC 398, 2009 SCC OnLine SC 751, [31].

[57] Gardbaum (n 53) 606–607.

[58] MP Singh, 'India' in Jörg Fedtke and Dawn Oliver (eds), *Human Rights and the Private Sphere* (UT Austin Studies in Foreign and Transnational Law 2007) 210.

[59] ibid 204–205.

[60] *Parmanand Katara v Union of India* (1989) 4 SCC 286, AIR 1989 SC 2039.

What can be fairly said is that there is, as yet, no general approach to what is required of the state in the regulation of private interactions. To see what concerns are militating requires a deep dive into the case law.

(3) England and the European Convention

The English courts have had relatively little experience dealing with the question of how duties are to be assigned. This should not be surprising, because although the ECHR does impose positive obligations,[61] which are frequently litigated in domestic courts,[62] the constitutional set up does not lend itself well to review of the adequacy of the legal framework regulating the realisation of rights between individuals.[63] There is, *firstly*, no possibility of bringing an action under the HRA for a bare failure to legislate.[64] *Secondly*, outside the privacy/free speech context, the common law has been left relatively undisturbed by human rights law.[65] Finally, there have not been many head-on challenges to private law legislation,[66] save for where there have been equality

[61] Keir Starmer, *European Human Rights Law* (Legal Action Group 1999) 206.

[62] Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2nd edn, OUP 2009), [6.183].

[63] S. 6 Human Rights Act 1998; Dawn Oliver, 'England and Wales' in Dawn Oliver and Jörg Fedtke (eds), *Human Rights and the Private Sphere* (UT Austin Studies in Foreign and Transnational Law 2007) 97.

[64] Human Rights Act 1998, s. 6(6).

[65] Oliver and Fedtke (n 4) 494.

[66] *McDonald v McDonald* [2016] UKSC 28, [2017] AC 273, where the challenge was explicitly to an individual eviction decision, rather than the legislative scheme governing evictions; the case went to the ECtHR, which found for the UK in *FJM v United Kingdom* (2019) 68 EHRR SE5.

issues.[67] The English courts have not engaged in *'complex and sophisticated theorising'* beyond that necessary to resolve individual cases.[68]

However, there has been a huge amount of ECtHR case law on the positive obligations of states to regulate the relations between private actors to ensure the realisation of rights, as summarised in Chapter 4.[69] In spite of the fact that the ECHR is a traditional, civil-and-political-rights text,[70] and one which is a creature of international law and therefore necessarily state-centric, the ECtHR has developed a doctrine of positive obligations, drawn from Art. 1; the principle that rights should be practical and effective, not theoretical and illusory; and the right to an effective remedy under Art. 13.[71] Sometimes, the positive obligations are drawn directly from the text of the rights themselves.[72]

The doctrine of positive obligations includes an obligation to put in place legal and administrative measures to regulate private relationships to ensure that rights are effective within that relationship.[73] As suggested in Chapter 4, the ECtHR, by imposing

[67] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557; *R (on the application of Steinfeld and Keidan) v Secretary of State for the International Development* [2018] UKSC 32, [2020] AC 1: such cases do not raise as squarely the issue of what is required between private individuals, as they tend to concern access to the social institutions of private law, of which the state is gatekeeper.

[68] Oliver (n 63) 96.

[69] Catherine Donnelly, 'Positive Obligations and Privatisation' (2010) 61 NILQ 209 211; Oliver and Fedtke (n 4) 467.

[70] Ursula Kilkelly, 'Protecting Children's Rights under the ECHR: The Role of Positive Obligations' (2010) 61 NILQ 245 247.

[71] Starmer (n 61) 194.

[72] Clayton and Tomlinson (n 62), [6.169].

[73] Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights*

an unequivocal requirement that the state adopt an *'adequate legal framework'*,[74] and not merely respond to incidents as they happen, [75] commits itself to determining what makes a legal framework adequate, and, critically for these purposes, *what obligations would have to exist between which private actors* in order for a legal framework to be adequate.[76]

The general test for whether a particular legal framework imposing (or not) certain obligations on private actors complies with the ECHR is that a *fair balance* must be struck between the general interest of the community and the interests of the individual, taking into account the situation in each state and the necessary choices which must be made in terms of priorities and resources. [77] This is the position whether the case is pleaded in terms of a positive or negative state obligation.

This is a vague test, and current commentary has not properly unpacked what this means for the legal and administrative system specifically through the lens of private duties, which has led to allegations of incoherence and inconsistency.[78] In addition, such literature as there is on the approach of the ECtHR is not particularly helpful in discharging the ECtHR's intellectual commitment described above. Lavrysen, in a

(Intersentia 2016) 118–119: We are not here concerned with reactive *ad hoc* responses to individual acts, or duties of investigation, which follow from breaches of the legal framework, but do not tell us what obligations the legal framework must include or not include.

[74] Starmer (n 61) 196–199.

[75] Lavrysen (n 73) 149.

[76] ibid 127.

[77] *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* (2011) 52 EHRR 8, [81] - [82].

[78] Lavrysen (n 73) 7.

recent review of the court's positive obligation jurisprudence, identifies three key factors in the court's reasoning on the state's positive obligations to ensure the rights contained in the ECHR: knowledge of the violation, proximity of the state to the violation, and effectiveness of the right.[79] None is particularly helpful in identifying the specific content of private actors' duties, or how those duties are to be reconciled with the private duty-bearer's rights or autonomy, because all three rely on a pre-existing conception of what kinds of restraint or action must be required of private actors. Knowledge of, and state proximity to, the violation depend on a pre-existing conception of what, in the private sphere, amounts to a violation. Effectiveness, which formed the lynchpin of earlier work on the ECHR's positive obligations,[80] is simply tautological in this context: a measure can only be effective in preventing private parties from acting in a manner impermissible under the ECHR, if it is known what it is the ECHR does or does not permit.

The position is therefore unclear. There is a huge amount of potential hidden in the jurisprudence,[81] but it is obscured by a failure to develop a general approach to *'interference'* in the private context. [82] Most of the work on positive obligations has focussed on what measures are required to respond to an interference by a private party, rather than working out what a private interference is in the first place. To see what (if

[79] ibid 131.

[80] Xenos (n 14) 91; Lavrysen (n 73) 15–23.

[81] Brice Dickson, 'Positive Obligations and the European Court of Human Rights' (2010) 61 NILQ 203, 206.

[82] Olha Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (2006) 13 Maastricht Journal of European & Comparative Law 195, 203.

anything), operates on the ECtHR's mind when determining what a *'fair balance'* requires, a closer look at the case law is necessary.

(4) Conclusion

In each jurisdiction, there is significant uncertainty surrounding the horizontal application of human rights. This section will, through close doctrinal and comparative analysis, unpick the militating concerns in the three jurisdictions and show that the six key factors identified above are deployed to resolve this issue – to a greater or lesser extent – across all three jurisdictions.

C. THE SIX KEY FACTORS: COMMON THREADS IN A RICH TAPESTRY

When courts resolve any cases of the sorts set out above, they must be adopting a conception of what human rights law requires in horizontal relationships, and this, as Fredman argues, cannot be as easy as simply transposing onto private individuals the duties of the state.[83] There are *'other factors'* swirling around, but what exactly these might be is a question which has not yet been satisfactorily addressed. It is only through close analysis of the *'rich tapestry'*[84] of the case law that the true principles governing the approach of courts to cases where a private actor is alleged to bear duties under human rights law can be distilled.

[83] Sandra Fredman, *Human Rights Transformed* (OUP 2008) 73.

[84] Oliver and Fedtke (n 4) 519.

This section conducts just such an analysis. The argument here will not be an exhaustive attempt to fully describe all the twists and turns of the case law in each jurisdiction. Rather it will be that courts in these jurisdictions determine the content of horizontal duties by reference to six key factors (to different degrees, and in various forms): the nature of the right, its importance, and the correlative severity of the violation; private autonomy and countervailing rights; the power of the putative duty-bearer and its capacity to violate rights; the vulnerability of the beneficiary; the social role of the putative duty-bearer; and the public interest. This section will not critique these choices of factor (that will have to wait for Chapter 6), but will show how, assuming these factors to be correct, their application to private education shows that private schools should bear at least some duties under human rights law.

It is worth emphasising, at the start, that in this context, courts very often **do not articulate what they are doing.** They do not explain why they rely on some of these factors in some cases but not in others; they do not explicitly recognise that the exercise is the same whether the case is directly or indirectly horizontal or vertical; or indeed that they are determining a case about private obligations at all. I will expand on this when I consider the three analytical challenges, but it needs to be stated upfront that significant amounts of deduction are often required to get from what the court says it is doing, to what factors, when seen from a horizontal obligations perspective, it must be taking into account in determining those obligations.[85] That deduction will be imperfect, and necessarily amount to a gloss on or interpretation of the words of judges. However, if order is to be imposed on these fairly chaotic lines of jurisprudence, such

[85] ibid 467.

an approach is unavoidable. It is submitted that these six factors are best reflective of the general approach of courts across the jurisdictions.

(1) Importance of the Right and Severity of Violation

The first factor to address is one which is almost always considered, which is the importance of the right, and the consequent severity of the violation of the right. Importance and severity are interrelated ideas, and so are appropriately dealt with together as reflecting much the same consideration. The two are interrelated because, naturally, the more important a particular right or aspect of a right, the more severe in consequence a violation of that right will be. Individual rights could, of course, be violated in more or less severe ways, but the level of severity depends at least in part on the initial importance of the right.[86] In this sense, then, the importance of the right is assessed in the abstract, while the severity of the individual violation is assessed by reference to the applicant's specific experience.

(a) Importance: 'Intensity' and 'Fundamentality'

The (abstract) importance or fundamentality of the right is central in reasoning in all three jurisdictions. In the positive obligations case law of the ECtHR, the importance of the right is routinely emphasised,[87] and used as a reason why effective protection against invasions of that right by private actors must be put in place.[88]

[86] See Starmer (n 61) 199: The European Court of Human Rights tends to treat violations of the most fundamental rights as more severe.

[87] Clayton and Tomlinson (n 62), [6.177]; *X and Y v The Netherlands* (1986) 8 EHRR 235, [27]; *VC v Slovakia* (2014) 59 EHRR 29, [100].

[88] *Storck v Germany* (2006) 43 EHRR 6, [100].

In South Africa, the language of *'intensity'* rather than importance or fundamentality is used, but it seems to mean much the same thing, and it dominated the analysis of the *'nature of the right'* in earlier cases under s 8(2).[89] In *Juma Musjid*, the Court's explanation for why the trust was bound not to interfere with the realisation of the right to education was not entirely convincing or clear, but it seems very likely that the Court was basing its reasoning on the importance of the right to education for learners, in a manner akin to the reasoning of Justice O'Regan in *Khumalo*. After much discussion of the importance of the right to education, the Court held that *'from the discussion in the previous paragraphs of the general nature of the right and the MEC's obligation in relation to it, the form of the duty that the right to a basic education imposed on the Trustees emerges,'* although it did not explain exactly why the ways in which the right was important led to this conclusion, or link it back to the test of *'intensity'* propounded in *Khumalo*.[90]

The Indian courts have been more specific in this regard, in that, rather than simply proclaiming a right to be *'fundamental'* or *'intense'*, explanations are often given for why the right in question is important in the constitutional scheme, often linked to conceptions of equality.[91] The Indian Supreme Court has placed much rhetorical emphasis both on the importance of the respective rights, and on the severity of the potential violation, in identifying the duties of private actors. The importance of

[89] *Khumalo* (n 16), [33].

[90] *Governing Body of the Juma Musjid Primary School v Essay N.O.* (n 21), [57].

[91] See, for example, the soaring rhetoric and argument of the Indian Supreme Court in *Indian Medical Association vs Union of India & Ors* (2011) 7 SCC 179, 2011 AIR SCW 3469, based explicitly on a firm link with the right to substantive equality.

the rights to free press and privacy,[92] health[93] and education[94] have been made much of in horizontal cases, although this is rarely tied to an explicit indication that there is a correlation between private duty-bearing and the importance of the right, of the sort in *Khumalo*.

(b) Severity

(i) Individualised Severity

The severity of the individual violation, as opposed to the importance of the right in general, is usually also relevant. According to the ECtHR, the *'degree of prejudice to the applicant'*[95] (or severity of the violation of the right) is relevant in deciding how the state needs to design its legal and administrative system.[96] *'Grave'* violations will require the imposition of criminal sanctions,[97] whereas *'petty'* ones may not require any intervention at all.[98] The severity of the violation, and whether it touches on fundamental values and essential aspects of the right at stake, has been emphasised in

[92] *Rajagopal vs State of TN* (1994) 6 SCC 632, AIR 1995 SC 264.

[93] *Kirloskar Brothers Ltd vs Employees' State Insurance Corp* (1996) 2 SCC 682, 1996 SCC (L & S) 533 3.

[94] *Indian Medical Association vs Union of India & Ors* (n 91).

[95] Clayton and Tomlinson (n 62), [6.177].

[96] Lavrysen (n 73) 122; *Köpke v Germany* (2011) 53 EHRR SE26.

[97] *KU v Finland* (2009) 48 EHRR 52, [43].

[98] *Avram and Others v Moldova* (2015) 61 EHRR 24 16, Concurring Opinion of Judge Poalelungi.

cases concerning rape,[99] domestic violence,[100] the confidentiality of medical records,[101] and access to documents vital to understand the applicant's childhood and early development.[102] In respect of sexual violence, similar observations regarding how significant an interference with the right to a dignified life it is were made by the Indian Supreme Court in *Shri Bodhisattwa Gautam*.[103] This reasoning is relatively abstract: it is not (explicitly) contextualised to the particular complainant, but the violation in question is generalised as a *'severe'* example of interference with a particular right. This is clearly related to the question of importance – a focus on the importance of the right in the abstract is used to (in part) determine the severity of a violation.

(ii) Contextualising Violations

Sometimes courts, in addition to the abstract severity of the violation *vis-à-vis* other possible violations of that right, contextualise the violation by reference to the position of the complainant in the society in which it took place. The Indian and South African courts have been particularly sensitive to the way in which socio-economic context and history can aggravate the severity of any given violation. In *People's Union for Democratic Rights*, the Indian Supreme Court emphasised the link between political freedom and socio-economic inequality, and the transformative nature of the Constitution as one designed to change the socio-economic structure of the country and

[99] *X and Y v The Netherlands* (n 87), [27].

[100] *Opuz v Turkey* (2010) 50 EHRR 28, [132]; [184]-[191].

[101] *I v Finland* (2009) 48 EHRR 31, [38].

[102] *Gaskin v United Kingdom* (1990) 12 EHRR 36, Joint Dissenting Opinion of Judges Ryssdal, Cremona, Gölcüklü, Matscher and Sir Vincent Evans, [8].

[103] *Bodhisattwa Gautam vs Subhra Chakraborty* (n 51) 7.

bring about socio-economic regeneration, in light of the deleterious effects of foreign rule, abject poverty, economic inequality, and illiteracy.[104] Similarly, in *Daniels*, the denial of permission to make improvements by a landowner to a tenant protected under ESTA was put in the context of the history of dispossession and apartheid by the South African Constitutional Court.[105] The ECtHR does this too, to an extent, but shorn of a similar commitment to socio-economic rights and similar specific national history of oppression, this tends to manifest in cases arising from discrimination, such as sex and gender-based violence,[106] or racial segregation,[107] where the Court contextualises the violation by drawing attention to the vulnerability of the victim (which will be discussed further below).

(c) Application to Education

It is challenging to engage in the exercise of deciding which rights are more *'important'* than others: by definition, all human rights are important. However, the particular importance of the right to education has been regularly recognised. Its *'intensity'*,[108] its position as a multiplier right,[109] its capacity for the redress of poverty and empowerment of the vulnerable,[110] is clearly such as to dictate strong protections for the right to

[104] *People's Union for Democratic Rights* (n 54).

[105] *Daniels v Scribante* (n 22), [1], [14] - [26].

[106] *Opuz v Turkey* (n 100), [160].

[107] *DH v Czech Republic* (2008) 47 EHRR 3, [181].

[108] *Governing Body of the Juma Musjid Primary School v Essay N.O.* (n 21).

[109] *Indian Medical Association vs Union of India & Ors* (n 91), [4].

[110] ibid, [6].

education, even against private actors.[111] It is also important to remember that, in the context of private education, many rights other than the right to education may be imperilled, such as the right to bodily integrity[112] or life,[113] and these rights are clearly so foundational in the firmament of human rights law that they demand protection against private actors too.[114]

(2) 'Private Autonomy' and the Putative Duty-Bearer's Conflicting Rights

Cases involving horizontal obligations implicate the private autonomy and rights and freedoms of others. These have been dominant factors in the reasoning of (at least some) courts, although, in different jurisdictions and at different times in different kinds of case, they manifest in different ways.[115] Conflicting rights are relevant in cases of indirect effect, positive obligations, direct on- and off-the-constitution claims, and even challenges to any rules of criminal or private law, all of which limit the freedom of private parties.[116]

(a) Duty-Bearer's Conflicting Rights

A challenging aspect of horizontal human rights obligations is that they (sometimes) implicate the human rights of those bound by them. It is recognised in all jurisdictions

[111] *Governing Body of the Juma Musjid Primary School v Essay N.O.* (n 21).

[112] *O'Keeffe v Ireland* (2014) 59 EHRR 15.

[113] *Avinash Mehrotra vs Union Of India* (n 56).

[114] *Vishaka* (n 45).

[115] See, for example, *Governing Body of the Juma Musjid Primary School v Essay N.O.* (n 21); *AB v Pridwin Preparatory School (SCA)* [2018] ZASCA 150; [2019] 1 All SA 1 (SCA).

[116] Fredman (n 83) 73.

– at least some of the time – that rights on the horizontal plane are relative and in *'constructive tension'* with each other.[117] In *Khumalo*, for example, O'Regan J conceptualised free expression and human dignity as requiring balancing against each other.[118] In *Pridwin*, a balance had to be struck between the (alleged) rights of the school to associate or disassociate with whoever it wished, the rights of the other children at the school, and the rights of the children of the litigating parents. Likewise, the ECtHR, in deciding what duties are owed between private actors, clearly takes into account the rights and freedoms of others.[119] The relative weight of competing rights, including, crucially, the rights of the duty bearer, is considered explicitly.[120] In India, too, the Supreme Court has recognised the need to balance the rights of voters and candidates,[121] minority rights and the rights of workers employed by minority institutions,[122] the press and private individuals,[123] and students and educational institutions.[124]

[117] *Modern Dental College & Research Centre vs State Of Madhya Pradesh* (2016) 7 SCC 353, 2016 SCC OnLine SC 373, [62].

[118] *Khumalo* (n 16), [28].

[119] *Redfearn v United Kingdom* (2013) 57 EHRR 2, [47].

[120] *Fernández Martínez v Spain* (2015) 60 EHRR 3, [139].

[121] *People's Union of Civil Liberties vs Union of India* (2003) 4 SCC 399, AIR 2003 SC 2363 12.

[122] *Christian Medical College Hospital Employees' Union v CMC Vellore Assn* (1987) 4 SCC 691, 1988 SCC (L & S) 53.

[123] *Rajagopal vs State of T.N.* (n 92).

[124] *Indian Medical Association vs Union of India & Ors* (n 91).

There is therefore no doubt but that courts are alive to the possible human rights implications of horizontal duties for the potential duty-bearers. However, this is not consistent. In *Ghaidan v Godin-Mendoza*, the House of Lords did not consider the relevance of the competing property right.[125] Had it done so, it would have been necessary to perform a proportionality analysis.[126] This might perhaps be indicative of a lack of a culture of horizontal rights in England, but is reflected in the context of private education in the Indian experience too. In *SUPSR*[127] and *Pramati Educational and Cultural Trust*,[128] the Court did not balance the possible tension between the right to education and the rights of minority institutions, with the effect that those cases ended up being resolved with a *'bald assertion'* that enforcing the RTE Act on minority institutions would violate minority rights.[129] Even in *Modern Dental College*, it is arguable that the actual application of the proportionality test was perfunctory at best, collapsing it into a test of *'larger public interest'*.[130]

(b) Duty-Bearer's Private Autonomy

In every jurisdiction, the private autonomy of the putative duty-bearer is relevant, although the extent of its relevance varies significantly, even within jurisdictions. It is

[125] *Ghaidan v Godin-Mendoza* (n 67); see by contrast *McDonald v McDonald* (n 66) [39], where landlords' A1-P1 rights were balanced against tenants' Art. 8 rights.

[126] Oliver (n 63) 78–79.

[127] *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1, AIR 2012 SC 3445.

[128] *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1, AIR 2014 SC 2114.

[129] Surendranath (n 48) 768.

[130] *Modern Dental College & Research Centre vs State Of Madhya Pradesh* (n 117).

South Africa where the notion of private autonomy has received the most judicial traction, under the motif of the *'nature of the duty imposed by the right'*. In s. 8(2) cases, its effect has been to impose limits on the imposition of *positive* obligations on private actors. *Juma Musjid* might have been read to suggest that the obligations imposed on private actors by s. 8(2) will always be negative,[131] but that notion was explicitly rejected in *Daniels v Scribante*, where the Court held that, while private autonomy was relevant, it was not determinative in excluding positive obligations.[132] Even within *Daniels* itself, Justice Jafta concurred but disagreed with the majority view that s. 8(2) can impose positive obligations on private actors, on the grounds that the Constitution never does so explicitly, and positive obligations and the remedies attached to them are more *'intrusive'*.[133] In *Pridwin*, the majority in the Supreme Court of Appeal seemed to more or less ignore the majority judgment in *Daniels*, and return to the *Juma Musjid* position that positive obligations were too invasive to be imposed on private parties, before being corrected by the Constitutional Court.[134] The Constitutional Court has even gone so far as to elevate private autonomy in contracting to a constitutional value (without any explicit textual mandate), and held that it needed to be weighed in the balance accordingly.[135]

[131] *Pridwin (SCA)* (n 115).

[132] *Daniels v Scribante* (n 22), [39] - [40].

[133] ibid, [159] - [162].

[134] *Pridwin (SCA)* (n 115), [42]; *Pridwin (CC)* (n 26).

[135] *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC), [57].

The ECtHR also treats private autonomy as relevant,[136] but does not do so as part of the determination of whether there exists a prima facie interference by a private actor. Instead, it is considered at the balancing stage. This follows from its focus on the state, which can justify not imposing an obligation by reference to the freedom of others – provided that doing so reflects a *'fair balance'*. In *Martínez*, a priest was dismissed by a state secondary school, on the advice of a bishop, allegedly on the basis that he had generated significant publicity as a married priest. The ECtHR interpreted the case as requiring a balance between *'the applicant's right to his private and family life, on the one hand, and the right of religious organisations to autonomy, on the other.'*[137] The Court gave significant weight to religious autonomy in reaching the conclusion that there had been no violation.[138] However, the ECtHR has on occasion given the concept short shrift.[139] In *Pla and Puncernau,* the applicants alleged that the Andorran courts, in interpreting a will as excluding adopted children as beneficiaries, had discriminated against them on grounds of filiation. This was therefore a case which went to the heart of private law's commitment to private autonomy – the freedom of testation and arrangement of one's own affairs. The Court however held that *'no question relating to the testatrix's free will is in issue in the present case. Only the interpretation of the testamentary disposition falls to be considered.'*[140] The Court then went on to correct the Andorran court's interpretation, holding that the interpretation

[136] *Fernández Martínez v Spain* (n 120), [128].

[137] ibid, [122].

[138] ibid, [127]-[152].

[139] Cherednychenko (n 82) 218.

[140] *Pla and Puncernau v Andorra* (2006) 42 EHRR 25, [57].

had to be in light of changed social circumstances.[141] By contrast, a majority of the South African Constitutional Court in *King* – dealing with a similar issue of an alleged conflict between equality and testamentary freedom – undertook close analysis of the meaning of the latter freedom to determine whether it was inconsistent with constitutional demands of equality.[142]

In India, by contrast, there has been much less sympathy for pleas of private autonomy, and the Court's focus has more generally been on ensuring the realisation of the rights: *'[l]aissez-faire has been dethroned.'*[143] In *Modern Dental College*, this was made explicit: the interests of the private educational provider in having total liberty to determine their fees and entry requirements had to yield to the larger interest of the community, and the rights of the learners.[144] Particularly powerfully, in *Indian Medical Association*, the Court held:

> *One of the things that has exercised our minds has been that in the debates in popular discourse of the elite in India it is assumed that imposition of reservations on private unaided educational institutions would have a great and deleterious impact on the freedom of educators, i.e., those who promote, operate, finance and teach in those private unaided educational institutions, to choose their own students. We hold that granting such a freedom would by itself be the actual problem. Our societal hierarchy, and in fact one of the sustaining forces of caste system, and caste like structures in even other religious groups, apart from endogamy, lack of relative vertical and occupational mobility, has been the normative assumption that only some amongst us, belonging to certain*

[141] ibid, [62].

[142] *King v de Jager* (n 28).

[143] *National Textile Workers' Union vs Ramkrishnan* (1983) 1 SCC 228, AIR 1983 SC 75 33.

[144] *Modern Dental College & Research Centre vs State Of Madhya Pradesh* (n 117), [48].

> *social groups, deserve to study and gain the knowledge that truly provides ability to critically evaluate and attempt to change their world.*[145]

This is not to say that the Indian courts see no limit to the ways in which private autonomy can be restricted. The other fundamental rights in Part III impose limits, and concerns about floodgates where too many constitutional provisions bind private actors have also been expressed.[146]

(c) The Beneficiary's Autonomy

In all jurisdictions, to a greater or lesser extent, there is a recognition that permitting one party their *'private autonomy'* could encroach upon the autonomy of others, including the beneficiary of any relevant human right, and that this must be taken into account when deciding on the relative weight to be given to the putative duty-bearer's private autonomy. Courts therefore rely on the autonomy of the potential victim, to justify both imposing and not imposing duties.

(i) Negative Autonomy: Waiving the Beneficiary's Rights and Corresponding Obligations

On some occasions, courts use the concept of the beneficiary's autonomy in a negative way, to justify not imposing duties, on the ground that, effectively, the beneficiary of the right chose to be in the position they find themselves in.

[145] *Indian Medical Association vs Union of India & Ors* (n 91).

[146] *Women Lawyers Association v State of Tamil Nadu* [2009] High Court at Madras W.P. Nos. 3335, 3703, 3704, 3705 and 3910 of 2009, (2009) 7 Madras Law Journal 1233, [590].

The ECtHR has taken into account consent to the private activity and personal and institutional autonomy in deciding what must be provided for by the legal framework. So, for example, in *Martínez*, the institutional autonomy of the Roman Catholic Church was very important for the Court, but the case also emphasised, at the individual level, the priest's responsibility for the consequences of actions and choices made, and the heightened duty of loyalty which the priest voluntarily undertook.[147]

Similarly, the Indian Supreme Court (at least implicitly) took into account the agreement of a candidate for public office to put in papers and stand, in deciding how the balance is to be struck between that candidate's right to privacy and the right of an individual voter to know information about them.[148] In South Africa, concern for this negative, *pacta sunt servanda* conception of autonomy underpins much of the case law on the constitutional duties owed by contracting parties.[149] This reasoning has also seeped in s. 8(2) cases. In *Pridwin*, the SCA considered that the (alleged) victim's contractual consent was very important in rejecting the suggestion that a private school might owe human rights obligations to provide education.[150]

(ii) Positive Autonomy: Beyond Coercion

[147] *Fernández Martínez v Spain* (n 120), [135]; although this has not been consistent: *DH v Czech Republic* (2008) 47 EHRR 3.

[148] *People's Union of Civil Liberties vs Union of India* (n 121) 5.

[149] *Barkhuizen v Napier* (n 135), [57].

[150] *Pridwin (SCA)* (n 115), [32].

Across the jurisdictions, a richer form of autonomy can also be discerned, which looks to the genuineness of choice in the relationship between the victim and the putative private duty-bearer.

There is a significant body of case law from the ECtHR which treats any suggested waiver of rights with great suspicion. The ECtHR has developed a nuanced and positive view of consent, which goes far beyond the bare terms of contracts or waivers.[151] So, in *VC*, it insisted that medical treatment required *informed* consent. In *Bărbulescu,* the ECtHR held that if employees were informed of their employer's policy of workplace surveillance, that would count in favour of permitting that surveillance under an ECHR-compliant legal framework.[152] In *Vilnes*, where divers were injured by their employer's faulty equipment, the ECtHR considered what level of risk the applicants might have expected to be exposed to, and so could have meaningfully consented to.[153] However, those cases show the limits of this doctrine, at least in the employment context: the obvious power imbalance between employer and employee did not play a significant role in the Court's reasoning on the issue of consent.[154] An emphasis on informed consent (coupled, it must be said, with some gratuitous denigration of people who are HIV-positive) drove the Indian Supreme Court in *Mr X* to find that a hospital was required to disclose the appellant's HIV status to someone he was about to marry, in order that she could make an informed

[151] *Storck v Germany* (n 88), [147].

[152] *Bărbulescu v Romania* [2017] IRLR 1032, [121(i)].

[153] *Vilnes and Others v Norway* (2014) 139 B.M.L.R. 199 (Applications no. 52806/09 and 22703/10), [236].

[154] See, for example, ibid, [225]; and *Bărbulescu v Romania* (n 152).

decision.[155] Whether or not right, this decision clearly indicates, among other things, concern for informed consent.

On other occasions, courts have been more nuanced still, seeing consent against the backdrop of operative social pressures. In the recent decision of *Opuz*, for example, it was held that a legal system which invariably required the permission of the victim before domestic violence could be prosecuted was not ECHR-compliant, on the ground of the severity of the risk and vulnerability of the complainant.[156] The genuineness of choice in the face of adverse socio-economic circumstances has played an important role in the jurisprudence of the Indian Supreme Court and South African Constitutional Court.[157] In *People's Union for Democratic Rights*, holding an employee to a contract of service entered into under conditions of socio-economic duress was described by the Indian Supreme Court as *'Hobson's choice'*, given the power which rested in the employer's hands by virtue of the risks of starvation awaiting a disobedient employee.[158] So too in *CERC*, concerning the lack of genuine choice for workers as to whether to work in a hazardous industry, and so too the obligation on private employers to provide healthcare.[159]

[155] *Mr X v Hospital Z* (1998) 8 SCC 296, AIR 1999 SC 495.

[156] *Opuz v Turkey* (n 100), [138]; [160].

[157] See, for example, Justice Sachs' dissent in *Barkhuizen v Napier* (n 135); *Daniels v Scribante* (n 22).

[158] *People's Union for Democratic Rights* (n 54), 490. This is in the context of a discussion of specific performance, which, as an equitable judicial remedy, is more clearly an example of state power than it is the content of private law. But this could be read more broadly as limiting the enforceability of certain terms by any means, and in that sense, is still a good example. .

[159] *Consumer Education & Research Centre vs Union of India* (1995) 3 SCC 42, 1995 SCC (L & S) 604, [26].

(d) Application to Education

In considering what the private autonomy factor means for private schools, it is helpful to think first about children, and then about the school.

It is clear that, generally, children – and especially young children – do not have a lot of choice about the school in which they end up. They have absolutely no choice at all about whether they go to school (unless their parents choose to home-school them), compulsory education being not just a policy choice but an international legal obligation of all of the jurisdictions under consideration. In reality, they also do not have much choice about *which* school they attend. That is a decision which will be hugely conditioned if not totally controlled by their parents, and, while that may not be a bad thing given the conception of dynamic self-determinism outlined in Chapter 2, it certainly means that no arguments about children *'waiving'* their rights by attending a private school, or their ability to go elsewhere, should get any traction at all. The structural disadvantage children face in exercising control over the educational institution to which they are sent, often reinforced by legal provisions which put parents in control, mean that no child should be taken to have waived their rights by walking through the school gate.

Considering, next, the private autonomy and conflicting rights of the private school, it can be accepted that the school's institutional autonomy may be of value. However, it is also important to be cautious, and not to weigh this value more heavily than appropriate. Thus, where the school insists upon a negative form of freedom, one which allows it to do whatever it wants, careful consideration should be given to whether this might impinge upon the positive (or negative) freedom of learners. It should be emphasised that many rights other than the right to education are in play in

schools, and many of the most egregious violations which private schools can perpetrate against children are breaches of duties of restraint, compliance with which should not (at least adopting the South African approach of dividing putative private duties into positive and negative ones) have a significant autonomy cost for the private school.

(3) Power/Capacity to Interfere

Asymmetry of power is a standard rationale for the extension of the control of human rights law to the private sphere.[160] In all three jurisdictions, there is recognition that the capacity of private actors to interfere with the relevant right is an important determinant of whether the right imposes any duties on other private actors, although the force of this factor varies. Sometimes this analysis is done by a general assessment of the *'power'* of the private institution, and sometimes it is done by reference to the specific capacity of the putative duty-bearer to interfere with the particular right in question.

(a) Abstract Power

In a few cases, courts have approached the duty-bearing enquiry by reflecting upon the abstract power of the putative duty-bearer. In *NTWU*, the Indian Supreme Court held that businesses had duties to society as a whole, on the basis that they were *'socio-economic institution[s] wielding economic power and influencing the life of the people.'*[161] A similar approach was adopted by the ECtHR in *Centro Europa,* where the ECtHR held that the power of certain private actors in the media – in a general sense –

[160] Oliver and Fedtke (n 4) 503.

[161] *National Textile Workers' Union vs Ramkrishnan* (n 143) 21.

allowed them to exercise dominance and curtail editorial freedom, and therefore required their regulation in order to safeguard the interests protected by the ECHR rights.[162]

(b) Concrete Power

More commonly, the capacity of the private actor to interfere with the particular right complained about is considered. This is explicitly recognised in India and the ECHR as a necessary approach if rights are to be *'meaningful'*,[163] and not *'theoretical and illusory'*.[164] In South African law, this is a central aspect of the basic *Khumalo* enquiry: the potential invasion of that right which could be occasioned by persons other than the state or organs of state.[165]

For the ECtHR, this is the central consideration. A review of the ECtHR's approach leads to the unexpected conclusion that it is radical in this regard: it seems to take the view that the mere capacity of a private actor to interfere with an interest protected against the state under the ECHR is enough, or almost enough, to require the state to impose obligations on or otherwise restrain that private actor. Comparative reflection shows how radical a position that is: it is as if s. 8(2) of the South African Constitution were phrased in exactly the same terms as s. 8(1), without the *'appropriateness'* qualifier.

[162] *Centro Europa 7 SRL and Di Stefano v Italy* App no 38433/09 (ECtHR (GC) 7 June 2012), [133].

[163] *Vishaka* (n 45).

[164] *Opuz v Turkey* (n 100), [271].

[165] *Khumalo* (n 16), [33].

Some examples are necessary to illustrate the point. In *Hatton*, it seems that the mere fact that the (private) night flights could interfere with a protected interest under Art. 8 was enough.[166] But for any countervailing interests, there would have been an obligation to make the night flight operators respect Art. 8 rights. If the right were a negative one, those countervailing interests would be articulated in terms of the proportionality test; and there would be no need to consider counterweighting arguments if the private action was simply not an interference with Art. 8. The flights are described as a limitation on the right to respect for private and family life – something which would only be relevant if the test for duty-bearing was whether a private actor could limit an Art. 8 right, in the same way as the state. Otherwise, there would be a need to decide, before making that point, whether the case involved a violation of Art. 8 of a sort a private actors (as opposed to the state) could perpetrate.[167] In *I v Finland*, like in *Hatton*, the ECtHR implies that private parties must be bound in the same way as the state in relation to breaches of medical confidentiality, holding that the domestic law must afford safeguards to *'prevent any such […] disclosure of personal health data as may be inconsistent with the guarantees in Article 8.'*[168] Note that, under this analysis, it is the *'private disclosure of information'*, not the legal framework for the protection of medical confidentiality, which the ECtHR assessed for consistency with the Art. 8 guarantee (even though the matter would be formally articulated as a complaint about Finnish *legislation* governing confidentiality). In *CAS v Romania*, the Court held that the state's positive obligations could arise where private

[166] *Hatton and Others v United Kingdom* (2003) 37 EHRR 28, [118] - [119].

[167] ibid, [141].

[168] *I v Finland* (n 101), [38].

'acts of violence that meet the condition of severity such as to engage Article 3'[169] were committed, suggesting that it is the mere ability to act in a way which, if the state acted that way, would breach a negative obligation under Art. 3, which triggers the obligation to prevent that action. In other words, as regards the negative obligation under Art. 3, the individual must be restrained just as the state is.

It can therefore be seen that, the ECtHR adopts a surprisingly radical beneficiary-focussed approach which does not condition the enjoyment of the rights in any way on which actors are interfering with them (although this may, of course, affect the appropriate *'fair balance'*).

In Indian law, by contrast, close analysis of the capacity of private actors to interfere has not played such a substantial role – at least not explicitly.[170] Instead, Indian courts have tended to focus on the institutional roles of and relationships between private actors which give rise to the capacity to interfere, such as that of employment, or education. There are, however, some exceptions to this general position. In *People's Union for Democratic Rights*, for example, the Supreme Court held that part of the justification for the horizontal applicability of Art. 23 was that the problem of forced labour was too urgent to await legislation giving effect to the prohibition, and the prohibition required *'teeth'*, given the proliferation of private actors engaging in it.[171] In *Rajagopal*, the Court relied on the fact that privacy was a right of the sort which private actors, especially the media, would have the capacity to violate, and that the

[169] *CAS and CS v Romania* (2015) 61 EHRR 18, [69].

[170] It may well be because this is assumed, unlike in systems which take the vertical conception as their starting point: Singh (n 58) 181–183.

[171] *People's Union for Democratic Rights* (n 54) 25.

private law cause of action protecting privacy would therefore need to be infused with constitutional protection.[172]

(c) Application to Education

Private schools exercise significant power over the children in their care. In their relationship with children, they wield massive authority, with significant power in law and fact to enforce discipline, over an already vulnerable group. The individual decisions made about children under their care might not be subject to any independent supervision or grievance procedure. The asymmetry of power, not only between schools and students but also, in some cases, between schools and parents, renders the school very powerful indeed. Private schools or educational consortiums can also exercise a lot of power in society more abstractly. *Firstly*, they control access to a vital social good, which empowers beneficiaries but can also entrench privilege and disadvantage. *Secondly*, they could also have the power to distort and segment the education market. Regulatory capture is a real risk. If power is a relevant criterion, then it tends in favour of imposing duties on private schools.

(4) Vulnerability of Victim

The vulnerability of the victim is always relevant in deciding whether a private actor owes duties.[173] Vulnerability appears in some iteration or another in the reasoning of all three jurisdictions. It appears in one of two guises, much like the *'severity of violations'* factor: on the one hand, it is sometimes dealt with abstractly, drawing on

[172] *Rajagopal vs State of T.N.* (n 92).

[173] Oliver and Fedtke (n 4) 512–513.

the characteristics of the victim to class them as vulnerable, without identifying a clear relationship which created the vulnerability. This is the general approach of the ECtHR.[174] On the other hand, courts in all the jurisdictions under review have sometimes drawn upon contextualised or relational vulnerability, situating the beneficiary of the right within a power dynamic. As set out in Chapter 2, vulnerability is a complex and contested concept, and so it is no surprise that the concept has been deployed differently by courts.

(a) Abstract Vulnerability

In the ECtHR, the vulnerability of the victim to the interference complained of at the hands of the private actor is a relevant consideration. When faced with the question of whether the legislative framework is adequate in the duties it imposes on other private actors, the Court has routinely emphasised the vulnerability of children,[175] prisoners,[176] trans people, [177] women in the home, [178] racial minorities, [179] and survivors of human trafficking.[180] In this sense, as observed above, the conception of *'vulnerability'* developed by the ECHR is closely linked to inequality. So, in *VC v Slovakia*, where a Roma woman complained that she had been subject to non-consensual sterilisation, the

[174] See, most explicitly in this regard, *Opuz v Turkey* (n 100), [181].

[175] *Marckx v Belgium* (1979-80) 2 EHRR 330, [37], [39].

[176] *Edwards v United Kingdom* (2002) 35 EHRR 19, [56].

[177] *Goodwin v United Kingdom* (2002) 35 EHRR 18, [77].

[178] *Opuz v Turkey* (n 100), [159] - [160].

[179] *V.C. v. Slovakia* (n 87), [145] - [146].

[180] *Siliadin v France* 2006 43 EHRR 16, [143].

Court emphasised the position of the Roma as an ethnic minority in Slovakia, and dangerous stereotypes about the rate of birth of Roma children.[181] Similarly, in South Africa, this kind of abstract vulnerability was identified in *Bhe*. In striking down legislative and customary rules of primogeniture, the Court relied heavily on the vulnerability of women and children *in general*.[182]

For the purpose of categorising people as *'vulnerable,'* the ECtHR has developed a conception of vulnerability which draws on both general and specific characteristics of the private parties involved. In *Opuz*, where the applicant complained about the state's failure to protect her from domestic violence, the Court highlighted aspects of the individual applicant's position: *'violence suffered by the applicant in the past, the threats issued by [the perpetrator] following his release from prison and her fear of further violence.'*[183] However, the Court then also took into account the general factor of *'her social background, namely the vulnerable situation of women in southeast Turkey.'*[184] Both aspects are not always considered, however. In *O'Keeffe*, for example, the focus was general, on the context of children in primary school,[185] whereas in *Redfearn*[186] and *Martinez*,[187] both employment cases, the Court paid attention to the

[181] *V.C. v. Slovakia* (n 87), [145] - [146].

[182] *Bhe v Magistrate Khayelitsha* [2004] ZACC 17, 2005 (1) SA 580 (CC) 2005 1 SA 580 CC, [91].

[183] *Opuz v Turkey* (n 100), [160].

[184] ibid, [160].

[185] *O'Keeffe v Ireland* (n 112), [145].

[186] *Redfearn v United Kingdom* (n 119), [46].

[187] *Fernández Martínez v Spain* (n 120), [143].

specific vulnerability of the applicants, in relation to the position they would be in if required to find a new job.

This kind of generalised, abstract vulnerability also crops up from time to time in the Indian case law. So, in *IMA*, for example, the Supreme Court drew a general link between access to education, the power of knowledge, and entrenched disadvantage; which was borne of more general observations about society, and not a particular relationship of power.[188] In the context of children in education, this sort of reasoning can be seen in *Rohit Singhal*, [189] where a group of children in a state school complained about their transfer to another school (the basis of the complaint was somewhat unclear), in a different place with a different dialect. The Court held, in finding for the children, that *'children are vulnerable. They need to be valued, nurtured, caressed and protected.'*

In the positive obligations context, this kind of generalised vulnerability has also been used to show that particular responses to violations were inadequate. So, in *KU v Finland*, the ECtHR took into account the applicant's vulnerability and its link to the ability to enforce rights through private law.[190] In *I*,[191] *Stork*[192] and *Tysiąc*,[193] the applicants' vulnerability was held to indicate that retrospective measures such as

[188] *Indian Medical Association vs Union of India & Ors* (n 91), [142].

[189] *Rohit Singhal vs Principal* (2003) 1 SCC 687, 2003 SCC (L & S) 113.

[190] *KU v Finland* (n 97), [46]; see also third party submissions from the Helsinki Foundation for Human Rights at [34].

[191] *I v Finland* (n 101), [47].

[192] *Storck v Germany* (n 88), [102].

[193] *Tysiąc v Poland* (2007) 45 EHRR 42, [127].

liability and damages were inadequate to protect them. There has also been a focus on *'intimate interests'*.[194] This approach has also been adopted in Indian law when dealing with obligations to protect. In sexual harassment and assault cases, the Indian Supreme Court has tended to make general statements about the urgency of gender justice,[195] and in *Shri*, dealing with the adequacy of the legal framework protecting women from rape, the court emphasised the disadvantage women face.[196]

(b) Relative Vulnerability

Relative vulnerability is vulnerability contextualised within the power dynamic of a particular relationship, and any imbalance of power within it.[197] In the English case of *Wilson v First County Trust*, a consumer took out a loan, secured on her car. When the creditor sought to enforce this security interest, she resisted, relying on consumer protection regulations which provided that a court could not enforce a credit agreement where the agreement did not correctly state the amount of credit. The creditor complained that the strict statutory rule was inconsistent with the right to peaceful enjoyment of possessions in A1-P1,[198] which it claimed protected its security interest in the consumer's car. A majority held that A1-P1 was applicable, and accordingly had to apply the proportionality test.[199] In applying this test, the majority held made heavy

[194] Starmer (n 61) 200.

[195] *Vishaka* (n 45).

[196] *Bodhisattwa Gautam vs Subhra Chakraborty* (n 51) 7.

[197] Lavrysen (n 73) 88.

[198] *Wilson v First County Trust (No 2)* 2003 UKHL 40 2004 1 AC 816, [41].

[199] ibid, [39].

weather of the vulnerability of debtors *vis-à-vis* creditors, and in particular of the fact that the creditor could set the terms, and that *'[notorious] social evils'* flowed from this.[200]

This is reflected at the European level. The ECtHR has specifically contextualised this vulnerability in a particular power dynamic in cases concerning the relationship between abusers and children,[201] between traffickers and victims,[202] between employers and employees,[203] and (more implicitly) between businesses and workers, or other parties disempowered by asymmetric information.[204] These cases might be seen as the ones which push closest towards a clear theory of private duty-bearing, explicitly linking vulnerability and capacity to interfere in a protected interest in a nexus of mandatory legal obligation[205] between actor and victim.

This contextualised consideration of vulnerability within a specific relationship of asymmetric power is a key theme of the Indian case law. In *People's Union for Democratic Rights*, the Indian Supreme Court considered the power of the employer relative to the *'economically helpless'* position of the employee.[206] In *AISC*, the Court considered the vulnerability of contract (agency) workers in interpreting the statute

[200] ibid [74] - [75].

[201] *O'Keeffe v Ireland* (n 112) [148].

[202] In identifying their relationship as being based on the relationship between property and owner: *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, [281].

[203] *Bărbulescu v Romania* (n 152), [177].

[204] *Vilnes and Others v Norway* (n 153), [238].

[205] In the sense that the state is required to create such obligations.

[206] *People's Union for Democratic Rights* (n 54) 490.

which required their incorporation into companies.[207] In *IMA*, the mere *risks* of imbalances of power were relevant.[208]

In South Africa, by contrast, the position is more varied. In *Daniels*, the power landlords held over occupiers was relevant in determining the content of the positive obligation imposed on them.[209] Similarly, in *Jaftha v Schoeman*, a case concerning the consistency of execution of security over an individual's home by a creditor with the right to have access to adequate housing, the Court placed great weight on the vulnerability of the poor:

> *People at the lower end of the market are quadruply vulnerable: they lack income and savings to pay for the necessities of life; they have poor prospects of raising loans, since their only asset is a state-subsidised house; the consequences of inability to pay, under the law as it stands, can be drastic because they live on the threshold of being cast back into the ranks of the homeless in informal settlements, with little chance of escape; and they can easily find themselves at the mercy of conscienceless persons ready to abuse the law for purely selfish gain.'*[210]

However, this strong approach to contextualized vulnerability is not always carried across into the case law concerning the human rights obligations owed between contracting parties, where the imbalance of bargaining power between the parties is, in principle, highly relevant.[211] However, the courts tend to adopt a restrictive conception of inequality of bargaining power, which does not fully explore the pressures which

[207] *Air India Statutory Corporation vs United Labour Union* (1997) 9 SCC 377 : 1997 SCC (L&S) 1344.

[208] *Indian Medical Association vs Union of India & Ors* (n 91), [142].

[209] *Daniels v Scribante* (n 22), [49].

[210] *Jaftha v Schoeman* [2004] ZACC 25; 2005 (2) SA 140 (CC), [30].

[211] *Barkhuizen v Napier* (n 135).

might pertain in relationships of asymmetric power. In *Barkhuizen*, the Constitutional Court held that *'the personal and social situation of the claimant may have some bearing on the public policy evaluation, but it is ordinarily not decisive'*.[212] This explains the gulf between the majority and minority, the latter of which required a far more searching examination of inequality of bargaining power.[213] This tension continues to run through the case law: in *Paulsen*, Madlanga J and Moseneke DCJ both concurred in the outcome, but the latter gave much more focus to the position of vulnerability of debtors and the financially vulnerable find themselves in in South Africa,[214] while the former gave much more emphasis to contractual private autonomy.[215]

(c) Application to Education

The vulnerability of children – in both an abstract and relative sense – in school is obvious,[216] and recognised in all three jurisdictions. In an abstract sense, of course, children are hugely disempowered in society. They have restrictions on their freedom which adults do not have, they are physically weaker, and are more likely to lack the mental capacities to effectively enforce – or even complain about a breach of – their rights. They are also vulnerable in a relative sense, for the reasons discussed above – namely that the school and their parents are in a very powerful position over them, both

[212] ibid, [94].

[213] ibid, [124]; [135-136].

[214] *Paulsen v Slip Knot Investments* [2015] ZACC 5, 2015 (3) SA 479 (CC), [72]-[80].

[215] ibid, [125]-[131].

[216] Marius Pieterse, 'Relational Socio-Economic Rights' (2009) 25 SAJHR 198 204.

as a matter of law and a matter of fact. A full account of this vulnerability is developed in Chapter 2, to which the reader is referred back.

(5) Social Institutional Role

In all jurisdictions, there has been consideration of the institutional role of the private actor: that is, the role that the private actor plays in society, and any public function they discharge,[217] and the *'social responsibility'* to which that gives rise.[218]

(a) Examples

This can be seen most clearly in the context of **employment**. The role of employers as providers of work and livelihood – in contrast to any other coincidentally powerful individual – has been emphasised in the Indian cases of *AEP,*[219] *Air India,* and *Kirloskar*. In *Kirloskar* it was held that employment's role in society is to enable workers to enjoy the fruits of their labour, and participate in economic, social, and cultural life.[220] In *Air India*, it was held that *'[t]o make these rights meaningful to workmen and meaningful right to life a reality to workmen, shift of judicial orientation from private law principles to public law interpretation harmoniously fusing the interest of the community.'* The Indian Supreme Court has been at pains to emphasise that employers are equal participants with the Government in the realisation of

[217] Lavrysen (n 73) 90.

[218] *Indian Medical Association vs Union of India & Ors* (n 91), [141].

[219] *Apparel Export Promotion Council vs AK Chopra* (1999) 1 SCC 759, 1999 SCC (L&S) 405 9.

[220] *Kirloskar Brothers Ltd vs Employees' State Insurance Corp.* (n 93).

workers' rights.[221] In *CERC*, health plans were required to be provided by private employers, on a similar basis.[222] Under the ECHR, too, the state is required to impose obligations on employers in respect of, amongst other things, safety at work[223] and dismissal,[224] while the social and economic position of employment is taken into account in granting a generous margin of appreciation.[225]

Employment is a major example of this kind of reasoning, but it is certainly not the only one. In *LIC*, the Indian Supreme Court emphasised that **insurance companies'** provision of life insurance was one of the ways in which the Constitution's commitment to socio-economic rights and equality was to be realised, and that, as such, life insurers were constitutionally constrained from including discriminatory or otherwise constitutionally offensive clauses in the policies they offered.[226] The special role of **trades union** in India in securing workers' rights and organising labour[227] meant that special protection for unionised employees against their employer, in line with international labour law standards,[228] was appropriate. The role of the **media** in a

[221] ibid 4.

[222] *Consumer Education & Research Centre vs Union of India* (n 159).

[223] *Vilnes and Others v Norway* (n 153).

[224] *Redfearn v United Kingdom* (n 119).

[225] ibid, [53].

[226] *LIC Of India & Anr vs Consumer Education & Research Centre* (1995) 5 SCC 482, AIR 1995 SC 1811 22.

[227] *Charu Khurana & Others Vs Union of India & Others* (2015) 1 SCC 192, (2015) 1 SCC (L & S) 161 30.

[228] Zafar Hussain and M Afzal Wani, 'Application and Enforcement of International Labour Standards in India: A Critique' (2011) 53 JILI 578 580, 583.

democracy has also been much emphasised in determining what obligations its members have, both by the Indian Supreme Court,[229] and the South African Constitutional Court in *Khumalo*, where O'Regan J held that the media comprised of extremely powerful institutions with *constitutional* duties to safeguard democracy and disseminate information to the people.[230] Similar reasoning applies to **providers of education**, as will be shown below.

Relevant to the institutional role of the private actor is any **assumption of responsibility** on their part. Actors performing roles related to the realisation of human rights, or which have the capacity to interfere with rights, assume the responsibility to adhere to those obligations. This has been explicit in the context of the doctor-patient relationship in India, where the Supreme Court has relied upon the Code of Medical Ethics,[231] and even the Hippocratic oath. So, in *Mr X*, the Court considered, but rejected, an argument based on the responsibilities assumed by doctors swearing the Hippocratic oath, on the grounds that the doctor had a higher loyalty, and that the responsibility assumed was not absolute.[232] The Court has adopted similar, but more general logic, in the context of charitable or philanthropic institutions. In *IMA*, the Court emphasised the importance of holding allegedly charitable institutions to the lofty goals they espouse, and not allowing them to ignore *'conditions of social injustice*

[229] *People's Union of Civil Liberties vs Union of India* (n 121) 1, 5.

[230] *Khumalo* (n 16), [23] - [24]. Note Art. 10 ECHR, which recognises both rights *and* responsibilities in relation to free expression.

[231] *Parmanand Katara v Union of India* (n 60) 9.

[232] *Mr X v Hospital Z* (n 155).

and inequality'.[233] Similarly, the South African Constitutional Court in *Pridwin* indicated that the voluntary assumption of the educational role by the private school was relevant to the constitutional duties it owed.[234]

(b) Reasoning by Comparison with the State

This focus on institutional role extends to consideration of the way in which the **institutional role of the state**[235] might have implications for private duty-bearing. This can be an argument both in favour of and against the imposition of duties. In favour, the role of the state as a regulator with certain constitutional goals tends towards certain consequences for private actors.[236] Those discharging public functions have a special role which tends towards duty-bearing.[237] It is sometimes emphasised that the state is working together and interwoven with private actors to realise rights,[238] and that both have a role to play in that regard.[239] This has been particularly salient in the context of privatisation, where the existence of privatisation and liberalisation has been used to justify the imposition of duties.[240]

[233] *Indian Medical Association vs Union of India & Ors* (n 91).

[234] *Pridwin (CC)* (n 26), [85], [178].

[235] Of course, the 'state' is hard to define, and it is often impossible to identify a bright line between the state and other actors. However, it is possible at least to identify paradigm instances of *'the state'* for the purpose of such analogising, and courts most certainly do this.

[236] *Indian Medical Association vs Union of India & Ors* (n 91), [111].

[237] *People's Union of Civil Liberties vs Union of India* (n 121) 16.

[238] *Governing Body of the Juma Musjid Primary School v Essay N.O.* (n 21).

[239] *Advocates' Forum for Social Justice v State of Tamil Nadu* 2017 1 Madras Law J 81, [3], [10.1].

[240] *Kirloskar Brothers Ltd vs Employees' State Insurance Corp.* (n 93).

On the other hand, in England, this very logic has been used to argue against the imposition of duties on the grounds that exemption from scrutiny is what privatisation deliberately seeks to achieve.[241] Similarly, in South Africa, drawing contrasts between the institutional role of the private actor and the state has been used to justify the non-imposition of duties, under the rubric of the *'nature of the duty'* – the question asked is whether the duty is of the sort that performing it would be the institutional role of the state. In *Daniels*, the Constitutional Court was keen to emphasise that *'the state is supposed to be motivated by a concern for the well-being of society as a whole'* and is funded by the public purse.'[242] This line of argument is also closely linked to the discussion of private autonomy, above: the institutional role of the actor is a guide, in part, for how important their autonomy interests are.

(c) A Variable Concept

The correct conception of an actor's institutional role is of course in part determined by the constitutional principles and *'national aspirations'* pertaining in the jurisdiction in question,[243] and, as this analysis shows, a particular conception of the role of the state. So, in India, the rule of law,[244] social democracy,[245] socialism,[246] and the directive

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

[242] *Daniels v Scribante* (n 22), [39] - [40].

[243] *Indian Medical Association vs Union of India & Ors* (n 91).

[244] *Kirloskar Brothers Ltd vs Employees' State Insurance Corp.* (n 93); *Vishaka* (n 45).

[245] *Air India Statutory Corporation vs United Labour Union* (n 207).

[246] ibid.

principles of state policy[247] have been relevant in determining the obligations owed by private actors.

The social institutional role of particular kinds of private actor are not just variable across jurisdictions, but also across time. In *National Textile Workers' Union*, dealing with the question of whether workers were entitled to be heard in a winding up petition, the Indian Supreme Court tracked the shift in the social understanding of a company from a *'convenient mechanical device for carrying on trade and industry'* to *'a species of social organisation, with a life and dynamics of its own and exercising a significant power in contemporary society. […] The adoption of the socialistic pattern of society as the ultimate goal of the country's economic and social policies hastened the emergence of this new concept of the corporation.'*[248] The led the Court to a conception of the company as a social institution having duties and responsibilities.[249] This conception of social role as variable across time and jurisdiction is important: it highlights that the same principles can govern an inquiry, while also meaning different things in different jurisdictions.

(d) Application to Education

The unique role of educational institutions for democracy and the raising of the next generation has been repeatedly emphasised. In *Costello-Roberts*, the ECtHR highlighted the role of schools in providing and realising the right to education, and

[247] Singh (n 58) 188.

[248] *National Textile Workers' Union vs Ramkrishnan* (n 143) 20.

[249] ibid 21. Although the case itself concerned the principle of *audi alteram partem*, it was subsequently applied to hold that Parts III and IV of the Constitution bore directly upon private companies in *Consumer Education & Research Council vs Union Of India* (n167) 24.

held that the state cannot exempt itself from responsibility for performing such a role by delegating it to private schools.[250] In *IMA,* the Indian Supreme Court held that education trained citizens for democracy,[251] and that the inherently philanthropic, non-commercial nature of education was relevant to the duties educational actors owed.[252]

Further, education is a field where the state and private are interwoven and must work together. In *Mohini Jain* it was held that control over capitation fees is part and parcel of the state's duty to provide education,[253] which makes the school an *'agency'* of the state in realising the right to education.[254] In addition, the social role of parenting,[255] and any analogous or complementary functions performed by the school, might tend in favour of duty-bearing.[256]

Reasoning by analogy with state schools leads to the same conclusion. If duties are appropriate for a public school, it is hard to see how a private school is not an analogous institution, at least in some respects. Even if the position of the institution is not analogous in respect of positive duties to provide education to the community at large,[257] it is certainly the same for the student actually attending the school. Further,

[250] *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112, [27].

[251] *Indian Medical Association vs Union of India & Ors* (n 91), [137].

[252] ibid 27, [136].

[253] *Mohini Jain vs State Of Karnataka* (1992) 3 SCC 666, AIR 1992 SC 1858, 10.

[254] ibid 12.

[255] *Avinash Mehrotra vs Union Of India* (n 56), [27].

[256] Kumar (n 12) 22–23.

[257] *Pridwin (SCA)* (n 115), [42].

some of the school's powers, if analogised to powers in other areas of society in this way, may also dictate the application of human rights duties – some of the powers schools exercise are analogous to those exercised by the state in, among others, its policing function, including the use of force, detention, and punishment for breach of rules which the school has created, and yet more of them might be thought analogous to the powers of an employer over an employee.

(6) The Public Interest

In every jurisdiction under review, there is a recognition, albeit one which is more or less inconsistently applied or more or less inchoate, that there must be some attempt to balance, in positive obligation cases, not only the competing rights of the private parties in issue as discussed above, but also the broader public interest.

(a) Public Interest

In making decisions about the obligations which (must) exist between private actors, the public interest comes to play a significant role in justifying both the imposition of duties on private actors, the limitation of rights by application of the proportionality test, and sometimes the flat rejection of the applicability of rights at all, in all the jurisdictions under review. The ECtHR takes into account the public interest as part of its fair balance test.[258] In *IMA*, the Indian Supreme Court's focus was more on the public good,[259] including the rights of others not involved in the case,[260] and the good

[258] *Redfearn v United Kingdom* (n 119), [47].

[259] *Indian Medical Association vs Union of India & Ors* (n 91) 22, [116].

[260] *Apparel Export Promotion Council vs A.K. Chopra* (n 219) 10.

functioning of democracy,[261] than it was with an explicit balancing exercise between the rights of students and the rights of the educational institutions actually before the Court. In giving brief consideration to these rights, the Indian Court rejected the *'primordial importance'* of formal equality and freedom,[262] and gave them little further consideration. The public interest can tend in favour of values and interests which might limit the ability to fully realise rights, such as legal certainty,[263] the enforcement of contractual agreements,[264] and the coherence of the legal system, including private law.[265]

There is also a trend, in the Indian case law, of treating the public interest as a rubric for other rights claims that might be at stake. So, in *Meenakshi Mills*, provisions which governed the circumstances under which workers could be retrenched were challenged as inconsistent with the freedom to conduct a business in Art. 19(1)(g). The workers' rights elements of the decision were dealt with by conflating workers' rights and the public good,[266] including by focusing on rights violations as part of the mischief the provisions sought to deal with, rather than as independent imperatives.[267] In *Frank*

[261] *People's Union of Civil Liberties vs Union of India* (n 121) 5.

[262] *Indian Medical Association vs Union of India & Ors* (n 91), [104].

[263] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* [2015] ZACC 34, 2016 (1) SA 621 (CC), [37].

[264] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa* [2016] ZACC 33, (2016) 37 ILJ 2723 (CC), [24].

[265] *X, Y and Z v United Kingdom* (1997) 24 EHRR 143, [41]; Kilkelly (n 70) 252.

[266] *Workmen v Meenakshi Mills* 1992 3 SCC 336 1992 SCC 67 36.

[267] ibid 23; see also *Hariharan v Reserve Bank of India* (1999) 2 SCC 228, 1999 SCC OnLine SC 179.

Anthony, where the applicant sought to argue that a provision which provided that educational standards did not extend to unaided minority institutions was unconstitutional, the balance between minority rights and learner's rights was framed in terms of *'educational excellence'*.[268]

Indian Courts have been somewhat inconsistent in what sort of evidence is required to substantiate arguments about the public interest. The courts have on different occasions both affirmed a *'floodgates'* argument against horizontally applicable rights (without evidence),[269] and insisted, in a different case, that any attempt to rely on this argument would require positive evidence.[270] In *Frank Anthony*, the Supreme Court was firm in rejecting hyperbole, and insisting on proper evidence of what the public interest required.[271] On the other hand, the South African courts have been minded to accept arguments that interference with private law's ordering of things would have deleterious social consequences, without much in the way of evidence.[272] Sometimes basically no reasoning at all is given for courts' assessment of the public interest – as in *Den Braven* where, in reliance on *Barkhuizen*, it was used to justify the non-applicability to rights to contractual relationships.[273]

[268] *Frank Anthony Public School Employees Association vs Union of India* (1986) 4 SCC 707, AIR 1987 SC 311.

[269] *Women Lawyers Association* (n 146), [590].

[270] *National Textile Workers' Union vs Ramkrishnan* (n 143) 32.

[271] *Frank Anthony Public School Employees Association vs Union of India* (n 268) 28.

[272] *Barkhuizen v Napier* (n 135), [57], [87].

[273] *Den Braven v Pillay* 2008 ZAKZHC 22 2008 6 SA 229 D, [30], In fairness, it might be said that such analysis was unnecessary, since *Barkhuizen* was controlling precedent.

(b) Separation of Powers/Deference/Margin of Appreciation

The question of to what extent courts are to defer to the institutional competence of the legislature (or, the case of common law, the private law courts of the past) in the context of private duties is a vexed one. It is clear that, when the question is articulated as how the state should arrange affairs between private citizens, courts recognise that some respect for the choices of the legislative branch is in order, to a greater or lesser extent.

In South Africa, the Constitutional Court has repeatedly held that the major engine of law reform should be the legislature. Relevant factors in determining the level of deference due include whether the rule is judge-made, the extent of development required, and the legislature's ability to amend or abolish the common law.[274] Closely related to this is the important doctrine of constitutional subsidiarity: if the legislature has enacted rules to give effect to a constitutionally protected right, the legislation must be subject to constitutional challenge if it is said to not fully protect the right in horizontal relations. There can be no direct recourse to the Constitution.[275]

Under the ECHR, respect for the judgement of the legislature is extremely important in contexts where private interests need to be balanced.[276] The margin of appreciation is wide in relation to positive duties which must balance public and

[274] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* (n 263), [39]; *MEC, Health and Social Development, Gauteng v DZ* [2017] ZACC 37, 2017 (12) BCLR 1528 (CC), [34].

[275] *SAMSA v McKenzie* [2010] ZASCA 2, 2010 (3) SA 601 (SCA), [33]; see also [27].

[276] Cherednychenko (n 82) 211.

different private interests.[277] There is lots of scope for the state to regulate private interactions in different ways, and this clearly plays a role in the balancing exercise. Reflection, debate and consultation are all also taken into account in deciding how wide the margin is to be.[278] Only rarely has the margin of appreciation not been mentioned.[279]

However, the margin of appreciation is not unlimited, even in the context of positive obligations.[280] *'Under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights, the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged[.]'*[281] The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of *'intimate'* or key rights, or where a particularly important facet of an individual's existence or identity is at stake.[282]

In India, by contrast, there is very little judicial deference to legislative choices, and courts often take it upon themselves to make orders which have the effect of filling in legislative deficiencies.[283]

[277] Clayton and Tomlinson (n 62), [6.178]; *Evans v United Kingdom* (2008) 46 EHRR 34, [77]; *Janković v Croatia* App no 38478/05 (ECtHR 5 March 2009), [46].

[278] *Evans v United Kingdom* (n 277), [86]; [91].

[279] *Gaskin v United Kingdom* (n 102).

[280] *KU v Finland* (n 97), [44].

[281] *Opuz v Turkey* (n 100), [165].

[282] *Fernández Martínez v Spain* (n 120), [124].

[283] See e.g. Singh (n 58) 205.

This issue is different, but related, to the constitutional constraint discussed in Chapter 4. The constitutional constraint deals with cases where a deficiency in the law or private conduct is found, but the court is, for other, non-human-rights-based constitutional reasons, restrained from intervening. Here we are concerned with whether there has been a violation at all – i.e., the extent to which the legislature's judgment should be respected in so far as it determines the *content* of rights and their correlative horizontal duties.

Where courts approach provisions which are openly horizontal – whether one of the accepted horizontal provisions of the Indian Constitution, or s. 8(2) of the South African Constitution – almost no consideration is given to the wisdom of the legislature's ordering of things. In *Juma Musjid*, for example, the Court did not take into account at all the notion that the rules of property were common law rules in which the legislature had acquiesced. *Daniels* is an even stronger example of this phenomenon. The Constitutional Court used s. 8(2) to go behind ESTA and work out, independently of any statutory provision what horizontal duties were owed. These horizontal duties were used to interpret the relevant provisions of ESTA in a constitution-compliant way, in potential tension with the normal rules about both deference and constitutional subsidiarity.[284]

(c) Application to Education

[284] EJ Marais and G Muller, 'Abandoning Established Principles? An Analysis of the Constitutional Court's Approach to the Right to Make Improvements in Daniels v Scribante' <https://www.researchgate.net/publication/324977895_Abandoning_established_principles_An_analysis_of_the_Constitutional_Court's_approach_to_the_right_to_make_improvements_in_Daniels_v_Scribante> accessed 30 December 2021.

It is obviously very hard to offer any kind of general thoughts on the weight due to legislative judgment, which will vary hugely not only by jurisdiction but also by how the case is brought, the provisions relied upon or challenged, and the precise fact pattern. It can however be observed that education involves very important social choices for the interests of lots of competing actors. The way in which a society educates children is not only a matter with deeply personal and moral implications for parents, children, and schools It is also a difficult socio-economic balancing act, possibly with competing interests of local and national governments, coupled with a close connection to conceptions of the wider public good and public morality. It might be thought that, for these reasons, education cases would, generally, attract significant respect for legislative choices in such a *'polycentric morass'*.[285] That might of course mean that, in certain cases, it is a matter for the legislature how children's rights in private schools are to be formulated and enforced in particular cases. One might expect that this would be particularly so where the alleged duty is said to arise outside of the learner-school relationship, or require expenditure . However, in cases where putative duties of restraint are in issue, one would not expect this to have much purchase: if something must be prohibited, it would naturally lie outside the legislature's margin of judgement not to have prohibited it.

D. THE THREE ANALYTICAL CHALLENGES

Accordingly, there is no singular, agreed upon approach, even within each of the jurisdictions under review, to assessing which duties private actors owe each other. The exercise of drawing out from the case law what principles militate requires a lot of

[285] *Paulsen v Slip Knot Investments* (n222), [91].

inference and deduction. Courts do not explain or justify their choices from the factors above, nor do all of these factors apply the same way in each jurisdiction, nor within each jurisdiction.

Leaving aspects of reasoning unarticulated is an overarching theme running throughout the case law cited above. These failures to articulate, are compounded by three significant analytical challenges: (i) moving beyond a high level of generality; (ii) explaining the role of competing rights and interests; and (iii) accounting for the division of labour between state and private actors. While the twists and turns of the jurisprudence in each jurisdiction are different, this review indicates where, so far, there are analytical gaps which, to a greater or lesser extent, are common across the jurisdictions. A theory which seeks to draw together these insights will make a contribution if it provides the tools to overcome these common challenges.

(1) Analytical Challenge 1: Moving beyond a high level of generality

The first challenge faced by courts is the need to move beyond a high level of generality. Courts often use broad concepts, without fully explaining the parameters of those concepts, or adopting and defending specific conceptions of those concepts. This makes predicting the outcome of future cases difficult, and raises doubts about the explanatory power of the concepts deployed.

The use of the factors set out above in a highly general way is widespread. For example, the concept of vulnerability is often used in a way which does not explain the analytical labour it is doing. People or groups are identified as *'vulnerable'* and this is then used to justify the imposition of duties on those who deal with them. The precise nature of the vulnerability, and its link to the imposed duty, is left unsaid. Likewise,

when considering how important, fundamental or intense the right is, the metrics by which the importance of the right is to be assessed are left somewhat vague. An obvious question, which is never answered, is how this tool might be used to identify rights which are *not* important enough to warrant horizontal application. As tests, neither of these general concepts allows much prediction of what courts will do in future.

General concepts are also used to resolve conflicts between competing rights (whether by holding that no right is applicable in the circumstances, or holding that interference with that right is justified). These include autonomy, dignity,[286] socialism,[287] and effectiveness.[288] These words, while reflective of deep bodies of learning and important ideas, do not resolve cases, without much more explanation. They serve, in some cases, as cover for difficult questions inherent in the balancing exercise. In terms of who should bear duties, courts often do not acknowledge the intensely political nature of the question they are trying to answer: that it is a question of what it means to be a citizen, child, school, business or any other actor in a democracy, and what living together in a community governed by law means.

It is therefore necessary for an effective theory of private duty-bearing to go beyond such abstract ideas. Although they may provide a fertile starting point, they cannot be the end of the analysis. There is some recognition of this in the case law. The Indian courts sometimes do this, going beyond raw assertion of high-level values,

[286] *Brendenkamp v Standard Bank of South Africa* [2010] ZASCA 75, 2010 (4) SA 468 (SCA), [57].

[287] *People's Union for Democratic Rights* (n 54).

[288] *Opuz v Turkey* (n 100).

unpicking what they mean in the particular case,[289] but this is certainly not consistent. In South Africa, the earlier jurisprudence relied on abstract conceptions of the importance of the right: as with free speech in *Khumalo*, or education in *Juma Musjid*, but these cases do not link the important of the right to any particular conception of private duty-bearing they adopt. In *Daniels*, by contrast, a far closer, contextual analysis was undertaken.

This move towards thinking about private-duty-bearing in concrete, contextual terms means that a theory which explains the triangular relationship between the parties and the state, and the way in which those principles map on to that, is required.

(2) Analytical Challenge 2: Explaining the substantive role of competing rights and interests, especially private autonomy.

Incorporating the countervailing rights and the private autonomy of the duty-bearer has always been a challenge for horizontal human rights law. An effective theory would need to explain, both structurally and substantively, how these fit in. In none of the jurisdictions under review has this yet happened, and this gives rise to five problems.

The first problem is the conflation of countervailing considerations. Courts often fail to disaggregate three operative considerations which might tend against duty-bearing (or justify non-compliance with a duty which would otherwise exist). The *first* is competing rights proper, which are clearly relevant. The *second*, into which the protection of rights is sometimes folded, is the public good. This is often used as a shibboleth for what, in truth, are competing rights. While there is clearly a public

[289] See, e.g., *National Textile Workers' Union vs Ramkrishnan* (n 143).

interest in the realisation of rights, it is submitted that these concerns are different, and should be properly disaggregated, in a way the courts do not always do. The *third* is a more general concept of private autonomy. This idea has been hugely important in the debate around horizontal human rights obligations. However, its content, value, and relationship to the public good and other human rights are often not properly unpacked.

The second problem is the notion of private autonomy itself. It is rarely explained what exactly it is that private autonomy means. It seems to mean a general, negative, freedom of action, which goes beyond the particular enumerated human rights. This is certainly the approach in *Juma Musjid* and the SCA decision in *Pridwin*, where the focus on the difference between positive and negative obligations is front and centre. However, autonomy is also sometimes interpreted in a far richer way, and can run in the other direction. It can provide a reason not to impose an obligation, but also a reason to impose one, depending on whose autonomy (beneficiary or duty-bearer) is being considered. The value of informed consent, as an aspect of private autonomy, has underpinned decisions concerning medical or sexual choices which have had the effect of recognising limitations on the way private actors are entitled to behave, and the way the law is entitled to regulate their interaction.

The third problem follows from the first and second. Because courts do not properly disaggregate private autonomy and competing rights, and do not properly define what private autonomy is, they effectively turn raw negative freedom of action into a human right, granting that freedom the enhanced protection which such a status would confer. For example, in *Pridwin*, the SCA in its now-overturned majority judgment took into account the freedom of the school to *'associate and dissociate'* with whoever it wishes in deciding whether it could exercise the termination clause in the

contract.[290] It is not entirely clear that this is a right protected by the Constitution – certainly, no similar right has been recognised.[291] The SCA did not fully take into account the implications of recognising that any contracting, corporate parties have a *prime facie* human right to dissociate from each other, because, rather than concretely identifying the countervailing right in issue, all was dealt with under the rubric of private autonomy.

The fourth problem follows from the previous three, and it is that it is very difficult to assess what exactly the value of private autonomy is. The South African courts (until very recently) tended to treat it as self-evidently important, while the Indian courts take a far harder line, but, in doing so, tend not to draw out what value there might be in respecting private autonomy. Both approaches suffer from a failure to properly weigh up competing interests. This failure to properly assess private autonomy's weight, and then balance it against competing rights, leads courts to fall back on analogy with accepted duty-bearers (i.e., state actors), rather than fully articulating the link between private autonomy and the imposition of obligations. So, in *Air India Statutory Corp.*, the Indian Supreme Court was faced with the question of how to interpret an act which required, under certain circumstances, the absorption of agency workers into the employment of the private actor contracting for the labour. The Court's reasoning had a strong undercurrent that the duties which would be imposed by this change in status were ones which were appropriate for a (*de facto*) employer, and as such it was appropriate that they be imposed through the act in

[290] *Pridwin (SCA)* (n 115), [32].

[291] Stu Woolman, 'Freedom of Association' in S Woolman, *Constitutional Law of South Africa* (2nd edn, Kenwyn: Juta & Co) [44-30]-[44-32] .

question.[292] A similar approach was adopted by in the dissent in *Appleby v UK*, where a protestor complained that they had been excluded from a privately owned shopping centre for protesting, and that this was incompatible with Art. 10 ECHR. The ECtHR focussed on the private nature of the property, in effect asking how analogous it was to the traditional town square.[293] Autonomy therefore matters less if an actor's social role is analogous to the state, or the actor has assumed responsibility for a particular function or right. However, none of these cases actually explain what is valuable about private autonomy, or what its content is. They just provide a way out of answering those questions.

The fifth problem is that it is very unclear how, structurally, private autonomy and countervailing rights are to be incorporated and balanced against the beneficiary's right. In the ECtHR, it follows from the structure of the Court's *'fair balance test'* that competing interests justifying limitations to rights, rather than being considered separately at the proportionality stage, are lumped in with all the reasons for imposing a duty.[294] In South Africa, the Constitutional Court judgment in *Pridwin* has left the nature of this justification exercise unclear, as discussed above. The Indian Supreme Court has undertaken this balancing exercise through a reasonableness analysis,[295] a proportionality analysis, and in *Sharda*, the Court held that *'[i]f there were a conflict between fundamental rights of two parties, that right which advances public morality*

[292] *Air India Statutory Corporation vs United Labour Union* (n 207).

[293] Cherednychenko (n 82) 202.

[294] With the exception that, where a private action is backed by public funding, the Court may conceptualise it as a negative obligation case, with the effect that a full proportionality analysis is undertaken: *Fernández Martínez v Spain* (n 120), [131].

[295] *Frank Anthony Public School Employees Association vs Union of India* (n 268) 19.

would prevail.'[296] Sometimes, there is little more than an intuition that competing rights are at issue, with no real separate *'balancing'* exercise conducted at all,[297] whereas sometimes, a more structured approach is adopted. So, in *Meenakshi Mills*, there was a structured interference/justification analysis of sorts, but the Court *'proceeded on the assumption'* that there had been an interference with the rights of the workers, rather than properly analysing it.[298] In cases of indirect effect, the problem is yet greater. *Barkhuizen* – which held that the horizontal demands of the constitution are to be given effect by the interpretation of private law in line with constitutional values – leaves no separate stage of analysis for justifying infringements in competing rights. Similarly, in *Rajagopal*, the Indian Supreme Court articulated its approach as one of balancing, but the relative importance of the competing rights is never assessed, and the Court reaches its conclusions about the right to privacy and the balance with free expression in a perfunctory way.[299]

(3) Analytical Challenge 3: Accounting for the division of labour between the state, and different private actors

The third analytical challenge is working out how duties are to be assigned between different putative duty-bearers. This issue has been given relatively little consideration, but it is critical. There will be no situation in which there are only two private actors,

[296] *Sharda vs Dharmpal* (2003) 4 SCC 493, AIR 2003 SC 3450, [60].

[297] In *Christian Medical College Hospital Employees' Union v. C.M.C. Vellore Assn* (n 122) the balance between minority rights and worker's rights clearly underpins the reasoning, but there is no clear balancing test adopted.

[298] *Workmen v Meenakshi Mills* (n 266) 21.

[299] *Rajagopal vs State of T.N.* (n 92), [26].

one beneficiary and one putative duty-bearer, atomised from the rest of society. There will always be, at the very least, the state involved as well. This has been described as *'three-way'*,[300] but in fact it is very much more complicated than this triangular image, because often, multiple private actors will be involved, with the effect that the allocation of duties is not just between one private actor and the state, but between multiple private actors and the state. This will be especially critical for positive duties. It is the nub of the classic question in horizontal duty cases: *'why me?'*

There is sometimes confusion between what must be demanded of private actors, and what must be demanded of the state. In *Pla*, the ECtHR seemed to resolve the issue of an alleged discriminatory will by asking whether the Andorran court correctly interpreted the will, which raises the difficult question of whether the violation stemmed from the domestic court's *reasoning,* or from the *outcome* of the case. The ECtHR does not seem to rule that *no* testamentary disposition excluding adopted children can be permitted by domestic law, only that, in this case, the interpretative route used to get there was not Convention-compliant. This is perplexing, because it is hard to see how an otherwise permissible disposition can be made impermissible by the technical rules of interpretation used to get there. It would surely be better to have approached the case, as the ECtHR does in *O'Keeffe*, as a challenge to the domestic legal framework of rights and duties of private actors, and to accordingly resolve it by reference to what limits on testamentary freedom are demanded by the ECHR.[301]

[300] Fredman (n 83) 73.

[301] *O'Keeffe v Ireland* (n 112).

Further, to the extent the interaction between private and state duties is considered, it is dealt with only in a very inchoate way. In *Pridwin*, the Constitutional Court placed great weight on the fact that the school was realising a constitutional right (without explicitly justifying the link between this and the existence of horizontal obligations); and, as *Daniels* makes clear, the fact that a state owes an obligation does not preclude a private actor owing a similar one. However, it is left unclear how, in such a situation, the respective duties of state and provide actor are to be reconciled, or to interact with each other. In *Avinash Mehrotra*, the Indian Supreme Court drew out the particular salience of this question to education. The Court was approached to secure safer learning environments in schools, including private schools. In directing the enforcement of and adherence to minimum safety standards, the Court drew attention to the roles of multiple actors in education – the school as instructor, the state as regulator, the parents, the child as beneficiary, and *'all participants in our civil society'*.[302] Even then, however, a clear understanding of the interaction between the duties of these various *'participants'* was not fully developed.

Any good framework for horizontal human rights has to explain how this exercise is to be conducted and incorporated into the analysis. This is a serious analytical challenge, and one to which, in the main, the case law has not risen.

E. CONCLUSION

There are three key conclusions to draw from this Chapter. The first is that there are six key factors militating when courts across these jurisdictions make decisions about

[302] *Avinash Mehrotra vs Union Of India* (n 56) [29] - [32].

private duty-bearing: the importance of the right, and the correlative severity of the violation; private autonomy and countervailing rights; the power of the putative duty-bearer and its capacity to violate rights; the vulnerability of the beneficiary; the social role of the putative duty-bearer; and the public interest.

The second is that, applying these factors to private education clearly and unequivocally leads to the conclusion that private schools do and should owe obligations to respect the human rights of learners. The case law on private schools has not, however, fully unpacked what such respect would entail, how it is to be reconciled with the rights and autonomy of the private school, and how the responsibly for the realisation of those rights is to be divided up between state and various relevant private actors.

The third is that these issues are reflective of three major analytical challenges to overcome in designing a framework for private duty-bearing. They are: overcoming generality and articulating choices; explaining how competing rights and interests, especially private autonomy, are to be factored in; and accounting for the division of responsibly between the state and different private actors.

The next Chapter will attempt to set out a framework for analysing the allocation of positive duties which is as true as possible to the case law principles set out in this Chapter, but which meets these analytical challenges.

CHAPTER 6

THE FRAMEWORK FOR ASSIGNING DUTIES AND ITS APPLICATION TO PRIVATE SCHOOLS

A. INTRODUCTION

Human rights law makes demands of private actors. It can do so either explicitly, through the direct horizontal effect of human rights law, or implicitly, through state duties to respect and protect. Whichever route is followed, the same question arises: how are the duties which human rights law imposes on private actors to be assigned? This Chapter presents an answer to this question, and uses it to show how human rights law imposes obligations on private schools.

The previous Chapter argued that there are six factors which courts across the jurisdictions under review use to determine the horizontal human rights obligations to which private actors are subject. Those six factors are: the nature of the right, its importance, and the correlative severity of the violation; private autonomy and countervailing rights; the power of the putative duty-bearer and its capacity to violate rights; the vulnerability of the beneficiary; the social role of the putative duty-bearer; and the public interest.

However, it also demonstrated that there are three analytical challenges associated with designing a coherent framework for duty-bearing. The first challenge was overcoming generality and articulating choices. The second challenge was explaining the way in which competing rights and interests, especially private autonomy, are relevant. The third challenge was accounting for the division of responsibility between the state and different private actors. This Chapter will develop

a framework for the application of positive duties which overcomes these challenges, by developing three arguments. Together, if accepted, these three arguments can begin to overcome the analytical challenges, while also being as true as possible to the principles derived from the case law in Chapter 5.

First, the starting point should be a relational and beneficiary-centred conception of rights, in accordance with the principled conception of children's rights developed in Chapter 2. I will then show how these rights claims are *'perfect'* (within the technical meaning of that term[1]) by developing an analytical framework for determining the bearers of these duties, which determines duty-bearers through the interplay of three factors: **power**, **vulnerability**, and **social role.** This Chapter will set out some of the key proposals in the literature for developing this theory, and where they fall short. This will meet the first analytical challenge: articulating choices, and explaining specifically and overtly why duties are imposed.

Second, the proportionality test is a useful tool for the reconciliation of competing horizontal rights claims, and this is how the private autonomy of putative horizontal duty-bearers can be reconciled with the protection of rights. The proportionality test can be applied to reconcile these claims, and is as suitable for conducting this balancing exercise in horizontal claims as it is in vertical claims. This will meet the second analytical challenge, providing a principled and structured way of resolving conflicts of rights, or rights and autonomy interests. It will also contribute to meeting the first

[1] Florian Wettstein, *Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution* (Stanford University Press 2009) 125.

analytical challenge, in that it requires conflicts between rights-holders to be articulated and resolved openly.

Third, the recognition of horizontal human rights duties is not inconsistent with a strong central role for the state in organising and enforcing obligations through its legislative, executive, and judicial arms. The state has the final responsibility to respect, protect and fulfil children's rights to education. This is achieved through the rubric of the duty to protect, such as that contained in s. 7 of the South African Constitution, or Art. 1 ECHR. In this way, Chapter 7 will tie together the various threads of this Thesis, as well as meet the third analytical challenge.

As argued in Chapter 4, this approach is of more general application than just direct horizontal application cases. This approach, or one like it, would be a useful way of overcoming the analytical challenges where:

(a) The Indian Supreme Court must decide the implications of the horizontally applicable right to equality in educational disputes;[2]

(b) The South African Constitutional Court must decide what obligations private educational actors have under s. 8(2), in order to give effect to those obligations through the common law via s. 8(3);[3]

[2] *Indian Medical Association vs Union of India & Ors* (2011) 7 SCC 179, 2011 AIR SCW 3469.

[3] *Governing Body of the Juma Musjid Primary School v Essay N.O.* [2011] ZACC 13.

(c) The United Kingdom Supreme Court must decide whether a tort of privacy should be developed,[4] and;

(d) The ECtHR must decide whether English criminal law has adequately criminalised the abuse of children in a private school by a teacher.[5]

Throughout these jurisdictions, with their undoubted differences, a common thread emerges: every single one of these cases requires consideration of what is required by human rights law between private individuals. Sometimes it will make intuitive sense to describe the private party as bearing a human rights obligation, as in (b) above. Sometimes it will seem a little *'odd'* to do so,[6] as in (d).

However, it is suggested that any unease felt at describing the private party as *'bound by human rights law'* in (d) stems from a failure to properly dissociate the mechanism for enforcement from the duty itself. Both state and private actors must refrain from violating children's bodily integrity, and both for (in part) the same reason: the human rights of the child. That one of those is enforced through classic public law actions, and one by the criminal law, should not distract from the fact that both of these duties flow (in part) from the rights of the child,[7] and therefore both depend on being able to answer that one crucial question: *what does human rights law require of private*

[4] *Campbell v MGN* [2004] UKHL 22, [2005] 1 WLR 3394; *Wainwright v Home Office* [2003] UKHL 53, [2004] 2 AC 406.

[5] *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112.

[6] Max Du Plessis and Jolyon Ford, 'Developing the Common Law Progressively - Horizontality, the Human Rights Act and the South African Experience' (2004) 3 EHRLR 286 309.

[7] Jane Wright, *A Human Rights Based Approach to Tort Law* (Hart Publishing 2017) 24.

actors in their interactions with each other, and when can those requirements be deviated from? Only once this question has been answered will the issue of remedies and enforcement arise, which is the purview of the state and goes to the question of the allocation of responsibility between state and private actor. That topic is considered in the third part of this Chapter.

The lens of private education will be used to explore and test this approach, and bring this account of duty-bearing down from the general to the specific. This tripartite approach provides a framework to identify not just the duties of private schools, but also the allocation of responsibility between them and the state. In this way, the specific and general questions are studied reflexively, as described in Chapter 1.

B. RIGHTS ARE RELATIONAL

The starting point of this analysis is that the rights for which human rights law provides are relational.[8] It is from this point that all which follows flows.

This means that, implicit in the existence of the right is one or more concomitant duties, with the right specifying not only the content of the duty but the duty-bearer(s) which it binds. In addition, because rights will make different claims on different duty-bearers (for example, rights will not apply in the same way to private actors as the state[9]), the identity of the duty-bearers will condition, and cannot be considered separately from, the content of the duty. Rights are *'relational'* if they contain explicit

[8] Jean Thomas, 'Our Rights, but Whose Duties? Re-Conceptualising Rights in the Era of Globalization' in Tsvi Khana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (CUP 2016) 20.

[9] John Knox, 'Horizontal Human Rights Law' 102 Am. J. Int'l L. 1, 41.

or implicit norms governing (1) the identity of the beneficiary; (2) the identity of the duty-bearer; (3) the content of the duty in light of the identity of the duty-bearer.

Human rights law is very familiar with (1), and with (3) where the duty-bearer is the state. Far less consideration has been given to (2), and (3) where the duty-bearer is not the state. To open up space for this debate will be part of the contribution of this Thesis. The rights guaranteed by human rights law must contain rules which identify duty-bearers, and condition duties accordingly.[10] Drawing on Thomas' work, there are three reasons why this is so.[11]

First, human rights must be relational because they are *'directed constraints'* – they purport to constrain conduct – they only make sense if it is clear whose conduct they constrain.[12] This does not at this stage presuppose any particular answer to that question – it could be *'the state'*[13] or *'any person certain of whose functions are functions of a public nature'*[14] – but it cannot be *'no-one'*. Otherwise, the duty is empty. It also cannot simply be *'everyone,'* [15] because even if human rights law bound literally everyone *in principle*, it would bind them in different ways,[16] and that variation in duty

[10] David Bilchitz, 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (2008) 125 SALJ 754, 777.

[11] Jean Thomas, *Public Rights, Private Relations* (OUP 2015); Thomas (n 8).

[12] Thomas (n 11) 151.

[13] Indian Constitution, Art. 12.

[14] Human Rights Act 1998, s 6(3)(b).

[15] Bilchitz, 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (n 10) 166.

[16] Deeksha Bhana, 'The Horizontal Application of the Bill of Rights: A Reconciliation of Sections 8 and 39 of the Constitution' [2013] (2013) 29 SAJHR 351, 374.

is explained by the right's relationality. There is, therefore, no escape from the need for a right, if it is to be a directed constraint, to imply norms governing its relational effect.

Second, because rights can be claimed, implicit in them must be rules of claiming, which must identify the correct duty-bearer.[17] Rights claims must be addressed to someone, and it is only if the right contains some indication of who the correct addressee is that it can be known whether the rights-claim succeeds or not. This is especially so because rights purport to constrain action in a peremptory and exclusionary way,[18] and provide independent scrutiny of decisions. This purpose will only be realised if the legal arbiter has access to a test for when a duty has been breached, which requires a set of norms for resolving whether the actor in question is actually bound.

Third, there is nothing qualitatively different about the norms determining the addressee and the norms determining the content of duties which would mean that the latter is appropriately considered internal to the logic of the right, while the former is not. This is so because, in every jurisdiction, the state is under an obligation to interpose in private legal relations to create rights and obligations for the purposes of protecting human rights. To do so requires, as argued in the previous two Chapters, a conception of who must be bound by those rights and obligations. This explains why, even in jurisdictions where there is an external provision governing who the duty-bearer is,[19]

[17] Thomas (n 11) 152.

[18] ibid 153–154.

[19] For example: Indian Constitution, Art. 12; South African Constitution, s. 7 and s. 8; ECHR Art. 1 and Human Rights Act 1998 s. 6.

these external determinants do not exhaust the relationality of each right. In addition, of course, because the identity of the duty-bearer conditions the duties owed, it simply cannot be the case that the identity of the duty-bearer is a normatively distinct question to the content of the duty. Separating the two is impossible: if the content of the duty is internal to the logic of the right, so too is the identity of the duty-bearer(s).

Rights are therefore relational. Once this is recognised, there is no need to rely on overly simplistic tests (such as the distinction between perfect and imperfect obligation,[20] obligations and responsibilities,[21] or positive and negative obligations[22]), which act as inadequate proxies for the genuine norms governing the assignment of duties to private actors. Instead, that question is to be answered by reference to the relational norms implicit in rights.

This relationality means that a theory of *duty*-bearing for *private actors* is required. This means a couple of approaches which have been adopted to respond to the question at the heart of this Chapter can be rejected immediately.

First, approaches which centre on the duty-bearer, and impose merely moral obligations of beneficence[23] or corporate social responsibility[24] are inadequate. It is

[20] Wettstein (n 1) 125.

[21] John Ruggie, 'UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights - Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2008) A/HRC/8/5.

[22] *AB v Pridwin Preparatory School (SCA)* [2018] ZASCA 150; [2019] 1 All SA 1 (SCA).

[23] Garrett Cullity, *The Moral Demands of Affluence* (OUP 2004) 121.

[24] Nien-hê Hsieh, 'The Obligations of Transnational Corporations: Rawlsian Justice and the Duty of Assistance' (2004) 14 Business Ethics Quarterly 643.

incompatible with the mandatory and relational nature of a right that respect for the individual interest at stake be voluntary,[25] or unconnected to the beneficiary.

Second, approaches which rely in whole or in part on notions of the state to complete their analysis do not fully explain the relational norms underpinning rights.[26] If rights are relational, the norms governing duty-assignment must pre-exist any particular duty, including duties of the state. An approach which relies on and extrapolates from traditionally established duty-bearers does not engage with these *a priori* norms. They are, fundamentally, exercises in analogy, and consequently do not articulate the norms governing the relationality of rights.

Two points of caution are required here. First, the point is absolutely not that nothing helpful can be drawn from such approaches based on beneficence, corporate social responsibility, or theories such as Ratner's, which depend on relationships with the established duty-bearer, the state. Notions such as nexus to relevant populations,[27] impartiality, [28] and critical reflection on the way in which business might benefit from iniquities in the legal system[29] may well reflect valuable insights. However, they do not exempt human rights law from needing a beneficiary-centred, relational account of rights. Second, it is a fair point that there may be dangers associated with shifting the

[25] Bilchitz, 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (n 10) 760.

[26] Steven R Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 443 105.

[27] ibid.

[28] Lawrence Blum, *Friendship, Altruism and Morality* (Routledge 1980) 38.

[29] Hsieh (n 24).

focus of human rights law away from the state and towards private actors.[30] The state should not be able to plead outsourcing in order to avoid its obligations, and shift them on to someone else.[31] However, adopting a framework of the sort set out here, far from distancing itself from the state, in fact implies recognition of sweeping duties on the state to arrange the legal, social, and even economic system in a particular way, through its coordinating function.

It is therefore necessary to look beyond these existing kinds of contribution,[32] to try to explain how the obligations which rights imply are allocated. The comparative case law survey in Chapter 5 will provide the raw materials to construct a framework which interprets the existing practice in the jurisdictions in such a way as meets the three analytical challenges, while accounting for jurisdictional difference.

C. SCOPE OF OBLIGATION: POWER, VULNERABILITY AND SOCIAL ROLE

Human rights law makes demands of private actors, both directly and indirectly. This section and the following one suggest a tentative framework through which to approach answering the question of what those demands are, which is simultaneously general enough to be useful across the jurisdictions reviewed but not so abstract as to be unworkable.

[30] Wright (n 7) 22.

[31] *Costello-Roberts v United Kingdom* (n 5).

[32] As in, for example: Thomas (n 11); David Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (2010) 57 Theoria 1.

A useful starting point in doing so is the traditional distinction between the existence of the *'conditional'* duty and justification for non-compliance with the duty.[33] This distinction already provides the potential to impose some order on the material set out in Chapter 5. Through recognising and reframing the debate around this distinction, the analytical challenge of isolating and properly accounting for concerns about balancing private autonomy and competing rights can be overcome. As argued below, they are best dealt at the justification stage, once a conditional duty has been established.

Before it is possible to get to that stage, however, it is necessary to explain how conditional obligations come about. (It is important to be clear that *'obligation'* here refers not only to direct horizontal obligations, such as those which accrue under s. 8(2) of the South African Constitution, but also the limits on how the horizontal relationship can be permitted or required to be by the state through its ordinary law, as discussed in Chapter 4.) This section will argue that when assessing the scope of the conditional duty,[34] the private actor's *power* and the beneficiary's *vulnerability* identify *'candidate relationships'* for duty-bearing, and the *social role* of the actor determines the relational content of children's rights in those candidate relationships. In this way, the principled

[33] David Bilchitz and Laura Ausserladscheider Jonas, 'Proportionality, Fundamental Rights and the Duties of Directors' (2016) 36 OJLS 828, 839.

[34] As above, *'duty'* here refers not only to direct horizontal obligations, but also the limits on how the horizontal relationship can be permitted or required to be regulated by the state through its ordinary law.

insights of Chapter 5 are retained, while a more rigorous framework is imposed on top of them, overcoming the analytical challenges set out above.

(1) Candidate Relationships: Factors 1 & 2

Rights are relational. This means that duties must be grounded in relationships, but it is obvious that not all relationships give rise to the same (or perhaps even any) duties. This means that only some relationships are *'candidate relationships'* for duty-bearing.

Candidate relationships are those relationships where it would not be either redundant or futile to recognise rights. Recognising a right would be redundant if the putative duty-bearer were in no position to interfere with it, and futile if there was no way the putative duty-bearer could fulfil the right. The way to identify candidate relationships is therefore to consider the **power** of the duty-bearer and the **vulnerability** of the beneficiary, which, taken together show in which relationships the imposition of duties would be neither redundant nor futile.

It bears emphasis that candidate relationships do not necessarily give rise to conditional duties. Some create a presumption of duty-bearing, which can be rebutted by the application of the social role criterion. Some do not create such a presumption, and the social role criterion is applied to determine whether duties are nonetheless owed. Candidate relationships are therefore only the starting point in the analysis: the social role criterion will be critical in determining the overall existence of conditional duties.

(a) Factor 1: Power

The first factor in determining the existence of a duty is power. Power is difficult to define,[35] but in this context it is best to adopt a simple definition: power is a capacity to affect change (or refrain from doing so) in a way that impacts other people. This section will defend this definition of power, explain its implications, and show how it plays a role as a relational norm.

Power – defined as the capacity to affect change (or refrain from doing so) in a way that impacts other people – can be viewed on (at least) two planes.[36]

The first is power to change the external physical world. A huge variety of factors can affect this. Power can be physical, economic, intellectual, informational, and emotional. Wettstein offers an elaboration of this kind of power by distinguishing between power and control. Control refers to the ability to dictate processes for reaching certain outcomes, whereas power refers to the ability to influence substantive outcomes in accordance with the actor's choices.[37]

The second is the ability to make changes to the legal organisation of relationships, or the legal order more broadly.[38] This can be further sub-divided into two more kinds of power: the power to affect legal rights and duties, and the power to create powers. The latter is largely (but not exclusively) the preserve of state

[35] Ruth Zimmerling, *Influence and Power: Variations on a Messy Theme* (Springer 2005).

[36] Kit Barker, 'The Dynamics of Private Law and Power' in Kit Barker and others (eds), *Private Law and Power* (Hart Publishing 2016) 9.

[37] Wettstein (n 1) 146.

[38] Barker (n 36) 9.

institutions, but it is easy to imagine ways in which private individuals might have the power to affect the legal rights and duties of others: through contract,[39] the way in which property is disposed of,[40] and through the application of non-legal (but lawful) pressure. Both of these are forms of power, and both involve affecting outcomes for other people.

Exercises of both kinds of power can impact other people. The implications of this definition of *'power'*, in its seductive simplicity, need unpacking, to show quite how broad they are.

First, it is a causal, not moral, definition. It says nothing about who should or should not have to do anything. *'Impact'* is a broad notion. The question is one of ability to affect an outcome, not one of supplying *the* causal factor: hence, in *Juma Musjid*, while the intransigence of the MEC led to the conclusion that eviction would not be unreasonable, the trust was not able to hide behind it as some sort of *novus actus interveniens*.[41] Similarly, in *Avinash*, the Indian Supreme Court did not ask who was at fault for the dilapidated school buildings. That the shoddy work could have been, for example, the fault of a contractor, was not relevant.[42] The schools were in a position to do something about it, and so had to. The strength of causal connection might be relevant to the end result, taking into account the social role of the actor and the proportionality test, but is not determinative at this stage. All that is required is some

[39] See Sachs J's dissent in *Barkhuizen v Napier* [2007] ZACC 5, 2007 (5) SA 323 (CC).

[40] *Wilson v First County Trust (No 2)* [2003] UKHL 40 [2004] 1 AC 816.

[41] *Governing Body of the Juma Musjid Primary School v Essay N.O.* (n 3).

[42] *Avinash Mehrotra vs Union Of India* (2009) 6 SCC 398, 2009 SCC OnLine SC 751.

ability to affect outcomes for other people. Leaving aside questions of moral responsibility renders power a very broad concept indeed.

Second, this is a test which does not distinguish between action and omission. A correct understanding of power requires us to consider potential positive actions as well as potential negative ones.[43] It may well be that the costs of requiring positive action are great. However, as argued below, the case law's (excessive) focus on this distinction can be well accommodated at the social role and balancing stages, as was the case in *Daniels*;[44] and *Redfearn*, where the additional compliance costs of a more generous system of employment law were expected to be borne by the employer.[45]

Third, the question is one of *potential*. It is enough that the private actor *could* affect the beneficiary's position. This has proven very important on the ECtHR cases on oversight and pre-emptive action. The state was required to regulate private schools,[46] hospitals,[47] manufactures,[48] and employers[49] not because all such private actors had violated rights, but because the potential for them to do so was there. This, of course, means that the test for whether power exists is a very broad one, requiring consideration of hypotheticals.

[43] Wettstein (n 1) 148.

[44] *Daniels v Scribante* [2017] ZACC 13, 2017 (4) SA 341 (CC).

[45] *Redfearn v United Kingdom* (2013) 57 EHRR 2.

[46] *O'Keeffe v Ireland* (2014) 59 EHRR 15.

[47] *Trocellier v France* App no 75725/01 (ECtHR, 5 October 2006), [4].

[48] *Öneryildiz v Turkey* (2005) 41 EHRR 20.

[49] *Redfearn v United Kingdom* (n 45).

Fourth, this definition does not look to the consequences for the actor in question. If, for example, an educational business has the capital to fund a child's education, but, in doing so, would go bankrupt, is it right to say that the business has the *'power'* to realise that child's right? Sticking with the very simple approach to power set out above, the answer is *'yes'*. To say otherwise ingrains the status quo, rather than opening it up to scrutiny. If a business can only respect or realise rights by going out of business, that is a countervailing consideration best dealt with at the proportionality stage. It would be wrong to hold that, because the only way a particular business can successfully operate is through rights-violations, human rights law must presumptively prefer the continued operation of the business, rather than the protection of rights. It may be that this is the correct outcome after the balancing exercise is conducted, but it surely cannot be the case that private activities which *necessarily* violate rights are hived off from scrutiny, while those which only *might* do so, but could be organised so as not to do so, are exposed to it. This also chimes with the approach in some of the case law, such as *Juma Musjid* and *IMA*, which treat the economic implications for the private actor as a secondary concern which could justify non-realisation, rather than as integral to the content of the duty.[50] That said, as set out in Chapter 5, this is not consistent, and the private autonomy and economic costs of compliance are often cited as reasons not to impose duties.

[50] *Governing Body of the Juma Musjid Primary School v Essay N.O.* (n 3); *Indian Medical Association vs Union of India & Ors* (n 2).

Fifth, this test does not distinguish between private and public power. Whether power is borne of the ability to change outcomes by the monopoly of force,[51] or the use private economic power entirely within the *'rules of the game'*[52] makes no difference. Public and private or economic power are not of a qualitatively different nature, once power is seen in terms of *impacts* on others. This leaves the test broader than if it were circumscribed by rules about the source of the power: that the source of the power is, for example, contractual, is relevant, but only at the later stages of considering vulnerability, social role, and proportionality.

The sixth point concerns the interaction between power and law. The law sets out what we can and cannot do, and in this sense, law both creates and circumscribes power.[53] It has *'power effects'*,[54] determining the order of priority of claims.[55] But it cannot be the sole originator of power, at least not in every sense of the word: power is also physical, intellectual, informational, and emotional. For this reason, while the state is responsible for the way the law empowers private actors, and must be transparent in the way it awards privilege and power,[56] a legal context which grants significant power

[51] Peter Cane, 'Tort Law and Public Functions' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 151.

[52] Bilchitz, 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (n 10) 779.

[53] Kaarlo Tuori, 'Law, Power and Critique' in Kaarlo Tuori, Zenon Bankowski and Jyrki Uusitalo (eds), *Law and Power: Critical and Socio-Legal Essays* (Deborah Charles Publications 1997) 17.

[54] ibid 15.

[55] Cane (n 51) 162.

[56] Martha Albertson Fineman and Anna Grear, 'Introduction: Vulnerability as Heuristic—An Invitation to Future Exploration' in Martha A Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2016) 7.

to one party might have the effect of *in fact* empowering that actor to violate rights, and thus bring not only the state but also that newly-powerful private actor within the definition of power espoused here. To put it bluntly, the fact that the state is responsible for having empowered a private actor does not detract from the private actor's acquired status as a candidate for obligation, whether that power comes solely from law or from the interaction of law and other factors.

This makes the breadth of the concept obvious. Power relations are state constructs, and in fact the state's main way of exercising power: it organises its society by giving different members of that society different powers over each other in different contexts. If, as a matter of principle, the state's power means it must bear duties, this principle must extend beyond the way the state happens to act, to also regulate those relationships created by the state to make society work: *'the State should not be seen as possessing power but as constructing a range of relations which tend to position people in ways which make the political system work.'*[57]

Seventh, this conception of power is non-abstract. It situates power within a particular relationship: that between the subject who has the power, and the object whose position the subject has the capacity to affect. This is especially important in the context of private education, where the fact that schools are concretely powerful in their relationships with children does not necessarily translate into abstract power in society. Minority schools, for example, may suffer huge discrimination, but nonetheless be powerful relative to their students. It is therefore not enough to observe that one party is *'powerful'* and the other is not. The analysis must be more complex than that:

[57] Sara Mills, *Michael Foucault* (Routledge 2003) 37.

concrete power is relational, requiring least two agents involved in an asymmetric relationship.[58]

The notion that power is relevant to duty-bearing should not be a difficult proposition to accept, at least in principle.[59] The traditional focus on the state and the public in allocation of duties is itself at least in part a function of power: a recognition that states are powerful and so special protection for our most important interests against their potentially dangerous power is warranted.[60] This basic natural intuition that power to violate a right should bring with it an obligation not to do so[61] is generally reflected in the case law.[62]

This is, as set out above, an extremely broad approach. Its full implications are not recognised in the case law, which often avoids them by setting up distinctions between positive and negative obligations,[63] or public and private power. However, the better view is to reject these impractical (and often arbitrary) distinctions, and instead recognise the breadth of the concept of power, but equally recognise that it is a *necessary but not sufficient* condition for the existence of a duty. It is merely a *sine qua*

[58] Zimmerling (n 35) 83.

[59] *Delhi Transport Corporation vs DTC Mazdoor Congress* (1991) SCC Supp (1) 600, AIR 1991 SC 101.

[60] David Bilchitz, 'Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law' (2016) 23 Indiana Journal of Global Legal Studies 143, 146.

[61] Aharon Barak, 'Constitutional Human Rights and Private Law' in Daniel Friedmann and Daphne Barak-Erez, *Human Rights and Private Law* (Hart Publishing 2001) 20.

[62] See Ch 6, *supra.*

[63] *Pridwin (SCA)* (n 22).

non – on top of which the concepts of vulnerability and social role limit the conditional duties owed (and even then, non-compliance with such a duty can be justified by reference to the proportionality test).

(b) Factor 2: Vulnerability

Vulnerability is the second factor in determining whether a relationship is a candidate relationship. As set out in Chapter 5, it has been a very important principle in all of the jurisdictions under review, in different ways and to different degrees. However, if the framework is to move beyond generalisation and properly account for the relational demands of rights, it is not enough just to identify a party as *'vulnerable'*, as there has been a tendency to do.[64] Just as with the notion of abstract power, this is insufficiently specific to be a useful relational norm. Instead, the best interpretation is that vulnerability has two functions in the duty-bearing analysis. It first anchors a relationship of asymmetric power to a particular human right or protected interest. Second, it explains the relationship between the existence of a candidate relationship and the consent of one or both parties to be in that relationship.

(i) Anchoring: Linking the Beneficiary's Right and Duty-Bearer's Power

The first role of the concept of vulnerability is to link the power which the putative duty-bearer has over the putative beneficiary to a *protected interest.* Just as power is a necessary prerequisite to the existence of a duty, a second obvious prerequisite is that

[64] Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights' in Martha A Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2016).

the impugned outcomes of the (non-)exercise of that power amount to interference with an interest protected by human rights law.

In order to overcome the analytical challenge of vagueness, it is vital to articulate vulnerability in these concrete terms. The approach of the ECtHR, which identifies abstractly vulnerable groups, should therefore be rejected. Vulnerability is a universal human condition, which resonates particularly strongly for children as a group, but it is not enough to *'herd'* together the disadvantaged under the banner of vulnerability.[65] Apart from the potential stigmatizing effects, it simply is not helpful as a relational norm. Everyone is vulnerable, even the rich and successful,[66] and the question is one of particularisation[67] of vulnerability within individual relationships.[68]

Instead, for the purposes of identifying a candidate relationship, the power which a putative duty-bearer has over the beneficiary must be anchored in an understanding of vulnerability as susceptibility of a particular interest to harm or interference. Group disadvantage of the sort deployed by the ECtHR is relevant to this susceptibility, but not determinative of it. For the purposes of the imposition of human rights obligations, it is obvious that the protected interests at stake must be those which find protection in the relevant part of human rights law from which the putative duty is said to derive.

[65] Martha Albertson Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha A Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2016) 16.

[66] ibid; Aurelia Colombi Ciacchi, 'Horizontal Effect of Fundamental Rights, Privacy and Social Justice' in KS Ziegler (ed), *Human Rights and Private Law - Privacy as Autonomy* (Hart Publishing 2007) 60.

[67] Fineman (n 65) 21.

[68] Fineman and Grear (n 56) 2.

Such an approach allows for the identification of candidate relationships based on a clear understanding of the operative principles and their roles. A candidate relationship requires power to affect outcomes for the beneficiary, which is anchored in vulnerability to interference with a particular right.

An obvious question is how this applies to positive entitlements, such as education. The vulnerability criterion is very easily applied in the context of *conjunctive obligations* – that is, negative[69] obligations to which all actors must adhere if the right in question is to be realised. In *O'Keeffe*, for example, the children's vulnerability to abuse at the hands of teachers was easily identified, because even one teacher abusing a child would result in a violation of the relevant right. It could therefore easily be said that the relationship between a child and *any* teacher is marked by vulnerability which implicated a relevant protected interest.

The position is more difficult in the case of positive, *disjunctive obligations*, where there are many possible actors who could fulfil the right.[70] Duties to fulfil of this sort are immensely difficult to assign among private actors.[71] In the educational context, it may be that everyone needs to refrain from preventing the child from enjoying such educational opportunities that exist,[72] but only one person needs to actually provide the education. This might seem to call into question the ability of the

[69] Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (n 32) 2, 4.

[70] Vladislava Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights' (2018) 87 Nordic Journal of International Law 344, 352.

[71] Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (n 32) 2; Hsieh (n 24) 644.

[72] *Governing Body of the Juma Musjid Primary School v Essay N.O.* (n 3).

vulnerability criterion to identify candidate relationships in the case of positive obligations. However, it is submitted that in fact, the difference between vulnerability to violation of a conjunctive right, and non-realisation of a disjunctive one, is one which goes not to the candidacy of the relationship, but to whether there is a presumption of duty-bearing.

Conjunctive obligations give rise to a presumption that an obligation is owed to respect that right. Power and vulnerability create a link between beneficiary and duty-bearer. In the case of conjunctive rights, that link is morally salient. It provides a basis for the attribution of responsibility for consequences which may follow from the exercise of that power,[73] since it is *known* that a certain exercise of power will result in a rights violation (because all actors must adhere if the right in question is to be realised). The children's rights principles set out in Chapter 2 include respect, which requires that the vulnerably of others not be treated as an opportunity for unfettered personal enrichment, even where that vulnerability was borne not of the personal incapacities of children, but legal and social structures which create them.[74] In this way, power itself, when it interacts with vulnerability to damage to an interest protected by human rights law, has an obligating function. As it might be pithily put, *'power must be linked with responsibility, and obliged to defend and justify itself within the framework of the general good.*'[75]

[73] Zimmerling (n 35) 45.

[74] Virginia Mantouvalou, 'Legal Construction of Structures of Exploitation' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018) 193.

[75] 'President Roosevelt's State of the Nation Address' (6 January 1945) <*https://www.presidency.ucsb.edu/documents/state-the-union-address*> accessed 1 January

That power obliges is clearly recognised in respect of the state. Part of the reason the state is subject to human rights law is its power. However, the idea that power neatly and uniquely derives from a single *'law-and-sovereign'* which occasionally deigns to intervene in private relations, but otherwise leaves any remaining instances of social interaction unaffected by *'power'*, is patently wrong.[76] Power manifests in the *'manifold relationships of force'* which constitute interpersonal interaction in our society,[77] including in interpersonal relations between individuals.[78] Once power is disassociated from the sovereign, we are forced to ask whether the *'sovereign'* has duties because they are the *sovereign*, or because they are *powerful*. It is argued that it is the latter.

By contrast, **disjunctive obligations give rise to no such presumption.** The relationship is still a *candidate* for obligation, but more will be needed before that relationship is one where non-realisation of the right can be attributed to the private actor, creating a *presumption* of obligation. There cannot be a presumption that all private actors wealthy enough to realise a positive right have concomitant obligations, because that would lead to a position where the law presumed that vastly more obligations were owed than would be necessary to discharge the right. In short, the question *'why me'* has far more force where not every candidate relationship needs to

2022; for a yet pithier version (*'with great power comes great responsibility'*), the reader is invited to watch Sam Raimi, *Spider-Man* (Sony Pictures Releasing 2002).

[76] Peter Fitzpatrick, 'Relational Power and the Limits of the Law' in Kaarlo Tuori, Zenon Bankowski and Jyrki Uusitalo (eds), *Law and Power: Critical and Socio-Legal Essays* (Deborah Charles Publications 1997) 87.

[77] ibid.

[78] Mills (n 57) 36.

result in an obligation for the right to be fully realised. To impose a presumption would be over-determinative. As will be seen, coordinating the fulfilment of positive obligations, including by imposing obligations on private actors which go beyond the minimum obligations demanded by human rights law, is the role of the state. In truth, not many actors will have the coordinating capacities of the state to realise socio-economic rights (which explains the focus on the state in *Juma Musjid*). There are, however, as will be set out below, some cases where the vulnerability and power criteria, when read with social role criterion, can impose positive duties without state coordination in doing so (as in *Daniels*).

(ii) Asymmetries of Power and Consent

Vulnerability is also important in determining the limits of consent and the power to affect outcomes. It is a redolent feature of the case law that power does not have an obligating function if the beneficiary consented to relevant power relationship. It is commonplace that, in a society where individual relationships are framed by respect for human rights, consent will be morally salient.[79] But to rise to the analytical challenge, it is necessary to explain how so. It is argued in this section that consent is relevant to the determination of whether the relationship is a candidate for obligation.

Consent will be absolutely vital in determining what obligations private actors have between one another, because the ability to consent to things which would otherwise be impermissible is an important aspect of self-authorship.[80] Equally, this

[79] Deryck Beyleveld and Roger Brownsword, *Consent in the Law* (Hart Publishing 2007) 2.

[80] Hugh Collins, 'On the (In)Compatibility of Human Rights Discourse and Private Law' in Hans Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 55.

must be balanced against the risk that it could become cover for the waiver of rights under conditions of pressure. Generally, the idea of waiver of rights is treated with suspicion in human rights law.[81] To the extent consent is relevant, it is relevant because it determines the substantive limits of any applicable obligation, not because it allows *'waiver'* of an existing right. Developing a positive conception of consent which is alive to the pressures a person faces, and the scope of a powerful private actor to exploit that to their advantage, is critical,[82] as the case law shows. Further, it is worth observing at this point that consent might cut both ways: if an actor consents or volunteers for a position of power, that will affect how much weight can be given, in the proportionality analysis, to their private autonomy in deciding whether a failure to adhere to a conditional obligation can be justified.

There are two elements to true consent: *firstly*, that consent can be withheld, and *secondly*, that the capacity to interfere with the protected interest does not survive the withholding of consent. Both of these elements can be identified by considering the circumstances under which the actions of the putative duty-bearer could interfere with protected rights.

The first element is that consent can be withheld (or, in some cases, withdrawn[83]). The question of whether consent can be withheld turns on the definition of the possible. The most obvious example is where there is simply no opportunity to consent in any

[81] ibid 35.

[82] Deeksha Bhana and Marius Pieterse, 'Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited' (2005) 122 SALJ 865 884–885.

[83] Beyleveld and Brownsword (n 79) 24.

sense. Children's autonomy and consent is contested,[84] as set out in Chapter 2, and that framework would have to be applied here. So, for example, when five-year-old children are sent to schools by their parents, even if the arrangement is entirely contractual, it cannot be said that the child had any kind of opportunity to choose to end up at the school in question. The simple absence of an opportunity to consent to a rights-interfering outcome is enough to conclude that there is a nexus between power and vulnerability, which creates a candidate relationship for duty-bearing. There is also a more complex issue, which is the question of what makes consent *'free and informed'*.[85] The grounding of vulnerability in particular protected interests means we would not expect a party to sacrifice one constitutional right for another: in such a case, the true construction is that the private actor forcing them into this *'Hobson's choice'*[86] interferes in at least one of the rights without any consent at all (assuming that the social role criterion does not dictate that no duties should be owed).

The second element is that the capacity to interfere in a protected interest does not survive the withholding of consent. If, notwithstanding that the beneficiary has not consented, a relationship of power nonetheless pertains, the beneficiary cannot be said to have consented to that. This is a question of substance in all the circumstances[87] rather than form (and so, for example, the mere fact a power is contractual does not mean it was meaningfully consented to).

[84] ibid 27.

[85] ibid 8.

[86] *People's Union for Democratic Rights v Union of India* (1982) 3 SCC 235, 1982 AIR 1473.

[87] Mantouvalou (n 74) 191.

(c) Conclusion: Candidate Relationships

Power and vulnerability delimit the candidate obligations for duty-bearing, and establish presumptive conditional duties. However, this is not the end of the conditional obligation analysis. Between them, power and vulnerability only identify *candidates* for duty-bearing. Using power or capability as a basis for determining duties is *'more complex than it might seem at first. It does not merely mean relying on the potentially limitless capacities of an agent but must also take the situational external circumstances into consideration.'*[88] The correct way to do so is through the social role of the putative duty-bearer. Obligations should track the role of the entity in society.[89] It is therefore necessary to complete the analysis by considering the social role of the actor.

(2) Social Role

The third factor to consider is the *'social role'* of the entity in question This rather vague term is used as shorthand for the *'nature and function that entity has in society.'*[90] This factor (or, more accurately, collection of factors) is the one which does a lot of the heavy lifting, and it is therefore unsurprising that it has had significant treatment in case law in all jurisdictions.[91] Power and vulnerability, in the senses set out above, are necessary conditions for the establishment of duties. However, they are not *sufficient*

[88] Wettstein (n 1) 148.

[89] Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (n 32) 5.

[90] ibid.

[91] ibid 2; Hsieh (n 24) 644.

conditions, especially in the context of positive duties, which are immensely difficult to assign among private actors. It is especially important when it comes to meeting the third analytical challenge – explaining the distribution of obligation between candidate duty-bearers and the state.

This factor, more so than power and vulnerability, is hugely contingent, and will give rise to deep political controversy,[92] both about what is relevant to determining the social role of the actor, and how those criteria are to be applied. There is a huge social justice element to tipping the scales of power in society.[93] This contingency means it is especially important to be careful in comparative research, and it is unlikely that an exhaustive and complete *comparative* account would be possible. Rather, this section will serve to point out the importance of judges' conclusions being properly defended, and to highlight some important factors which have emerged in the case law. It will also show how, even accounting for huge jurisdictional variation, they point strongly in favour of at least some human rights obligations for private schools, even those which are not, formally, part of the *'state'*.

(a) Constitutional and Legislative Dispensation's Conception of the Private Actor's Role and Relationships

The first – and most important – relevant factor is the way in which the constitutional and legislative dispensation conceptualises the private actor's position or role in society; and the way in which it conceptualises the particular relationship of power and

[92] Olha Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (2006) 13 Maastricht Journal of European & Comparative Law 195 203.

[93] Ciacchi (n 66) 62.

vulnerability at issue. Constitutional instruments have different political moralities,[94] and what living together in that society means will in part be determined by the foundational norms organising that society. These can be found in a constitution, which will of course have first claim on the judiciary's approach to the allocation of duties, but could also be found in laws passed by the democratic legislature which reflect democratic agreement about that relationship. This is a form of deference to legislature's social ordering: a recognition that the court is not unique amongst the branches of government in working out how the limits of rights and obligations are to be arranged.[95]

The potential duty-bearer's **role and position in society** will be key to determining the duties they owe. The importance of that function to society could be relevant.[96] A particular example of this is where the function is the realisation of a right, such as education. In such a case, there is a strong argument for the application of human rights obligations.[97] The nature of decision-making could also be relevant, as with corporations which – obviously – cannot make their own decisions and rely on institutionalised decision-making and collective responsibility for their choices;[98] as

[94] Alistair Price, 'The Influence of Human Rights on Private Common Law' (2012) 129 SALJ 330, 355.

[95] Gregoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009), Ch. 5.

[96] Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016) 90.

[97] *AB v Pridwin Preparatory School (CC)* [2020] ZACC 12, 2020 (5) SA 327 (CC).

[98] Wettstein (n 1) 149.

could the democratic accountability of the entity in question. [99] It may also be that the notions of abstract power and abstract vulnerability are relevant here, in that they could condition the social meaning of the relationship. [100]

For example, in considering what human rights obligations businesses have, Bilchitz looks particularly at the role of the company in society [101] and theories of shareholder and stakeholder value to determine the social salience of the business' relationship with those with whom it deals. In one society, there might be a rigorous focus on shareholder value, and a belief that the social role of the business is to maximise profits within the rules of the game, [102] while in another, there might be more weight attached to the business' relationship with not only its shareholders but also its stakeholders. Bilchitz argues for the latter, especially where socio-economic rights such as education are privatised. [103]

In addition to the position of the private actor in society, it is also necessary to consider the **particular relationship at issue** to determine what duties that private actor has. The constitution's response to a particular relationship could be guided by a wide array of factors. Ratner argues that the *'proximity'* or *'nexus'* between a putative (corporate) duty-bearer and affected populations increases or decreases their

[99] Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (n 32) 5.

[100] See for example: *National Textile Workers' Union vs Ramkrishnan* (1983) 1 SCC 228, AIR 1983 SC 75 21.

[101] Bilchitz, 'Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law' (n 60) 164.

[102] Although, of course, this does not tell us what the rules of the game are.

[103] Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (n 32) 24–25.

responsibility, consonantly with the notion of equal treatment and respect. Ratner accepts that this would not be geographical,[104] and that *'associative ties'* is a slightly amorphous concept.[105] Although Ratner does not explain what proximity is salient and in what way, this is indicative of a key point, which is that much will turn on the nature of the relationship between duty-bearer and beneficiary.[106] The question therefore becomes one of seeing the relationship through the lens of the prevailing constitutional morality, taking into account the power and vulnerability of the parties, any assumption of responsibility and the institutionalisation of the power. This exercise is hard and value-laden, but it cannot be avoided.

In the context of private education, the question is whether the *role and position* of private schools in society, and their *relationships* with pupils and non-pupils, rebut the presumption of obligation to respect conjunctive rights, or, in the case of disjunctive rights, show that there should be an obligation to realise those rights.

The starting point must be that the provision of education is an activity geared towards the realisation of a human right, which is recognised in all of the jurisdictions under review. All are party to the UNCRC, which recognises that children are not (merely) customers engaging in commerce, but recipients of an important public service and human right.[107] In India, this is recognised by the bar on profiteering and

[104] Ratner (n 26) 507–508.

[105] ibid 510.

[106] ibid 507.

[107] UN Committee on the Rights of the Child, 'General Comment No. 1 (2001), Article 29 (1), The Aims of Education' (17 April 2001, CRC/GC/2001/1).

the insight that charity is at the heart of the private provision of education;[108] in South Africa, by the recognition that some direct horizontal duties are owed to children in schools.[109] In addition, in all three jurisdictions, heavy regulation clearly indicates the special place of education and its high importance to society, and the vulnerability children experience in it.[110] In England, for example, independent schools must be registered,[111] must be inspected,[112] and can be deregistered if they fail to comply with independent school standards[113] after an action plan for remedying the non-compliance is agreed.[114] It is a crime to run an unregistered school.[115] For all their differences, the role and position of an education provider is not seen in any of these jurisdictions as just another business.

Within the particular relationship between school and student, there are a number of aspects which point towards the recognition of at least some duties. The particular relationship of power and vulnerability in that case is one where power is institutionalised and wielded in an environment which does not necessarily have the benefit of much public scrutiny. This is buttressed by the need to nurture children's

[108] *TMA Pai Foundation vs State Of Karnataka* (2002) 8 SCC 481, AIR 2003 SC 355, [57], [161]; *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 1, AIR 2012 SC 3445, [11], [29], [198].

[109] *Pridwin (CC)* (n 97).

[110] *O'Keeffe v Ireland* (n 46).

[111] Education and Skills Act 2008, s. 95.

[112] Education and Skills Act 2008, s. 96, s. 108.

[113] The relevant standards are prescribed in Section 94 of the Education and Skills Act 2008.

[114] Education and Skills Act 2008, s. 114, s. 116.

[115] Education and Skills Act 2008, s. 96.

capabilities, and the important role of schools in doing so,[116] which points towards this relationship being one in which obligations would be appropriate. In addition, of course, responsibility for children's safety and education is assumed towards students by schools, strengthening the case.[117] Finally, the fact that education involves the realisation of a human right means that students cannot be expected to sacrifice any rights to attend school – suggesting that within that relationship, the private school should be restrained from interfering with any of the children's rights, otherwise this would force a *'Hobson's choice'* between the realisation of two different rights.[118]

The really difficult question concerns disjunctive rights, both in respect of enrolled and non-enrolled children. The latter issue might be recast as the extent to which private schools have responsibility for externalities and general betterment of society. Here, there probably is a difference between the constitutional conceptions in India and South Africa on the one hand, and England on the other. Under the avowedly transformative South African and Indian regimes, we might expect significant redistributive effects in private relationships,[119] whereas where, as in England, a more restrictive conception of rights pertains, the position might be otherwise. This is illustrated by, *firstly*, the negative expression of the right to education in A2-P1 ECHR, when compared to the positively expressed rights in Art. 21A of the Indian Constitution and s. 29 of the South African Constitution. *Secondly*, the openness of those

[116] See e.g. *Indian Medical Association vs Union of India & Ors* (n 2).

[117] *Avinash Mehrotra vs Union Of India* (n 42).

[118] *People's Union for Democratic Rights* (n 86).

[119] PJ Sutherland, 'Ensuring Contractual Fairness in Consumer Contracts after Barkhuizen v. Napier 2007 5 SA 323 (CC) - Part 1' (2008) 19 Stellenbosch Law Review 390, 396.

jurisdictions to direct horizontality means that private actors in education are expected to take responsibility for negative externalities which might impinge on children's rights (and, in India, under the RTE Act, positively to reserve seats and provide education).[120] In England, on the other hand, unless a private school wishes to take advantage of charitable status (on which see below), it is generally free to disregard the education rights of children not enrolled, and, aside from as specifically provided for in education law, conduct its relationships with children and parents solely in accordance with the contract.

The presumption that duties are owed in respect of conjunctive rights is, on this basis, clearly not rebutted, in any of the jurisdictions. All three constitutional dispensations reject the idea that private schools are entitled to do whatever they want, and that children are mere factors of production in their business. In the case of pupils already enrolled, the relationship is one which might stretch even to duties in respect of disjunctive rights, such as the continued provision of education, especially in South Africa and India. On the other hand, arguments in respect of disjunctive rights might involve an uphill struggle in England.

In spite of this variation, one clear point emerges, even across this high level of difference – human rights law is not silent in private education. Private schools' role in society and relationship with children suggests that private educational actors do have human rights obligations. The really difficult question is what those obligations are, and to what extent they extend into the provision of education to children not within their care and the control of negative externalities. This requires a jurisdictionally

[120] Right to Education Act, ss12-13.

specific deep dive, one which cannot be undertaken here. But a clear starting point emerges: in the case of conjunctive rights, private schools have obligations in all the jurisdictions under review. The position in respect of disjunctive rights is more varied, but, under certain circumstances, it is conceivable that such duties might arise, especially in South Africa and India, where a relationship already exists between pupil and school.

(b) The Relationship with the State

A second relevant factor is the relationship between the state and the private actor. The social role of the actor may well be indicated by the way in which the state deals with it – including, for example, by choosing to regulate or supervise it in a particular way. This might also come up where the actor performs a function which has been contracted out by the government. In such a case, rules about non-avoidance of state duties might affect the social role of the actor.[121]

If the actor is publicly funded, or indeed is in any way publicly supported, this might also change its social role. There is a politically symbolic aspect to partnership between public and private sector. Donnelly argues, rather than simply being an economic activity, these contracts are awarded on behalf of the community and should bring with them the requirement to adhere to community norms.[122] There is force in this, and it is reflected in the case law. However, this point goes wider. *Everyone* should have to adhere to community norms, not just those in direct service contracts with the

[121] *Costello-Roberts v United Kingdom* (n 5), [28].

[122] Catherine M Donnelly, *Delegation of Governmental Power to Private Parties* (OUP 2007) 230.

state, because the state's control extends over not just the allocation of financial power by subsidy but also all the other rules and accretions of power. There is little principled difference, from the perspective of the demands of human rights law, between assistance rendered by direct transfer of funds, and assistance rendered by the favourable arrangement of entitlements and obligations, whether by state action or inaction. The state, in instituting the laws that regulate private relations, establishes the rules of the game,[123] which may be more favourable to some players than others. Those beneficiaries of the state's arrangement of society are as much supported by the state as those receiving subsidy.

The arguments set out in the section above would accordingly have force if the state provided no direct support to private schools at all. However, if state support suggests stronger human rights obligations, then, in the context of private education, there are four specific kinds of public support worthy of note.

The first is **recognition**. In all three jurisdictions, private schools must be registered or recognised to operate lawfully. In registering a school, and bestowing recognition, the state supports the private school. Recognition empowers the school to operate, grants it certain privileges under law, and increases the value of its brand.[124] It is hard to see how this does not amount to public support, and thus tend in favour of duty-bearing to realise rights in that context.[125]

[123] Bilchitz, 'Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law' (n 60) 160.

[124] Virendra Kumar, 'The Right of Children to Free and Compulsory Education Act, 2009: A Judicial Critique of Its Constitutional Perspective' (2013) 55 JILI 21 42.

[125] ibid.

The second is **tax exemption**. In England, significant debate has taken place over the tax exemptions available to independent schools, provided that they are registered as a charity. About half the sector is so registered.[126] Under English law, for a charity to operate, it must provide public benefit. In 2008, the Charity Commission published guidance that, although it was not a requirement, the natural way in which an independent, fee-paying school could demonstrate public benefit would be to offer reduced rates or free places to meritorious candidates who could not afford the fees. The Independent Schools Association sought judicial review of this guidance. The Upper Tribunal held that, provided a *de minimis* threshold was crossed, and the benefit given to non-fee-paying students was not merely tokenistic,[127] it was for the schools, and not the Charity Commission, to determine the form of that benefit, which could (but need not) involve subsidised places.[128] The Charity Commission withdrew the relevant parts of the guidance. Being a charity and receiving the associated tax benefits does not automatically make a body a hybrid public authority for the purposes of the HRA,[129] and independent fee-paying schools are almost certainly not hybrid public authorities, even where they are also charities. However, this does not mean that public funding is irrelevant, for the reasons Donnelly gives. Indeed, her argument has more force where the state not only lends assistance to private schools, but actively

[126] Catherine Fairbairn, 'House of Commons Library Briefing Paper: Charitable Status and Independent Schools' (Briefing Paper Number 05222, 17 October 2019) 7.

[127] *Independent Schools Association v Charity Commission* [2011] UKUT 421 (TCC), [214].

[128] ibid, [196].

[129] *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 W.L.R. 363.

designates them as acting the public interest. In such a case, her symbolic argument is surely stronger.

The third way is where there is **subsidy, or a contract for provision**. In England, academies are an example of such educational privatisation. In India, too, the RTE Act essentially requires the state to fund seats at private schools. In such a case, it may well be that some state action doctrine kicks in, but even if not, such public support suggests that there should be *some* duties.

The fourth way is where the **favourable set up of the legal system** benefits the school. It is submitted that this is itself a form of state support, as set out above. So, if a private school is allowed to terminate a contract, irrespective of the impact on a child, provided the requirements for lawful termination in contract law are made out, that is itself a form of state support: it is, in effect, empowerment through law of the sort discussed above. Human rights law should not be blind to the benefits conferred in this way, and disregard their symbolic importance, just because they do not come in the easily understood form of a subsidy package measured in pounds, rand, or rupees.

The argument here is not that a particular definite answer emerges within each jurisdiction. It is simply that state involvement with private schools is relevant to duty-bearing for the symbolic and empowerment reasons discussed above, and it should not be disregarded when determining the duties which private schools owe. Private schools must take the rough with the smooth – more state-backed power or advantage tends towards greater obligation.

Finally, it is important to note that, while the factors here are not dissimilar to those relevant to the *'publicness'* test criticised in Chapter 3, here they are performing a much more limited and targeted function, in a way which I defend below. They relate

solely to the social role of the private actor in question – rather than the broader question of whether the actor fits within an inadequate proxy such as *'publicness'*.

(c) Protected Space

The final point to make is that it will sometimes be appropriate to shut off decision-making from scrutiny, and create a protected zone of decision-making insulated from constitutional scrutiny. This is not to say that human rights law does not reach so far but that it – for good reason – does not impose justificatory burdens on private actors.

There are two different strands of the *'private autonomy'* concern about imposing rights obligations on non-state actors. The first, which is better dealt with at the balancing stage, discussed below, is private autonomy *simpliciter* – that it is an individual and social good, and in some cases a right, for people to be able to do what they like. However, the second concern is logically prior to the balancing stage, because it is a concern about the imposition of scrutiny *at all* – such concerns would not be ameliorated by a finding that, on balance, private autonomy *simpliciter* should win out over fundamental rights. For this line of thinking, the real problem would be that private decision-making was subject to scrutiny *at all*,[130] which required reason-giving.[131]

There are very likely to be – depending on the constitutional dispensation and social role of the actor – some cases where the total non-application of rights is justified;

[130] Collins (n 80) 51.

[131] Mattias Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 German Law Journal 341, 349.

where public scrutiny for decision-making is totally removed.[132] There are probably some examples in any society committed to respect for rights. The most extreme examples of such decisions might be decisions about friendship and sexual relationships. From these examples, however, more could be extrapolated: perhaps whom we invite into our homes falls within this protected space.[133] Defining this unrestricted sphere will be very difficult indeed.[134] It will not simply be a spatial test, because that would be likely to be both under- and over-inclusive.[135] Collins' example of who we invite into our houses may be more complicated than it initially seems: with the prevalence of modern slavery and domestic abuse we might think that in some circumstances what goes on in the home might not be off limits for public scrutiny. Much will depend on the relative importance of the relevant rights, which is usually relevant at the balancing stage but in this context, exceptionally, is relevant at the first stage too.

It will only exceptionally be the case that the need for protected space under a constitutional dispensation will have the effect of rebutting the establish a presumption of duty-bearing in the context of conjunctive rights. In particular, one would expect such cases to be extremely rare in the educational or economic context.[136] *Firstly*, this is because such cases leave no room for balancing – no matter how egregious the potential resulting rights-violation. That will only be tolerable in cases where

[132] *Bernstein v Bester* [1996] ZACC 2; 1996 (4) BCLR 449, [67].

[133] Collins (n 80) 46.

[134] ibid 53.

[135] ibid 46.

[136] Sutherland (n 119) 398; Bhana and Pieterse (n 82) 878.

exceptionally strong justification tends in favour of the withdrawal of public scrutiny.[137] *Secondly*, there is the basic point that all other human rights (with some possible exceptions) are capable of limitation in an exercise of public justification. It would be very surprising if the private autonomy of educational actors were not at least in principle in the same boat. The private autonomy of educational actors is a factor to be weighed in the balance, not a reason to treat private education as falling within that *'sacred sphere'*[138] where exposure to public justification is impermissible.[139]

(3) Conclusion: Overcoming Analytical Challenges

Accordingly, a conditional obligation will be established where the relationship between beneficiary and putative duty-bearer is a candidate relationship for obligation, and where the actor's social role either does not rebut the presumption that a conjunctive obligation will apply; or where it positively establishes that the actor should be responsible for the fulfilment of a disjunctive duty. Exceptionally, the social role criterion might indicate that no obligation should attach at all because the case falls within a protected *'sacred sphere'* in which no obligation can attach, and no justification is necessary.

Adopting this approach begins to overcome the analytical challenges, by adopting a clear, staged analysis. It separates out the different roles of the different considerations at play. (It bears emphasis that this is merely the first step: the

[137] *Bernstein* (n 132), [67].

[138] Cherednychenko (n 92) 218.

[139] Kumm (n 131) 362.

importance of the right at stake, and countervailing rights, simply are not relevant in identifying conditional duties; rather they become relevant when non-compliance needs to be justified.) This approach also starts the work of tracing the arguments which need to be deployed to consider the allocation of duties between state and different private actors, for which the social role criterion will be critical.

D. JUSTIFICATION OF NON-COMPLIANCE: PROPORTIONALITY

The existence of a conditional human rights obligation, dictated by power, vulnerability, and social role, is not the end of the story. It will be obvious that a number of the militating factors identified in Chapter 4 are missing from the analysis above: in particular, the importance or intensity of the right, private autonomy, and countervailing rights. This section argues that the way to deal with these concerns which best meets the analytical challenges is as part of a separate justification analysis, after the conditional private actor obligation has been identified, rather than blended into a single analysis.

The basic (but contested) notion that rights operate as principles requiring maximisation[140] implies a bifurcation between two stages.[141] First, compliance with a *'conditional'* duty is assessed. Once (a) a duty and (b) non-compliance are established, the burden shifts to the duty-bearer to justify non-compliance with the duty.[142] If the

[140] Robert Alexy, 'Constitutional Rights, Proportionality, and Argumentation' in Jan-R Sieckmann (ed), *Proportionality, Balancing, and Rights* (Springer International Publishing 2021) 2.

[141] Stoyanova (n 70) 350.

[142] IM Rautenbach, 'Constitution and Contract - Exploring 'the Possibility That Certain Rights May Apply Directly to Contractual Terms of the Common Law That Underlies Them'' (2009) Journal of South African Law 613, 632.

breach is not justified, the duty is concretised into an unconditional duty.[143] This is a standard two stage process, recognised in all the jurisdictions under review,[144] with the proportionality test answering the second stage.[145] This distinction will be important for the following analysis so bears emphasis: conditional obligations are those with which failures to comply can be justified. It is only after the justification analysis that it can be known concretely what the unconditional obligation is.

This is as true for *'horizontal'* as *'vertical'* cases. In the vertical, negative context, this is largely accepted, and the debate has shifted to the precise terms of the proportionality analysis and its different limbs, and whether the trend towards it is desirable.[146] These debates have received a huge amount of attention from scholars.

The place of proportionality in *horizontal* human rights law, by contrast, has not always attracted much attention.[147] There have been only a couple of recent contributions, in spite of the fact that as early as 2012, Möller observed that the horizontal application of rights is a part of his *'global model of constitutional rights'*.[148] Möller does not fully unpack what this means for the proportionality test. Only recently

[143] Bilchitz and Ausserladscheider Jonas (n 33) 839.

[144] *Bank Mellat v HM Treasury* 2013 UKSC 39 2014 AC 700; *Modern Dental College & Research Centre vs State Of Madhya Pradesh* (2016) 7 SCC 353, 2016 SCC OnLine SC 373.

[145] Stephen Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Vicki Jackson and Mark Tushnet, *Proportionality: New Frontiers, New Challenges* (CUP 2017) 224.

[146] Kai Möller, 'Proportionality and Rights Inflation' in Grant Huscroft, Bradley W Miller and Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 169.

[147] Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012) 2.

[148] ibid 10.

have Bilchitz and Jonas[149] and Gardbaum[150] written on the topic, the former arguing that proportionality can be applied by businesses when they make decisions, the latter arguing that the proportionality test is ill-suited to disputes between private actors.

There is no generally accepted canonical formulation of the proportionality test,[151] but there is broad consensus over its four limbs,[152] even if there is quite a lot of debate over what each of the limbs requires or means.[153] In order to be justified, a rights infringement must be *'provided for by law'* and meet the proportionality test. The proportionality test is traditionally divided up into four stages: (i) legitimate aim; (ii) rational connection; (iii) necessity; (iv) proportionality *stricto sensu.* The goal here is not to defend a particular conception of the four stages of the proportionality test, nor to argue that it is, all things considered, a good test. It is instead to deal with a specific question: that of whether, whatever proportionality's general merits, those merits are reduced or less applicable in horizontal cases. This does not require consideration of the precise differences between tests in different jurisdictions,[154] nor of the more

[149] Bilchitz and Ausserladscheider Jonas (n 33).

[150] Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' (n 145).

[151] Bradley W Miller, 'Proportionality's Blind Spot: 'Neutrality' and Political Philosophy' in Grant Huscroft, Bradley W Miller and Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 371.

[152] Stephen Gardbaum, 'Proportionality and Democratic Constitutionalism' in Grant Huscroft, Bradley W Miller and Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014).

[153] Pirker sets out the debate over the different limbs nicely: Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study* (Europa Law Publishing, Netherlands 2013), Ch. 2.

[154] See the methodological discussion in Kai Möller, 'Constructing the Proportionality Test: An Emerging Global Conversation' in Liora Lazarus, Christopher McCrudden and Nigel

general debates around proportionality. The point here is relative, and not absolute: proportionality works equally well in both vertical and horizontal contexts. Further, the proportionality test provides a way of incorporating the *'importance of the right'* and *'countervailing consideration'* factors identified in Chapter 5, in a way which meets the second analytical challenge.

As a matter of black letter law, the question is open. There is academic commentary to the effect that in horizontal cases, practice eschews the application of the proportionality test.[155] However, there has been so little in the way of either pure horizontality case law, or academic commentary on the question,[156] that such general conclusions are unwarranted. Indeed, there are reasons to think this claim is wrong. While, the Constitutional Court has now held definitively that the general justification provision in s. 36 does not apply to s. 8(2) duties in South African law,[157] it is unclear what arises in its stead.[158] In England, it is completely usual to apply the proportionality test horizontally in privacy tort cases.[159] The question is open as a matter of law, but it

Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 33.

[155] Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' (n 145) 223.

[156] ibid.

[157] *Pridwin (CC)* (n 97), [197].

[158] Tom Lowenthal, 'AB v Pridwin Preparatory School: Progress and Problems in Horizontal Human Rights Law' (2020) 36 SAJHR 242.

[159] See most recently *HRH The Duchess of Sussex v Associated Newspapers* [2021] EWCA Civ 1810, where the Court of Appeal rejected a submission that the judge had wrongly applied the proportionality test applicable to state interferences in a misuse of private information claim between private actors ([87] - [95]).

is, in principle, one which needs an answer. As the horizontal application of rights grows as a trend, the need for that answer will become more and more pressing.

This section makes three overarching points. The first is that it is important to be specific about the different ways in which proportionality might apply in horizontal cases. The second is to review possible difficulties with the application of the test in horizontal cases, and explain why they are overstated. The third is to move from a relative to an absolute claim, and offer a positive defence of the application of the proportionality test, or something like it, in horizontal cases.

(1) Two Approaches to Horizontal Proportionality

The first point to make is that the horizontal application of the proportionality test actually refers to (at least) two different things: the proportionality of the legal system's ordering of private relationships, and the amenability of individual private actions to *ad hoc* proportionality review. Up until now, these two kinds of horizontal review have not been adequately distinguished.[160]

The first is an assessment of the proportionality of the legal system's ordering of things, where, in either a horizontal or vertical case, it is argued that the outcome of the private actor's actions leads to a disproportionate rights violation. In such a case, the true complaint is that the private actor was allowed to act in the way they did – in other words, it was not the disproportionality of their actions (for they are under no obligation to make specifically proportionate decisions), but the disproportionality of the legal

[160] See e.g. Pirker (n 153) 25–26.

system's organisation of their obligations. It is the proportionality of the legal order, rather than *ad hoc* proportionality, with which Gardbaum concerns himself.

The second is an *ad hoc* proportionality test, where the individual decisions made by the private actor must be proportionate. This is what Bilchitz and Jonas are talking about. Where such a test must be undertaken, the individual decisions made by the decision-maker, where they amount to non-compliance with a duty, must be provided for by law and justified as a proportionate means of a legitimate aim.

It might be immediately objected that these two things must be more or less the same. How could the legal system possibly permit a disproportionate private interference with a right? There is force in that, and these approaches are likely usually to come to the same outcome. However, there are four key differences.

(a) Differences between the Approaches

The first main difference is **deference**. When it comes to justifying the legal ordering of private relationships, the decisions in question were made by the legislature or the courts. Decisions made by the legislature, at least, may warrant some form of deference to the balancing act which the legislature has undertaken, or respect for its institutional competence. As discussed in Chapter 4, there are a number of possible reasons for which deference might bite. Broadly, those reasons can be sub-divided into competence-based justifications, which are based on the better ability of the legislature to determine the relevant facts and what balances between rights best reflect the public and private interest; and democracy-based justifications, which are based on the (possibly indirect) electoral source of the decision-maker's authority. The application of deference to private actors is discussed in more detail below, but at this stage it is necessary only to highlight that deference applies differently to private and state actors.

It does therefore matter which of the formulations above is adopted – it changes the way which courts interact with the other decision-makers in the process.

The second main difference comes at the **legitimate aim stage** of the proportionality enquiry. At this stage, it will matter whether the justification is articulated in terms of the private decision or the public ordering, because public actors and private actors may act for different reasons, as will be elaborated below. In short, while it certainly is not the case that private actors can interfere with rights for *any* reason, it is certainly plausible that the list of reasons for which they might interfere would be broader than the list of reasons for which the state might.

The third main difference is that the **necessity test** will be applied slightly differently, because it involves consideration of potential alternative measures. Quite obviously, different alternative measures will be open to the state than will be open to the private actor. As an obvious starting point, the state is invested with legislative and regulatory power, and can rearrange affairs not just between the two actors to the dispute, but between all other actors as well. So, for example, if a private school seeks to expel a student, it is clearly not *necessary* that this child then be denied an education in its entirety: they could be taken in by another school. The state could require another school – be it private or public - to take the child; while the duty-bearing private school may not be able to do so (although the fact would be relevant at the balancing stage). In addition, of course, the state will probably have more resources at its disposal, although this cannot quite be guaranteed in contexts of regulatory capture and large multinational education providers.

The fourth main reason is one of emphasis, more than substance. The **paradigm through which a case is considered** can well make a difference to the outcome in fact,

even if in principle it should not. Viewing the matter through the lens of public ordering compels the court to consider the position not just of the two parties to the case, in an atomised way, but of the entire balance of public and private interests. It may be that neither of the parties are asking for something in the public interest – in which case the only way that concern will be sniffed out is if the court asks itself about the way in which public and private interests are balanced by the ordering of the legal system.

So, if there is a difference between these two kinds of proportionality test, which approach is correctly deployed in horizontal cases?

(b) Which approach should be applied?

The short answer is that, while it is *always* possible and necessary to assess the proportionality of the legal permission under which the private actor acts (even where the case is a direct horizontal one), it is only sometimes (but still often) that private decisions are *additionally* directly subject to the proportionality test.

It should be noted at the outset that, perhaps counter-intuitively, the correct approach cannot simply be determined by who is named as defendant: i.e., whether the complaint is about the legal system's ordering which permitted the private action, or the private action itself. Were this the case, we would fall back on exactly the position against which Chapter 4 argued – that the outcomes of cases, and thus the scope of protection of children's rights, would depend on procedural questions of how the case was brought, rather than the overall substance. If it is correct that indirect and direct horizontal effect do not make substantively different demands, that insight should surely also apply to the extent to which interferences with rights could be justified.

(i) *The General Approach: Proportionality of the Legal System's Ordering*

That the general version of the proportionality test – which tests the proportionality of the legal system's ordering of private rights and obligations – should be applied is obviously true in duty to protect cases, such as *Law Society* (which concerned the state's obligation to provide redress for people injured in traffic accidents),[161] or *Wilson* (which concerned the allegedly disproportionate proprietary consequences of a failure to adhere to certain formal statutory requirements).[162] In both those cases, the explicit target was the state's legal ordering of private relationships. However, a focus on the proportionality of the state's organisation of the legal system (and the grant of permission to the private actor to interfere with rights) is also the best way to approach the justification stage in *purely* horizontal cases.

Before defending that position, an example may help clarify exactly what is argued for here. Let us take the facts of the US case of *Morse v Frederick*, where a student was suspended from school after displaying a banner reading '*Bong Hits 4 Jesus'* at a school event.[163] Let us assume the school is a private school, owes a conditional duty to respect the student's free expression rights, and that the banner in question was protected speech. If my argument is right, the starting point for the analysis of the competing concerns in this case would be through the application of the proportionality test to the state's rule that students in private schools may be suspended

[161] *Law Society v Minister for Transport* [2010] ZACC 25, 2011 (1) SA 400 (CC).

[162] *Wilson v First County Trust (No. 2)* (n 40).

[163] *Morse v Frederick* 551 U.S. 393.

for protected speech. That analysis arises against the background of the particular facts of the case, but it is one directed to the legal ordering, and not the individual decision (which, as set out below, may need to be considered subsequently).

It might be thought a little counter-intuitive to require justification of the state's (vertical) law when the action complained of is the (horizontal) action of a private actor who had a duty not to act that way. However, for at least three reasons, this is the most appropriate approach.

First, such cases are always brought against the background of an existing legal system which has permitted (or, at the very least, failed to stop) the non-compliance with the private duty. In *Khumalo*, s. 8(2) was invoked alongside the law of defamation, in *Pridwin*, alongside the law of contract. In those cases, from the applicant's perspective, had the ordinary law safeguarded rights, there would have been no need to raise a constitutional claim at all. These horizontal rights would therefore find their expression through law and legal enforcement, where the state acts through its legislative and judicial organs. [164] Therefore, when an allegation of rights-violating private action is raised, that allegation could equally be reformulated as a complaint about the constitutionality of the system. Once the parties are before a court, any conflict is channelled to the state's system for resolving conflicts, requiring consideration of the permissibility of the state's organisation of legal relationships. Considering the proportionality of the actions of private actors without taking into

[164] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2011) 85.

account the legal system's ordering of their relations could only give an incomplete picture, which atomised one dispute.

Secondly, any rights-violating action must be provided for by law, as discussed below. If there is no law permitting the private actor to act in the way they did, they cannot justify their non-compliance. There is therefore always an applicable permissive law, the constitutionality of which is presumably coterminous with the constitutionality of the actions of the private actor to which it grants permission. In such cases, asking the question this way would, for the reasons given above, probably tend towards a fuller answer, by avoiding the atomisation of the interests in the dispute.

Third, these disputes will often be polycentric and require consideration of the broader public interest, beyond the dispute between the two parties before the court.[165] As the jurisdictional review showed, the public interest is an important part of determining the horizontal obligations which private actors owe each other. In addition, there is a risk, if things are not framed broadly as being about the organisation of the legal system, that other important interests, with no general channel to come before the court, will not be given adequate weight, and the interests of the actual litigants privileged.[166] Further, of course, it is important for courts to be alive to the need for

[165] In the context of socio-economic rights: Edwin Cameron, 'A South African Perspective on the Judicial Development of Socio-Economic Rights' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 320.

[166] Miller (n 151) 385.

deference to the legislative ordering. Such deference is only possible if the proportionality of the law, rather than the individual action, is considered.[167]

If this is right, what space does that leave for the application of the purely horizontal proportionality test to private decisions?

(ii) The Application of the Proportionality Test to Private Decisions

The answer to this question lies in the first stage of this analysis: whether the private actor's power, vulnerability, and social role, determine that the private actor may only make a decision which does not comply with a conditional duty if that non-compliance can be justified, in each case, by an *ad hoc* proportionality test. To continue the example of *Morse v Frederick*, it may be that not only the proportionality of the general law need be considered, but also the proportionality of the particular decision to suspend that particular student for that particular protected speech.

While it is not possible here, given limits of space and also how jurisdictionally contingent the social role factor is, to develop a full account, four preliminary thoughts can be offered.

The first point is that *ad hoc* proportionality is very unlikely to apply all the time to all private decisions. In many parts of our lives, decisions do not have the necessary institutionalisation and formality for this kind of approach. Determining which decisions have this characteristic is another aspect of social role: it would depend on the way in which the decision was made and the meaning of the decision within the

[167] Pirker (n 153) 30.

operative dispensation. There are likely to be many contexts in which individual freedom and certainty require that actors are bound only by the specific legislative scheme, and not required to consider the individual proportionality of their actions.

The second point is that *ad hoc* review makes most sense where power is *institutionalised*, and therefore where a decision-maker is acting, like a public authority would be, within a pre-existing discretion to deal with an individual in a particular way. This discretion could stem from a contract, or statute or regulation. This explains the application of public-law-analogous duties in cases like *Marlborough* or *Braganza* (which recognised that duties of fair procedure and reasonableness respectively could be implied into contracts where the contracting party was empowered to exercise a particular discretion).[168] The decision-maker has institutionalised power of decision-making, and so conditions attaching to individual decisions come with that power. The relationship between a child and private school, or employer and employee, is an excellent example of such institutionalised power stemming from contract. A school would be a perfect example of an environment in which individual decisions could be subject to an *ad hoc* proportionality analysis.[169]

The third point is that institutionalisation analogous to child and school is clearly not *necessary* for ad hoc proportionality to apply. Take the English privacy cases. There the proportionality test is applied *ad hoc* and horizontally, but the subjects of privacy-

[168] *Gray v Marlborough College* [2006] EWCA Civ 1262, [2006] ELR 516; *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

[169] David Dyzenhaus, 'Proportionality and Deference in a Culture of Justification' in Grant Huscroft, Bradley W Miller and Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 251.

infringing news stories are not institutionalised within the newspaper. Instead, it seems to be more a question of what can be expected of editors: they are expected to individually turn their minds to the consequences of what they do, and so can be held accountable for those decisions on an *ad hoc* basis.

The fourth point is that there will be occasions on which *ad hoc* justification is simply not permissible.[170] For example, the application of the test set out above leads to a clear obligation not to perpetrate domestic violence on the part of individuals, because the right to be free from violence in the home is a conjunctive right, and there is clearly nothing in the social role of cohabitees that would ever excuse such behaviour. However, the abuser cannot plausibly claim that their behaviour is justifiable, and it would not be helpful, realistic or moral to attempt to apply the proportionality test to such interferences with rights. Further, and more generally, there would be a serious lack of realism in expecting anyone, in their day-to-day personal lives, to make ad hoc proportionality assessments of their actions.

(2) Objections to the Proportionality Test in Horizontal Cases

Whichever of these approaches is adopted, the application of the proportionality test horizontally has come in for criticism. However, the potential objections to the horizontal application of the proportionality test are overstated. It applies just as well in vertical as horizontal cases. There are four particular difficulties which can be

[170] See, for a sceptical view of ad hoc proportionality, Jochen von Bernstorff, 'Proportionality Without Balancing: Why Judicial Ad Hoc Balancing Is Unnecessary and Potentially Detrimental to the Realisation of Individual and Collective Self-Determination' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014).

discerned from the literature, but, on reflection, it will be seen that none of these present a reason to object specifically to the application of the proportionality test in horizontal cases.

(a) Difficulty 1: Provided for by law

Any interference with rights must be provided for by law. In *Barkhuizen*, one of the reasons why the Court plumped for indirect rather than direct effect was that contractual terms are not *'laws of general application'* to which the limitations clause in s. 36 could apply; the same was true of the terms of the contract in *Pridwin*[171] and the clauses of the will in *King*.[172] Almost exactly the same reasoning was used by the Indian Supreme Court in *Zoroastrian Cooperative*.[173]

However, the requirement that an interference be provided for by law can easily accommodate both kinds of horizontal application. Whether we ask whether the state's ordering of private relationships is proportionate; or whether a particular private action is proportionate in the circumstances; that private action must be supported by law. This is really as simple as saying that the private actor's action must not be otherwise illegal: i.e. the private actor is authorised by the legal system to limit rights.[174]

This is a broad conception of the legality requirement, but it is warranted in the case of horizontal relationships. It matches the broad way in which the law empowers

[171] *Pridwin (CC)* (n 97), [197].

[172] *King v de Jager* [2021] ZACC 4; 2021 (5) BCLR 449 (CC), [99].

[173] *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632, AIR 2005 SC 2306, [18].

[174] Rautenbach (n 142) 623.

private individuals. The law allows private actors to act as they please except where there are specific prohibitions, while the same is not true for public authorities, who rely on statutory or constitutional grants of power, outside of which they may not act.[175] Equivalent specific grants of power tend not to exist for private individuals. Instead, the law tends to empower them much more generally, either through broad doctrines like *pacta sunt servanda*, or simply by remaining silent and presuming the freedom to do all which is not specifically prohibited.

To return to *Barkhuizen*, it is clearly correct that contractual terms are not laws of general application, but the law of contract is such a law, and it is not clear why it could not be subject to scrutiny for the way in which it empowered private actors to conclude contracts containing terms of the sort at issue.[176] Finn identifies that the contrary approach has the effect of perpetuating in South African law the persistent but disapproved notion that contract and constitutional law operate practically as parallel systems of law, rather than, as they theoretically should be, both part of the same constitutional order.[177] Treating the broad empowerment and liberty of private individuals as providing equivalent legal basis, at least for private actors, is a principled approach, even where that empowerment stems from common law.[178] It chimes with the argument in Chapter 4 that the common law must own its permissions as much as

[175] *R v Somerset County Council ex parte Fewings* [1995] 1 WLR 1037 1042.

[176] Rautenbach (n 142) 620.

[177] Meghan Finn, 'Befriending the Bogeyman: Direct Horizontal Application in AB v Pridwin' (2020) 137 SALJ 591, 599.

[178] Barak (n 164) 140.

it owns its prohibitions. If the law permits a private actor to act in a particular way, then that action is provided for by law.

This is not to rob the legality requirement of a role, however. Just as public actors require positive *vires* within which they must stick, private actors are bound by law. If they transgress legal limits on their conduct, the action in question will not be provided for by law. It is not unknown for private actors to break the law, and this hurdle ensures that no attempt to justify that in human rights terms is possible.

(b) Difficulty 2: Legitimate Aim

The next concern about applying the proportionality test horizontally is the applicability of the legitimate aim requirement to private actors. The permissible legitimate aims in, for example, Art. 8(2) ECHR, such as national security, were not designed with private actors in mind.[179] That specific concern is easily countered. Firstly, the provision for the *'rights and freedoms of others'* could presumably be relied upon.[180] Secondly, as these horizontal demands on private actors are often only implicit in the rights anyway, there is no particular reason why the court would be limited to the legitimate aims set out in the specific limiting provisions applicable to the *state* when it is *private action* which is under scrutiny.

There is a different version of the challenge, articulated by Gardbaum, which is that private actors cannot be expected to act in accordance with public reason, and it would be impossible to work out what a legitimate private reason would be. Two

[179] Donnelly (n 122) 261.

[180] ibid.

strands of reasoning can be identified in this view, and both are surmountable, if the approach defended here is adopted.

The first strand is that private actors cannot be expected to justify themselves. This point has been dealt with: this is true only in the rarest of cases, within the protected sacred sphere allocated by the social context. In cases where individuals are not expected to justify themselves, the proportionality test would find no application because no duty would arise. Outside such cases, the power and social role of the actor in question, coupled with the relationally linked beneficiary of a particular right, precludes acting with caprice or arbitrarily and demands justification.

The second strand is more forceful, because it makes the (fair) point that it will probably be harder to discern legitimate private aims than public ones.[181] As set out above, the private party is not in such cases entitled to act with caprice, and so cannot refuse to articulate an aim. The question moves from whether a private actor can be expected to justify their conduct in terms of their objective (they can), to which objectives are legitimate. Different reasons for action are acceptable for private and public actors,[182] unless the state is to become perfectionist, restricting permissible conceptions of the good life.[183]

This challenge can be resolved by drawing the distinction above, after which the objection falls away. If the question is phrased, as it generally should be, as one of

[181] Lorraine E Weinrib and Ernest J Weinrib, 'Constitutional Values and Private Law in Canada' in Daniel Friedmann and Daphne Barak-Erez, *Human Rights in Private Law* (Hart Publishing 2001) 57.

[182] Kumm (n 131) 362.

[183] Möller, *The Global Model of Constitutional Rights* (n 147) 189.

whether it was proportionate to permit the private actor to act in the way they did, then this is, in effect, a question of what legitimate aims *law* may pursue under that constitutional dispensation. This question is no harder in horizontal than in vertical cases, because it effectively reformulates the horizontal position as a vertical one. Often, for the reasons set out above, there will be no real problems at the legitimate aim stage in horizontal cases: the need to realise a countervailing right, contractual freedom,[184] or autonomy interest[185] will be enough.[186]

Where the private actor is obliged, because of its social role and power, to make *ad hoc* proportionality determinations, things get a little bit trickier. How can the court review those aims, given Gardbaum's points above?

The answer lies in the first stage of the analysis. As Pirker recognises, the legitimate aim question is really a question of what is (permitted to be) recognised as valuable, and that is a question which can be asked in both vertical and horizontal cases.[187] It is really a question of how the constitutional dispensation views the private actor's position in society: exactly the question being dealt with when power, vulnerability, and social role are considered. It is against this background that different jurisdictions will have different conceptions of what sorts of aims are legitimate.[188] This objection is therefore not insurmountable: it will require close thought about what

[184] Rautenbach (n 142) 634.

[185] Barak (n 164) 537.

[186] ibid; Möller, *The Global Model of Constitutional Rights* (n 147) 183.

[187] Pirker (n 153) 16.

[188] Möller, 'Constructing the Proportionality Test: An Emerging Global Conversation' (n 154) 34.

exactly the private party was hoping to gain,[189] and then reflection on whether that aim is permissible under the operative constitutional dispensation.

The answer would clearly vary across jurisdictions, depending on the respective dispensation. To take the example of *Khumalo* again, publication of scandalous information to (a) inform the public; (b) exercise a free expression right; or (c) make (or even maximise) profit are likely to be legitimate objectives; the mere desire to humiliate, is unlikely to be. This exercise is difficult and value-laden, and clearly subject to contestation, but it is possible, and, on this account, vital. Which legitimate aims are picked as acceptable is an analytically significant moral question,[190] which hugely colours the rest of the analysis.[191] The answer to the necessity analysis will vary hugely, for example, depending on whether the legitimate aim is *achievement* of profit or *maximisation* of profit.[192] However, this difficulty is not insurmountable. That this difficulty can be overcome is clear from the law of indirect discrimination. In cases of indirect discrimination, a private employer (or school) must justify the application of criteria or standards which disproportionately impact a protected group, and must do so by reference to the proportionality test. In such cases, courts have been willing and able to consider whether particular private aims are legitimate, and then apply the proportionality analysis to them.

[189] Rautenbach (n 142) 635.

[190] Miller (n 151) 383.

[191] TRS Allan, 'Democracy, Legality, and Proportionality' in Grant Huscroft, Bradley W Miller and Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press 2014) 219.

[192] Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (n 32) 25.

This is clearly possible, especially in the education context. The Indian courts have already made steps towards doing so, making it clear that profiteering in education is impermissible. Private education has charity and the realisation of the right to education at its heart under the Indian constitutional dispensation.[193] Therefore, just as pure humiliation would probably have been an unconstitutional (and therefore illegitimate) private aim in *Khumalo*, so too would the pure pursuit of maximised profit not be a legitimate aim for the purposes of *ad hoc* justification in private education.

Finally, as for the question of how the private actor's actual motivations are to be discerned, this is an important reason why it is necessary for there to be some sort of institutionalisation before *ad hoc* proportionality arises. Where a school or employer makes a decision, it can be expected to be written down, with reasons. The assumption that the reasons for institutionalised private decision-making can be identified and subject to review underpins both the law of indirect discrimination, and the law of unfair dismissal in employment. It should be noted that in both contexts there is often factual dispute about the reason for which the decision-maker acted. That dispute is resolved by the court or tribunal hearing the case in the ordinary way, by applying the civil standard of proof and reaching a conclusion. There is no reason why such an approach would not be available in horizontal human rights cases – indeed, in the context of the availability of cross-examination in judicial review claims, English

[193] *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1, AIR 2014 SC 2114, [24]; *Unni Krishnan v State of AP and Others* (1993) 1 SCC 645, AIR 1993 SC 2178, [198].

courts have recognised that human rights claims are particularly likely to involve disputes of fact.[194]

(c) *Difficulty 3: Incommensurables (Rational Connection, Necessity and Proportionality Stricto Sensu)*

A common complaint about the proportionality test is that it results in the balancing of incommensurable values, something which cannot be done rationally. The judge just has to choose. Whatever the merit in this concern, it is not aggravated by the horizontal context, for the following reasons.

(i) Means-End vs Balancing

It is first important to draw a distinction between two different kinds of reasoning which take place within the proportionality analysis: means-end reasoning, and balancing.

Means-end reasoning requires the identification of a means, and an assessment of the way in which it achieves that end. In the proportionality analysis, this is reflected in the requirement of rational connection, and that the measure adopted be no more invasive than is necessary to achieve its aims. In theory, there is absolutely no reason why the approach to means-end reasoning would be different in the horizontal context. There is no particular impediment, once a conditional duty and legitimate aim are identified, to the application of the rational connection and necessity tests in horizontal cases. They are means-end tests, and so, once the court has identified a means, and identified an end, it has the raw materials needed to conduct the analysis.

[194] *R (Al-Sweady) v Secretary of State for the Home Department* [2009] EWHC 2387, [2010] HRLR 2, [19].

However, even within the rational connection and necessity tests, there is a lot of room for values-based reasoning, and therefore lots of entry points for incommensurables. There is scope for a lot of variation in how this test is applied, and what evidence is required to substantiate it.[195] It is not, for example, generally expected that there be *no* measure which is *exactly equally effective*.[196] Bilchitz points out that an interpretation of necessity which really was so strict would impose significant limits on state action, and give rise to separation of powers issues.[197] The position is therefore that even the application of these means-end tests is driven to an extent by the balancing of incommensurables. This makes recognition of the horizontal demands of human rights law particularly important, because the question then becomes: how to weigh values and balance competing, incommensurable considerations, something which, to a greater or lesser extent, happens at all stages of the proportionality test in both vertical and horizontal cases?

(ii) How to Balance?

Since courts have to consider such difficult questions of weight and value in any event, the application of the test is no more difficult in the horizontal context than the vertical one. The fourth limb is especially susceptible to value judgement,[198] and given the

[195] David Bilchitz, 'Necessity and Proportionality: Towards A Balanced Approach?' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing 2014) 47.

[196] Stoyanova (n 70) 354.

[197] Bilchitz, 'Necessity and Proportionality: Towards A Balanced Approach?' (n 195) 44.

[198] Timothy Endicott, 'Proportionality and Incommensurability' in Grant Huscroft, Bradley W Miller and Gregoire Webber, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP 2014) 313.

propensity for conflicts of rights, in most cases this is where the heavy lifting happens.[199] However, even the other three stages, which seem more mathematical or means-end oriented in their approach, involve value judgment.[200]

The notion of balancing is, in itself, not especially helpful. It is code for the need for some kind of moral argumentation.[201] What sort of argumentation is due is a highly contested question, but the basic insight is that where autonomy interests conflict, there is no unconditional priority for either interest. Rejecting the need to balance these conflicts results in the privileging of one party's autonomy, granting it unconditional priority even where moral argumentation tends against it, because there is no venue for that moral argumentation. So, there must be such argumentation, and the moral raw materials for this can be drawn from the constitutional dispensation.

This can be demonstrated by considering three kinds of interest which might raise problems in the horizontal application of the test.[202] This exercise is very difficult, and involves a heavily value-laden judgment about the importance of competing interests – but it is no more difficult in the horizontal context than the vertical one. It accommodates concern about the importance of the right, and how it is to be balanced with competing interests.

Competing Rights

[199] Möller, 'Proportionality and Rights Inflation' (n 146) 156.

[200] Miller (n 151) 378.

[201] Möller, *The Global Model of Constitutional Rights* (n 147) 142.

[202] Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' (n 145) 246.

It will clearly, in both kinds of horizontal proportionality test, be necessary to balance any competing rights of the beneficiary and duty-bearer (and indeed any other human rights which might be implicated by the law or conduct in question). This will necessitate the application of a double proportionality test,[203] which tests each implicated right in turn.[204] This approach cannot be a radically different analysis to cases where a conflict between two rights are resolved by a state measure, which is then put to justification.

Contrary to what Gardbaum says,[205] it is hard to see how two competing rights are any more or less incommensurable than, for example, family life and immigration control.[206] Indeed, they might actually be more commensurable, if that is a possible concept, or at least more comparable: rights tend to share principled foundations, which they do not necessarily share with immigration control.

It is at this stage where the relative *'importance of the right'* factor comes into play. It will be recalled that one of the analytical challenges was explaining how competing rights are to be reconciled. It is a mistake to think that only certain rights are *'important enough'* to justify horizontal application, as seems to be done in *Khumalo*. By definition, all human rights are important, and important enough to justify

[203] Barak (n 164) 538.

[204] Collins (n 80) 49–50.

[205] Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' (n 145) 246.

[206] This example drawn from Endicott (n 198) 318.

the application of the framework set out in this Thesis. However, the importance of the right is relevant where rights are balanced *against* each other.

In assessing proportionality, it will be important to be completely clear what the competing rights at issue actually are, in order to avoid accidentally attributing to a non-right interest a normative priority which it does not have. This error was on full display in the SCA judgment in *Pridwin*, where the Court gave great emphasis to the right to establish a private school and the school's association rights, including *'the right of the School to enter into and terminate contracts freely in accordance with their terms, and the freedom to associate and to disassociate with whomsoever it wishes.'*[207] This right simply does not exist in South African law, as set out in Chapter 4. It is instead an exercise of private autonomy – an important principle to be sure, but one which, generally, is sub-constitutional, and most certainly subject to rights and other values.[208]

Competing Private Autonomy Interests

It will also be necessary to weigh the realisation of the right against the private autonomy of the duty-bearer. There are two key points to make here. First, it is wrong to conflate private autonomy with a right, and thereby to suggest it enjoys the same normative priority as other rights. Once the conflict is exposed, private autonomy as a value will have an uphill battle. In some jurisdictions, a general liberty right has been explicitly recognised. Where it has not, courts should be careful to insist upon the grounding of rights claims in the actual constitutional text. Möller welcomes the rights-

[207] *Pridwin (SCA)* (n 22), [32].

[208] *Daniels v Scribante* (n 44), [47].

inflation which he says proportionality heralds – but this is not so welcome in the horizontal context, where rights must be balanced against each other. General rights to liberty and equality are radical in their effects,[209] and can unreasonably restrict corporate obligations.[210] There is no inherent reason why it is impossible at the first stage to rule out bare liberty claims unsupported by a particular right.[211] Second, this approach does not destroy private autonomy[212] - but does expose it to justification. The protection of private autonomy in contract law is not absolute and exists within *'the greater fabric of society'*.[213] There is no such thing as *'absolute private autonomy'*.[214]

Giving undue weight to private autonomy can suffocate constitutional human rights,[215] and this is especially so where a narrow version of private autonomy is adopted, which privileges freedom from government interference, ignoring socio-economic domination and social context.[216] In some cases, it must be emphasised, it simply is the case that horizontal human rights will result in the obstruction of private

[209] Kumm (n 131) 346.

[210] David Bilchitz and Surya Deva, 'The Human Rights Obligations of Business: A Critical Framework for the Future' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (CUP 2013) 15.

[211] Gardbaum, 'Proportionality and Democratic Constitutionalism' (n 152) 281.

[212] MP Singh, 'Fundamental Rights, State Action and Cricket in India' (2005) 13 Asia Pacific Law Review 203, 210.

[213] Bhana and Pieterse (n 82) 868.

[214] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: A Manifesto' (2004) 10 ELJ 653, 654.

[215] Rautenbach (n 142) 617.

[216] Dennis M Davis and Karl Klare, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 SAJHR 403, 479–480.

autonomy. That is – that must be – the *point.*[217] They control private power, including that manifesting as *'private autonomy'*,[218] especially where private provision is relied upon for the realisation of socio-economic rights, such as education.[219]

Public Interest

Finally, it will always be necessary, as the jurisdictional review showed, to consider the public interest. This should not be a controversial observation. One point which must be made clear, in accordance with the search for analytical clarity, is that it is important not to conflate particular rights and the general public interest.[220] There is, of course, a public interest in the realisation of rights, but the value of rights goes beyond this. This is especially important in the context of education, which can very readily be defended as being in the public interest as increasing human capital, and producing good workers, consumers and voters. That may all be true, but it is not the predominant reason to protect children's rights in education.

(d) Difficulty 4: Deference

The final difficulty to consider is the way in which the concept of deference operates in horizontal cases. The difference between *ad hoc* and vertical proportionality is most marked when it comes to the question of deference. In respect of vertical proportionality, as is well known, there are good reasons for courts to defer to the

[217] Price (n 94) 369.

[218] Bhana (n 16) 352–353.

[219] Marius Pieterse, 'Relational Socio-Economic Rights' (2009) 25 SAJHR 198, 208.

[220] Barak (n 164) 534.

understanding of the legislature: shortly put, democracy and competence. But equally, it is important for courts not to over-defer and abdicate constitutional responsibility.[221]

In respect of *ad hoc* horizontal proportionality, there is, most likely, no democratic basis for deference. It will be readily apparent that the decisions of private actors are highly unlikely to have significant democratic legitimacy. Therefore, a private school which is fee-charging and unaided would not be able to suggest that there was a democratic basis for deferring to the balance it had struck. The position may, however, be different, where education is privatised in a more endogenous way: for example, where academies conclude funding agreements with the Secretary of State in England.

However, there may be a competence-based reason for deference. Schools are (hopefully!) good at educating. The knowledge and experience of educators is surely important in determining what is necessary and proportionate in a school setting, and there is no particular reason to think this competence would be less relevant just because the school in question is notionally private. This could prove particularly important where new or disruptive private schools claim that their educational model is unorthodox, and that it is not immediately obvious what the benefit will be. It will be important to be sensitive to good-faith and informed private assessment of the link between the objective and the measure.[222]

[221] Bilchitz, 'Necessity and Proportionality: Towards A Balanced Approach?' (n 195) 48.

[222] An analogy might be drawn between this and the employer-friendly approach adopted in English unfair dismissal claims, where significant deference is shown to (private) employers' judgement.

(3) Advantages of Viewing Horizontal Balancing though the Lens of the Proportionality Test

The proportionality test *can* therefore apply to private actors, but it is submitted, it is also the most structured way of approaching the very (but not uniquely) difficult exercise required by horizontal human rights.

First, the proportionality test recognises that it is simply **impossible to avoid controversy** over these questions.[223] There is no default answer, and balancing exercises of some sort are inevitable,[224] even in private law: indeed, statutory interpretation,[225] or the very application of private law[226] is itself a balance between competing concerns. Given that balancing is inevitable, and the kind of balancing performed here is not significantly different from that in vertical negative cases,[227] the onus is very much on those who argue that this context requires deviation from the constitutional norm of proportionality. Even those who would argue for a non-proportionality form of balancing (one can believe in a culture of justification – and even the two-stage process – while rejecting proportionality[228]) would have to grapple

[223] Oliver Gerstenberg, 'Private Law and the New European Constitutional Settlement' (2004) 10 ELJ 766, 780–782; Oliver Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't)' (2004) 17 Canadian Journal of Law and Jurisprudence 61 77.

[224] Möller, 'Constructing the Proportionality Test: An Emerging Global Conversation' (n 154) 35.

[225] Allan (n 191) 223.

[226] Barak (n 61) 33.

[227] Donnelly (n 122) 236.

[228] Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' (n 145) 224–225.

with the fact that more open-ended balancing tends to resemble the fourth stage of the proportionality test anyway.[229]

Second, if these balancing exercises have to happen anyway, then they should be as **explicit, structured and transparent** as possible, as a matter of public accountability for decisions, as well as legal certainty. The structure of the proportionality test leaves less room for dodging the issues,[230] ensuring active judicial consideration of relevant concerns.[231] Competing rights and countervailing factors need to be exhaustively and fully drawn out, and the proportionality test maximises the chances of this happening. To be clear, this is a difficult balancing exercise between incommensurable values,[232] but the structure, and forced open engagement, inherent in the proportionality test[233] is better than an unstructured interplay of values.[234] *'Competing ideologies join issue'* here,[235] and it would be better if this was made explicit. The outcome may well still be uncertain, and the proportionality test may end up as little more than a heuristic,[236] but that is not a reason not to maximise structure and transparency.

[229] Pirker (n 153) 43.

[230] Rautenbach (n 142) 637.

[231] Möller, *The Global Model of Constitutional Rights* (n 147) 179.

[232] Collins (n 80) 49.

[233] Pirker (n 153) 31.

[234] IM Rautenbach, 'The Constitutional Status of Contractual Freedom' (2016) Journal of South African Law 467 477.

[235] Rautenbach (n 142) 624.

[236] Pirker (n 153) 34.

The third advantage of the proportionality test is that it **actually tests claims made**, and requires parties to adduce evidence of those claims. This is important because often, when horizontal human rights law is discussed, prophecies of doom start to emerge.[237] In *Pridwin*, for example, the SCA held that it would be a *'catastrophe'* if a clause of the sort at issue were struck down. Such premonitions of disaster may or may not be right, but if they are the reason for non-compliance with a conditional duty, they should be supported by evidence. It is absolutely non-obvious that, for example, private actors will desert a market or be unable to price in rights compliance if that is required of them.[238] Likewise, those who find the application of human rights law in private relationships to be too uncertain should welcome the proportionality test as a sensible way to balance law's formal certainty and the human rights implications of its content.[239] This is important because a significant aspect of human rights law is that it exposes the status quo to justification. As Gerstenberg puts it, human rights bring *'dialogue and controversy back into exclusory, entrenched, and marginalising social settings.'* They are claims for *'equality of attention and recognition'*.[240] This is especially pressing in the educational context, where rights *'flow downhill'* and provide a voice for children, one of the most disempowered groups in society.[241]

[237] Weinrib and Weinrib (n 181) 72.

[238] Donnelly (n 122) 233.

[239] Price (n 94) 350.

[240] Gerstenberg, 'Private Law and the New European Constitutional Settlement' (n 223) 782.

[241] See Chapter 2, *supra*.

Fourth, the proportionality test can encourage **autonomous self-regulation**.[242] It can lead to a culture of justification and rights which prevents violations in the first place, and results in a ready defence. The culture of justification is often spoken about in relation to public power,[243] but it is important in the context of private power too. This is because the need for this culture stems from the respect with which the person affected by the decision should be treated, not the public or private nature of the decision-maker.[244] In forcing them to ask themselves whether their decision is proportionate, the application of the proportionality test exerts a salutary reminder on educational actors of their responsibilities to children.

(4) Conclusion

Therefore, the proportionality test provides a useful way of balancing the conflicting rights at issue where human rights make demands of horizontal relationships. It meets the first and second analytical challenges by explicitly drawing out the competing concerns, and balancing them against each other in a structured and transparent way.

E. OBJECTIONS TO THE HORIZONTAL APPLICATION OF RIGHTS

The fact that rights are relational and incorporate duties to protect means they impose, either directly or indirectly, duties on private actors. This has not stopped there being a trend of disclaiming, criticising or minimising the notion of horizontal human rights obligations. It is necessary to engage with some of these objections to the horizontal

[242] Gerstenberg, 'Private Law and the New European Constitutional Settlement' (n 223) 767.

[243] Dyzenhaus (n 169).

[244] ibid 254.

application of rights because of their currency, but it is important not to obscure the point that if there is to be coherence in human rights law, there has to be a test for who has the correlative duties. This simply is not optional. Subject to that critical caveat, these arguments can now be reviewed.

Donnelly provides a list of such arguments: private autonomy; the separation of powers; political compromise; excessive litigation; avoidance of discrimination; and avoidance of indeterminacy.[245] Political compromise arises in Donnelly's work from tensions between the CJEU and national courts, and between US federal and state competence.[246] Such compromises may exist and be relevant, but consideration of them falls outside the scope of this Thesis. The argument arising from discrimination arises in the specific context of Donnelly's work on contracting out, where a concern rightly militates that this would lead to inequality of treatment between different service recipients, depending on whether the state is paying for them or not. This is obviously not relevant where the account of private duty-bearing is based not on contracting out but on a conception of beneficiary-centred relational rights. Indeed, it is also an argument in favour of more general horizontal application!

This Chapter will therefore deal with only the other four arguments. Upon investigation, it will be seen that they are not especially powerful arguments for limiting the horizontal applicability of rights, and should be viewed with great circumspection.

[245] Donnelly (n 122) 232.

[246] ibid 234–235.

(1) Objection 1: Private Autonomy

It is said that keeping human rights out of horizontal disputes protects *'individual freedom, autonomy, and self-determination.'*[247] Concerns about the implications for private autonomy tend to be central to resistance to the *'constitutionalisation of private law.'*[248] There are, as set out above, two levels to this concern. The first is that private actors should not have to justify their conduct at all. [249] This will only be the case in exceptional circumstances justified by the applicable constitutional dispensation. The second is that there is an independent interest in having freedom of action, which is not adequately respected if human rights are allowed to seep into horizontal relations.

The basic answer to this is that private autonomy is respected by this approach, *where respecting it does not amount to a disproportionate interference with another person's rights,* taking into the account the importance which private autonomy has within that normative system, tested by reference to a rigorous and evidence-based proportionality analysis. Proportionality is designed to resolve conflicts between rights and autonomy interests.[250] Given this, there are two possible grounds to this objection. The first is that courts are likely to get the analysis wrong, and under-value private autonomy. Aside from the fact that it appears, in some jurisdictions at least, that the opposite is true, this is really a complaint about the capacity of the proportionality test

[247] Rautenbach (n 142).

[248] Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't)' (n 223) 62.

[249] Mark Tushnet, 'The Relationship between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect' in András Sajó and Renáta Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing 2005) 171–172.

[250] Barak (n 164) 493; Möller, *The Global Model of Constitutional Rights* (n 147) 181.

to balance rights. As explained above, there is no reason to think the proportionality test will encounter any more or fewer difficulties in the horizontal context when compared with the vertical context. The second possible ground is that private autonomy should be privileged even if it amounts to a disproportionate interference with a right. However, this is not consistent with the basic notion of human rights as having normative priority, and it would require some bravery to express the claim in that way. Such a challenge would be a more radical one – to the notion of the protection of human rights itself.

Private autonomy is certainly important, it bears emphasising, but not overwhelmingly so.[251] Its importance in a particular case must be balanced against the importance of the right with which respecting the duty-bearer's private autonomy would interfere, in accordance with the respective weight allocated to those competing concerns within the constitutional system.[252]

Further, private autonomy should be assessed contextually, and with due regard for its implications in complex societies. The jurisdictional review identified two important points in this regard.

First, overreliance on the distinction between positive and negative obligations tends to obscure rather than enlighten. The difference between an action and omission is an inevitably uncertain binary:[253] negative obligations can easily be restated as

[251] Donnelly (n 122) 232.

[252] *All Saints High School, Hyderabad v Government Of Andhra Pradesh* (1980) 2 SCC 478, AIR 1980 SC 1042 24.

[253] Davis and Klare (n 216) 498.

positive obligations and vice versa.[254] Further, the distinction is on its own terms a poor proxy for autonomy. Some restraint could in fact end up being costlier than some performance, and in any event, *'respect'* for rights could require positive action, such as due diligence.[255] Rather than getting tied in metaphysical knots over this distinction, it is surely better, and more consistent with the notion of rights as optimisation principles, to test the strength and legitimacy of the plea for private autonomy directly, with an evidence-based and value-driven proportionality analysis, rather than through the inadequate proxy of positive and negative obligations.

Second, when assessing the relative weight of private autonomy and competing rights, it is also important to bear in mind that respecting the private autonomy of a duty-bearer could end up restricting the autonomy of a rights-holder, perhaps in a more egregious way than compliance with the relevant duty would restrict the autonomy of the duty-bearer.[256] Once autonomy has been given a certain importance in the constitutional order, it is impermissible to treat the autonomy of one party as less important without subjecting that choice to justification of the sort provided for by the proportionality test set out above. This is particularly evident if thought about in terms of externalities. Granting private autonomy to economic actors could result in negative externalities, which result in rights violations. It is not permissible, in such cases, to

[254] Brice Dickson, 'Positive Obligations and the European Court of Human Rights' (2010) 61 NILQ 203 203.

[255] Bilchitz, 'Corporate Law and the Constitution: Towards Binding Human Rights Responsibilities for Corporations' (n 10) 770; Bilchitz and Deva (n 210) 15.

[256] Gerstenberg, 'Private Law and the New European Constitutional Settlement' (n 223) 770; Gerstenberg, 'What Constitutions Can Do (but Courts Sometimes Don't)' (n 223) 70.

take a laissez-faire approach,[257] and permit the cost of rights-violations to lie where it falls. If, for example, a private school can provide education at a lower cost than the state, but only by providing education which falls below the minimum standards required by human rights law, then this is not a true example of reduced costs. It is instead an example of shifted costs: the costs are borne by the child, whose rights have been traded away. In such a case, it ceases to be a question of the school's decision to provide inadequate education in the exercise of its private autonomy, and instead of question of whose rights should be prioritised. This question is only properly answered by the application of the proportionality test.

Third, although there is not space to fully develop the point here, there is a question of whether private autonomy has the same value for corporate persons as it does natural ones. At least some of the important concerns underpinning private autonomy, such as moral agency and conscience, seem to sit uneasily when applied corporate actors.[258]

(2) Objection 2: Separation of Powers

There is another common argument, that recognising horizontal rights between private actors, and requiring courts to enforce them, goes against the separation of powers, because the responsibility for regulating the interaction between private actors belongs to the legislature. There are three different guises to this argument. The first is that it gives more power to judges than is constitutionally proper. The second is that, even if

[257] Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (n 32) 23.

[258] Sandra Fredman, 'Tolerating the Intolerant: Religious Freedom, Complicity, and the Right to Equality' (2020) 9 Oxford Journal of Law and Religion 305, 325.

proper on the constitutional separation of powers, judges lack the actual ability to make these decisions.[259] The third is that to do so would undermine the role of the state as the duty-bearer and dilute the strong duties which it is under.

On the first point, while, of course, the separation of powers is a contested concept, which varies across the jurisdictions, it shares a common, sensible core, which is that judges must apply the law and safeguard individual rights, but a balance must be struck between this and overzealous judicial law-making.[260] Where this balance is struck will vary between jurisdictions, with India an outlier in terms of the significant powers judges have to, in effect, legislate, but it is recognised in all jurisdictions. Judges should not get '*carte blanche.*'[261] There are, however, two reasons why this is overstated. The *first* reason is that the legislature gets first bite of the cherry.[262] Its determination of the correct balance will be due significant (although not overwhelming) respect,[263] which can go some way towards resolving separation of powers concerns.[264] The *second* reason is the role of the constitutional and legislative dispensation above. In determining the existence of duties, judges have already found that the prevailing constitutional dispensation means that the nature and role of the actor is such that they should bear duties. The constitution and legislature already

[259] Barak (n 61) 17.

[260] Gerhard Lubbe, 'Taking Fundamental Rights Seriously: The Bill of Rights and Its Implications for the Development Contract Law' (2004) 121 SALJ 395, 408.

[261] FDJ Brand, 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 SALJ 71, 77.

[262] Barak (n 61) 34–35.

[263] Collins (n 80) 40–41.

[264] Bhana (n 16) 368.

created a framework in which the decision was to be left to judges, as Lord Neuberger observed in *YL*.[265] If the legislature is slow or sporadic in its intervention, a judicial response may well be constitutionally justified.[266]

The second concern is that judges lack the *de facto* institutional competence to make these decisions. There are two limbs to this concern. The *first* is a legal certainty one: that it will simply be impossible to guess how judges will decide cases. This was dealt with in Chapter 4 and is briefly discussed below. The *second* limb is that judges are being asked to engage in what is essentially policy reasoning,[267] which falls outside their domain of competence. The rich and polycentric set of concerns in resolving these disputes is formidable.[268] However, as discussed in Chapter 4, this is not unique to the horizontal context. This is a complaint levelled against human rights law, of all stripes, all the time.

The third concern is an important one. The duties of the state must not be undermined by a conception of private duty-bearing, or the abdication of responsibilities to private schools.[269] To this there are two responses. *First*, human rights law simply does make claims on what rights and obligations must exist between private individuals, and in determining what they are, courts are deciding what it is the state is obliged to do, as a matter of the duty to protect. There would be a lot more force to this argument if each rights claim only gives rise to a single duty, but, once it is

[265] *YL v Birmingham City Council* [2007] UKHL 27, [2008] 1 AC 95, [128], [152].

[266] Donnelly (n 122) 233.

[267] Kumm (n 131) 349.

[268] ibid 354.

[269] *Costello-Roberts v United Kingdom* (n 5).

recognised that rights contain complex relational norms, it becomes clear that there is no inconsistency between strong duties on the state coexisting with duties on private actors.[270] *Second*, as will be developed below, the state in fact retains a strong central role even within a framework for the horizontal application of duties.

(3) Objection 3: Indeterminacy

A major challenge to the application of the proportionality test in horizontal matters is certainty.[271] It simply will cease to be predictable how judges will resolve these difficult balancing cases, and thus, the arrangement of private affairs will become uncertain. The argument that human rights law is too indeterminate to identify horizontal obligations was dealt with in Chapter 4. It is not a persuasive one.

In any event, as the jurisdictional review showed, there is not all that much certainty around at the moment! The notion that horizontal rights will *introduce* uncertainty rather underplays the extent to which more indirect approaches tend to be uncertain.[272] In any event, even if adopting such an approach led to some teething troubles, a body of precedent would soon develop.[273] The fact that horizontal obligations might require interrogation of existing law and unsettle existing doctrine is not a reason not to undertake it if it introduces consistency into the law. Proper analysis

[270] David Bilchitz, 'A Chasm between 'Is' and 'Ought'? A Critique of the Normative Foundations of the SRSG's Framework and the Guiding Principles' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business* (CUP 2013) 127.

[271] Michael Dafel, 'Curbing the Constitutional Development of Contract Law: A Critical Response to Maphango v Aengus Lifestyle Properties (Pty) Ltd' (2014) 131 SAJHR 271, 285.

[272] Weinrib and Weinrib (n 181) 71.

[273] Bhana and Pieterse (n 82) 895.

is not made bad because it changes a legal rule.[274] Finally, even if the horizontal application of rights led to some uncertainty, that would not make it a bad idea. The value of legal certainty would have to be weighed against the need to protect rights, and assessed in context. That value is, in part, that it permits individuals to plan their lives and live freely. If that is so, excluding human rights law on the grounds of uncertainty could work against the very purpose (or at least one of the purposes) of insisting upon certainty in the first place: human freedom.[275]

(4) Objection 4: Too much litigation

The concern has also been expressed that extending horizontal duties would result in a flood of litigation.[276] It is important to disaggregate the problem here, because it is either simply a reworking of other objections, or a very weak argument indeed.

If what is meant here is that the law will be too uncertain, which will lead to lots of litigation, then that is dealt with above. If what is meant is that the claims being brought should not be claims it is possible to bring, then that has also been dealt with above. If it is accepted that these rights should exist, then they should be enforced. If it is not accepted, that is not a complaint about the amount of litigation, it is an argument that the rights should not exist in the first place, which is, presumably, based on one of the *other* reasons set out here.

[274] Weinrib and Weinrib (n 181) 71.

[275] Bhana and Pieterse (n 82) 893–894.

[276] Dafel (n 271) 285.

The only possible independent objection here is that it will lead to too much vexatious, unmeritorious, or improper litigation. If that is the complaint, then it is easily dealt with. The law of civil procedure has ample tools to deal with such mischief,[277] and, in any event, the risk of vexatious litigation is probably only tangentially connected with the underlying substantive law. It is inherent in the nature of vexatious litigation that it does not properly base itself on the underlying substantive law. It might even be argued that, by encouraging autonomous self-regulation,[278] and a culture of justification which prevents violations in the first place and results in a ready defence for duty-bearers, litigation could be reduced.

This approach also presumes that the appropriate remedy will always be formal litigation, which, certainly in the children's context, may not be true. There are all sorts of mechanisms for the enforcement of rights which do not run the minor risk of excessive litigation, and it will be the role of the state, in its coordinating function, to put them in place.

F. THE STATE AS REALISER OF RIGHTS

This Chapter has set out a framework for the determination of positive duties, and justification for non-compliance with them. This leaves open the question of what role remains for the state. A significant strand of though holds that horizontal human rights duties bring with them an element of danger, for they might undercut and undermine

[277] Donnelly (n 122) 235.

[278] Gerstenberg, 'Private Law and the New European Constitutional Settlement' (n 223) 767.

the duties of the state, providing a get-out by allowing the state to blame a private party when the state has failed in its obligations.

On the contrary, the recognition of horizontal duties in the manner set out above points to the state's central role in the realisation of rights, as a *coordinator* of the realisation of rights in society: a form of system responsibility.[279] Far from needing to pick between a paradigm of private duties and a paradigm of state duties, it becomes apparent that both are operative, and share a common framework. This final section will set out why this is, and how the private and state obligations coexist.

(1) The Violence of the Matrix

In his analysis of horizontal human rights obligations, Teubner expresses doubt that they would be such as to exhaust the rights violations requiring remedy.[280] It is likely to be correct that the application of the above approach, without a concomitant set of strong state obligations, would not result in the full realisation of rights in society, for three reasons.

First, the social role function will dictate some responsibilities for the state. In all three jurisdictions, it is likely that some aspects of the realisation of rights will fall *exclusively* within the social role of the state. This is especially likely to apply to large-scale economic and legislative interventions to redress the sorts of systemic problems

[279] Lavrysen (n 96) 93.

[280] Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by Private Transnational Actors' (2006) 69 MLR 327 340–341; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012) 141.

Teubner has in mind. Without these interventions, which fall within the purview of the state, the *'violence of the matrix'*[281] would continue.

Second, even if this were not true, the court, as a branch of state, has obligations to realise rights, but must do so in accordance with its own constitutional limits. Those may dictate that the realisation of some rights falls best within the legislator's purview, or that the constitutional constraint limits the power of the court to resolve the issue.[282] Even where no such limits apply, courts are institutionally ill-suited to make coordinating decisions. This is not a point about the separation of powers, but simply a practical one: even the most progressive procedural innovations leave courts facing tightly controlled, often bilateral litigation. Leaving aside the question of whether it complies with the separation of powers for courts to take a coordinating function upon themselves, it is highly unlikely that it would be discharged perfectly (or even well), such as to close all gaps in protection, across different courts with different judges across different cases. This also assumes that *litigation* is the only mechanism for the protection of rights, but many obligations require the imposition of system to prevent the need for rights-enforcing litigation in the first place. Such obligations are likely to fall on the state. It would be very difficult to design a system, though a series of bilateral cases, where the sum total of individual bilateral obligations amounted to the full realisation of human rights, without the legislature needing to intervene.

Third, the application of this approach, even if done perfectly (which would be an impossible task) is likely to leave gaps. It will often be difficult to attribute

[281] Teubner (n 280) 146.

[282] Lubbe (n 260) 423.

responsibility to a private actor for the realisation of a positive duty outside some pre-existing relationship, and, even where such obligations are owed, justification of non-compliance will be easier for private actors than the state, because private actors will usually have at least some private autonomy interest. It is the responsibility of the state to close these gaps, arrange society in such a way as to realise these rights, and account for and justify the choices it has made in doing so.

(2) The State's Duties in Depth

There are two broad and non-exclusive dimensions to the obligations which the state retains under this analysis: state duties to protect, and state duties to fulfil.

(a) The Duty to Protect: Providing Processes and Remedies and Passing Laws

Horizontal obligations mean nothing on their own, unless there are processes to enforce and give effect to them. In this sense, even the most far-reaching horizontal obligations make implicit demands of the state to give effect to them: they are necessarily *'triangular'* in nature.[283] State and private obligations go hand in hand.[284]

The first and most basic thing the state must do is provide remedies, and it does so through the provision of courts, which resolve disputes about the horizontal application of rights in accordance with their own constitutional frameworks. This will require courts to be self-critical about their approaches to, for example, evidence-gathering and remedies within the inherent jurisdiction, and whether they are suitable

[283] Lavrysen (n 96) 78; Wright (n 7) 24.

[284] Neeraj Tiwari, 'Vertical and Horizontal Fundamental Rights: An Effort to Locate India Between Two Poles' (2011) 2 Madras Law Journal 36 fn 75-76.

for this function.[285] The court is, however, bound by the constitutional constraint set out in Chapter 4. There are constitutional limits on what courts can or must do, which means the state duties go beyond the creation of courts.

The state must also pass legislation and institute policy, in order to create detailed schemes for the regulation of private actors' interactions.[286] The separation of powers does not *preclude* horizontal rights, but it would certainly be better if the legislature passed laws giving effect to them, for the coordination reasons set out above. Legislation allows more careful, general, and detailed rules, which are democratically mandated and redress power imbalance in society in a far more targeted way.[287] This extends to all forms of law, not just private law. The state may, as it did in *O'Keeffe*, need to deploy criminal law, based on a clear understanding of what human rights law requires to be criminalised.[288] This obligation need not be limited to legal control of private actors, either: it could be through *'nudges'*, or, in the specific case of contracting out, imposing conditions in contracts requiring rights-compliance.[289]

(3) The Duty to Fulfil: Going Beyond Private Actor Obligations

The private actor obligations identified by the above framework are those which can reasonably be administered by the judicial branch, within the constitutional constraint.

[285] Collins (n 80) 50.

[286] *Avinash Mehrotra vs Union Of India* (n 42), [31].

[287] Amit Kumar Sinha, 'Human Rights in Era of Globalisation: Indian Perspective' (2009) 6 Madras Law Journal 124.

[288] Stu Woolman, 'The Amazing, Vanishing Bill of Rights' (2007) 124 SALJ 762 768.

[289] Dickson (n 254) 206; *LW v Sodexo* [2019] EWHC 367 (Admin), [2019] 1 WLR 5654, [114].

They do not exhaust the list of obligations, because there are obvious limits to the way in which courts can resolve cases, as set out above. It will be recalled that human rights law will often leave a lot of scope for different ways of regulating private interactions. In such cases, it is the legislature which must take steps to fulfil the right. This can be seen through the example of the RTE Act in India. Art. 21A does not (at least on present understanding) apply horizontally. But this does not mean the state does not have a duty to protect, in the form of (among other things) legislating to seek to break down the marginalisation to which private schools have given rise, by requiring them to admit disadvantaged students.[290]

In addition, even where horizontal obligations can be identified by courts, it does not follow that there is not a further role for the legislature. The Indian Supreme Court has held, outside the context of the RTE Act, that Art. 15(2) applies to private educational actors.[291] But this absolutely does not mean the state is absolved from regulating that relationship further, and perhaps imposing further obligations.

In other words, the fact that a court is able to identify and enforce the absolute limits of permissible private actor interactions in individual bilateral cases does not exempt the state from its obligation to create rules governing those interactions in a detailed and general way. The most basic example is taxation. A court could not, in the absence of a tax law, hold that a private actor had a human rights obligation to contribute a certain amount of money to the general realisation of socio-economic

[290] Stephen Gardbaum, 'Horizontal Effect' in Sujit Choudhry, Khosla Madhav and Pratap Bhanu Mehta, *The Oxford Handbook of the Indian Constitution* (OUP 2016) 604–606.

[291] *Indian Medical Association vs Union of India & Ors* (n 2).

rights. This does not mean that states are not obliged to through taxation distribute resources to realise socio-economic rights. However, to do so lies only with the central coordinating function of the state.

To sum up, the state must give effect to the rights and obligations between private parties, whether through the judiciary or legislature. But the full enforcement of those obligations does not exhaust the state's duties, which include the fulfilment of rights by the mobilisation of social resources, including by redistributing power within a particular private relationship. As the Abidjan Principles recognise in the education context, even where educational provision is privatised, resulting in private schools accruing obligations under human rights law, the state retains the final obligation to provide free, quality, public education, and to work towards that goal by deploying the maximum of its available resources.

G. CONCLUSION

This Chapter has set out a framework for analysing the content of horizontal human rights law in a way which is as faithful as possible to the insights of principle developed from the close comparative review of the case law in Chapter 5, while avoiding the analytical traps which that Chapter identified. It is the result of reflexive study of the twin issues of (a) how are horizontal obligations to be identified and analysed on a general level; and (b) as a matter of principle, what horizontal obligations private schools owe their learners.

The structure proposed in this Chapter answers the general question as follows. Conditional horizontal obligations are determined by the factors of power, vulnerability, and social role; and those obligations are rendered unconditional where

an application of the proportionality test determines that there is no justification for non-compliance with the obligation which those factors indicate should exist. None of this absolves the state from its fundamental coordinating function, which goes above and beyond the sum total of duties which are imposed by this approach horizontally: both in the general coordinating sense, and in the specific sense that the state may be obliged to impose additional obligations (such as tax obligations) on private actors, beyond those identified by this framework.

Throughout the Chapter, it has been indicated how the principles and factors identified in Chapter 5 fit into this framework. Chapter 5 showed that those factors pointed strongly in favour of private schools owing at least some duties. That is now supported by the analysis in this Chapter. The learner-private school relationship is a clear candidate for duty-bearing. In respect of conjunctive rights, obligations arise presumptively, and nothing in the social role of the private school tends to rebut that presumption. The position is more difficult in the case of disjunctive rights. Even then, where the relationship is between learner and school (or some other sufficiently individualising relationship) it could well be imagined that some horizontal obligations, such as the continued realisation of the right to basic education, might be dictated by the application of the social role criterion even in respect of disjunctive rights.

Once such a conditional obligation is identified, the question then shifts to justification through the proportionality test. It was suggested that both the legal ordering of private schools' relationship with their students, and the individual decisions taken by the private schools themselves, require justification if they interfere with a conditional obligation. It is at this stage that the school's private autonomy, to the extent this is a relevant and important factor in all the circumstances, falls to be

considered. Further, it is at this point that the Thesis comes full circle – I have at various points above referred the reader back to the analysis of children's rights principles in Chapter 2. However, those particular references are not intended to undermine the generality of the application of those principles in resolving horizontal human rights disputes between private schools and learners. In conducting the analysis set out in this Chapter, courts should be acutely aware of the principles which underpin children's rights. In particular, the need to treat children as autonomous individuals whose present desires deserve consideration is likely to be of utmost importance. These are difficult issues for courts, and it has been argued above that the approach they take should be one which considers the general legal framework as well as the precise case. However, that must not be allowed to conceal the centrality of the beneficiary in the analysis – which the principles in Chapter 2 dictate, and around which the analysis in this Chapter is structured.

Finally, it must be reiterated that this analysis does not absolve the state from legislative intervention in the private school-learner relationship, from regulating private schools more generally, or from providing quality public education. Those duties are symbiotic with, rather than competitors to, the horizontal human rights obligations of private schools.

CHAPTER 7

CONCLUSION

All that remains is to draw together the threads of this Thesis, and identify points for further research suggested by the argument set out here.

This Thesis has set out to answer two questions through comparative study. On the *specific* level, it has sought to identify human rights law's response to the apparent accountability gap to which private education gives rise. That gap arises because, as set out in Chapter 3, private schools do not (generally) owe the same human rights obligations as state schools (or, in some jurisdictions, any such obligations). This means that they exercise power over children, but do not necessarily need to account for exercises of that power which violate children's rights. Chapter 1 explained this problem and situated it within the literature. On the *general* level, the Thesis has sought to grapple with the difficult question of how, as a matter of principle, human rights law responds to the problem of the private actor that violates human rights. These questions have been studied reflexively – the answer to one has illuminated and contextualised the answer to the other. Comparative law provides an excellent tool to undertake this kind of analysis, as it allows the exploration of jurisdictions in light of the experience of others, increasing the opportunity for assumption and misstep to be identified, as well as for the really key common principles to be identified.

The starting point is that children are bearers of human rights, and to analyse the demands those rights make, a principled account of what it means to treat children as rights-holders is required. In Chapter 2, it was submitted that that there are three attributes of such an account. The first is valuing children as people. The second is

recognition and respect for their vulnerability. The third is nurturing their capabilities. Critically, this approach does not support – and is indeed inconsistent with – making the realisation of children's rights in school contingent on the public or private nature of that school. If human rights law in fact does so, it is not true to the principles which animate it.

However, as the Thesis has argued, human rights law is not deficient in this way. If the analysis is approached properly (i.e. by directly asking the question, set out in Chapter 4, of what human rights law requires of the private school-child relationship), it is clear that children's rights do not cease to apply simply because they pass through the private school gates. As Chapter 5 shows, even across the very different jurisdictions under review, there is clear consensus that human rights law demands that respect for children's rights be secured in private education, and that to do so involves the placing of duties on the private actor. The general framework for horizontal human rights law developed in Chapter 6 supports this analysis. Crafted in the light of the experience in the jurisdictions dealing with both the specific question of private educational actors, and the human rights obligations of private actors more generally (as analysed in Chapter 5), it shows that this basic conclusion survives (and is in fact strengthened by) an analysis shorn of the analytical challenges which plague courts when dealing with horizontal human rights.

This is not to say that there is no difference between public and private educational actors. Their obligations may be different. Save for the case where a court is constitutionally constrained from responding to a rights violation (discussed in Chapter 4), these differences of substance (discussed in Chapters 5 and 6) are unremarkable, and do not undermine the ability of human rights law to close the

accountability gap. Human rights law is always context-sensitive, and insofar as there is a relevant distinction between a private and public school (if, for example, the private school is a protected minority school), that is taken into account. The critical point is that the school is accountable where its actions are inconsistent with children's rights: those actions are subject to public justification through the application of the proportionality test. If they interfere with a right, but are justified as a proportionate means of achieving a legitimate aim, then no rights violation arises, but that is because human rights law permits the actions in question, not because human rights law does not apply. In this sense, the alleged accountability gap arises not because of the substance of human rights law, but because its full potential has not been realised.

The final question is what further research is indicated by the analysis set out in this Thesis. It is useful to set this out, not least because it indicates what the Thesis has *not* set out to do.

First, there are a number of points at which the high-level analysis in this Thesis, borne of comparative law, effectively needs to be re-domesticated into any jurisdiction where it is sought to be applied or developed as a matter of positive law. The pertaining legal dispensation would need to be analysed against the approaches for which this Thesis argues, identifying deviations and consistencies. *Firstly*, in Chapter 4, a particular approach to the interaction between human rights law and ordinary law was suggested, one which deliberately sought to bypass the debate about direct and indirect horizontal effect. Re-domesticating this analysis will require head-on engagement with that debate, to identify which procedural and substantive arguments are likely to find favour with courts. In particular, close attention will need to be paid to the particular jurisdiction's conception of the separation of powers. *Secondly*, throughout Chapter 6,

which suggested a general approach to horizontal duty-bearing, it was repeatedly stated that much will depend on the operative constitutional dispensation – in particular, how the *'social role'* factor fell to be analysed. Further unpacking that will need jurisdictionally-specific work, in order to identify the relevant governing principles which feed into the analysis of social role.

Second, the recent adoption of the Abidjan Principles provides a fruitful area of study, in light of the approach in this Thesis. The extent to which they reflect this approach, and the extent to which they can help illuminate the demands which human rights law places on horizontal relationships in light of the general analysis set out here, require further work. It is hoped that, as states grapple with the implementation of the Principles, the clear and structured approach set out here could provide a framework for doing so.

Third, there is scope, in light of the approach to *'ordinary law'* in this Thesis, for a comparative review of the rights-protecting function of the ordinary law applicable to the learner-private school relationship, such as criminal law, tort law, contract law, and statutory education law. In particular, it would be interesting to consider how the commonalities and differences between the specific regulatory rules applicable to private schools across different jurisdictions secure or fail to secure the protection of rights.

Fourth, the focus on the coordinating and enforcement functions of the state which this approach dictates, as well as the importance of the ordinary law as one of the tools available to states to secure the required human rights obligations in private relationships, might allow, on further research, for a radical re-imagining of the procedures and enforcement mechanisms available to learners at private schools.

Ordinary civil litigation is not child-friendly, unavailable to those without means, and may not be geared towards optimal outcomes. The children's rights approach outlined in Chapter 2, coupled with the role of the state identified in Chapter 6, points towards the need for such a re-imagining, which will require close, jurisdictionally-specific work, as well as interdisciplinary work to benefit from the substantial body of existing work in this regard from childhood and education scholars.

It is respectfully suggested that the argument set out in this Thesis provides a valuable jumping off point for this further important work. As these suggestions illustrate, the approach advocated here requires significant re-interrogation of existing understandings of the legal relationship between learner and private school. This re-interrogation will help to unpack the potential of human rights law in realising the human rights of all children, no matter what school they go to.

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