
Public Law: The Impact of Human Rights Law on Business
Lecture Outline

Introduction

Legal Persons as Beneficiaries of Human Rights Protections

1. Legal commentators are more often concerned with whether companies are bound by human rights legislation than whether they can be human rights beneficiaries. This lack of interest is understandable given the relative infrequency with which corporations, in the past, have brought claims alleging infringement of their rights. For example between 1998 and 2003, of 3307 European Court of Human Rights (“Strasbourg”) judgments only 126 originated in applications filed by companies.¹ Increasingly, however, companies are relying on human rights provisions. We should not be surprised if businesses litigate their human rights more vigorously in the future; after all, as John Locke contended, property may be seen as the basis for liberty.

In New Zealand

2. According to section 29 of the New Zealand Bill of Rights Act 1990, its provisions are applied, “...so far as practicable for the benefit of all legal persons as well as for the benefit of all natural persons”. Whether or not an individual right applies depends on its nature. **[In addressing this issue, I will discuss the writings of Sir Ivor Richardson, the former President of your Court of Appeal.]**

In the UK

¹ Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (OUP 2006), pp 13-14

3. There was considerable controversy surrounding the proposal to include companies within the scope of protection of the European Convention on Human Rights (“the Convention”). **[The driving forces behind such opposition will be addressed.]**

4. In the end, this resistance was overcome; pursuant to Article 34 of the Convention:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

5. Strasbourg has always accepted that a company is a “non-governmental organisation” within the meaning of Article 34 and that the Convention protections are therefore available to businesses. It is interesting to note that Strasbourg’s first encounter with a corporate applicant arose in a case from the UK.² Moreover, Article 1 of Protocol 1 which relates to the protection of property expressly applies to “Every natural *or legal* person”.

6. The principal rights litigated by companies are: Article 6(1) which enshrines certain due process guarantees with regard to civil proceedings to which applicants have been parties; Article 1 Protocol 1, which enshrines the right to property protection, has arisen in various forms of regulation of economic activity; Article 10, which concerns the right to freedom of expression, has been relied on a number of times by the media industry.

7. I will next consider areas where companies’ human rights protections have posed particular challenges under the ECHR: in particular the extent to which

² *Sunday Times v UK* Series A No 30, (1980) 2 EHRR 245

a company has a right to a private life under Article 8(1) and the scope of corporate commercial expression under Article 10(1).

8. Article 8(1) provides:

Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

9. The question that has arisen in relation to Article 8(1) is whether the right to respect for one's "home" limits public authorities' ability to raid business premises. **[The case of *Colas Est SA and Others v France*³ which, in 2002, clarified the scope of Article 8(1) in relation to business premises will be analysed.]**

10. Turning to Article 10, which enshrines the right to freedom of expression, Article 10(1) does not protect private activity therefore it was queried whether corporate commercial protection would be covered. **[I will chart the series of cases which adopted an expansive interpretation of the right, in particular the case of *Autronic AG v Switzerland*.⁴]**

11. **[I will also discuss the American approach to commercial speech, as evidenced in the US Supreme Court decision in *Citizens United v Federal Election Commission*⁵ and *American Tradition Partnership v. Bullock*⁶ which upheld it. In these appeals, federal laws which banned corporations from funding political campaigns were struck down on the ground that they were contrary to the First Amendment.]**

Legal Persons as Actors in Breach of Human Rights Protections

³ (2004) 39 E.H.R.R. 17

⁴ (1990) 12 E.H.R.R. 485

⁵ 558 U.S. 50 (2010)

⁶ 567 U. S. ____ (2012)

Domestic Human Rights Obligations Applicable to Companies in the UK

12. For business activities to be susceptible to challenge under the Human Rights Act 1998 (“the HRA”), the companies must be exercising functions of a public nature (section 6, HRA). The privatisation of traditional public functions has meant that businesses are increasingly susceptible to review on human rights grounds. **[The tension between trade law and human rights law will be addressed.]**

Enforcement of International Human Rights Obligations Against Companies Domestically

13. A number of jurisdictions allow individuals to bring actions in domestic courts against companies for violations of international law. For instance in America, the Alien Tort Statute (“the ATS”) allows parties to bring tort claims against companies in respect of a tort “committed in violation of the law of nations or a treaty of the United States”.
14. The extraterritorial nature of the ATS has been recently explored in *Kiobel v. Royal Dutch Petroleum Company* (“*Kiobel*”). The Appellants in this appeal allege that various Shell entities aided and abetted egregious human rights violations committed against them by the Sani Abacha dictatorship in the Ogoni region of Nigeria between 1992 and 1995. The question initially raised was whether corporations may be sued under the ATS. After the oral hearing in February this year, however, the US Supreme Court made an order directing the parties to file supplemental briefs addressing the following question: “Whether and under what circumstances the Alien Tort Statute [...] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”
15. **[I will explore the extent to which businesses have been held to account for human rights violations under the ATS already and will consider whether**

the Supreme Court is likely to extend the extraterritorial reach further following *Kiobel*.

16. Cases such as *R. (on the application of Al-Skeini) v Secretary of State for Defence*⁷ and *R. (on the application of Smith) v Oxfordshire Assistant Deputy Coroner*⁸ have held that the HRA applies extraterritorially where UK public authorities are acting within the jurisdiction of the UK for the purposes of Article 1 of the Convention. **[I will describe how the scope of jurisdiction under Article 1 has been interpreted and compare this with the extraterritorial scope of the ATS.]**

Recent UK Cases Concerning Human Rights in the Context of Business

17. Three recent Supreme Court appeals highlight both the variety of circumstances in which human rights issues may be relevant in the business context and the trends in current human rights discourse.
18. The first is *AXA General Insurance Limited and others v The Lord Advocate and others*,⁹ in which the Court considered whether a statute – the Damages (Asbestos-related Conditions) (Scotland) Act 2009 – was compatible with insurance companies’ rights to the peaceful enjoyment of their possessions under Article 1 of Protocol 1. The Act provided that asymptomatic pleural plaques, pleural thickening and asbestosis constituted actionable personal injuries under Scots law. In doing so it reversed a House of Lords decision to the contrary.
19. The appeal gave rise to a number of interesting points, which I will touch upon, namely:
- a. The test of whether companies are “victims” for the purposes of article 34 of the Convention; and

⁷ [2007] UKHL 26

⁸ [2010] UKSC 29

⁹ [2011] UKSC 46

b. In what circumstances Article 1 of Protocol 1 will be infringed by retroactive legislation.

20. The potential for Article 1 of Protocol 1 to be infringed by retroactive legislation was again considered, albeit briefly, in *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue and another*.¹⁰ This appeal concerned a statute which retrospectively reduced the limitation period in relation to claims based on a mistake of law in taxation matters, where the action was brought after a certain date.

21. In the third appeal of my trilogy, rather than relying on the European Convention on Human Rights, the Appellant invoked protection from discrimination derived from a European Union directive. In *Jivraj v Hashwani* an arbitration clause required arbitrators to be members of the Ismaili Muslim community.¹¹ The Appellant challenged this requirement on the basis that it offended against the Employment Equality (Religion or Belief) Regulations 2003 (“the 2003 Regulations”). In determining the appeal, the Supreme Court considered two issues, namely: whether arbitrators are under a contract to do work so as to fall within the 2003 Regulations and, if so, whether the term fell within the genuine occupational requirement exception.

Future Developments

22. Domestically, the UK Supreme Court will continue to be required to decide upon the human rights of companies. Next term, for example, it will have occasion to consider again the extent of protection enshrined in Article 1 of Protocol 1. *Bank Mellat v Her Majesty's Treasury* concerns an Iranian bank. In 2009 an order was made by the Treasury, which prohibited any person operating in the UK financial sector from entering into or continuing to participate in any transaction or business relationship with it. In addition to challenging the order as being contrary to Article 1 of Protocol 1, the

¹⁰ [2012] UKSC 19

¹¹ [2011] UKSC 40

Appellant bank also contends that the procedure used to make the order infringed Article 6.

23. At the supranational level, it has been suggested that Strasbourg may rely on Article 35(3) of the Convention to reduce the notorious backlog of applications. This provision requires the Court to declare inadmissible any individual application if it considers that “the applicant has not suffered a significant disadvantage”. The Court may judge corporate human rights as trivial when compared with alleged violations of individual human beings’ rights, meaning that corporate human rights will be stymied.

24. In relation to companies acting as human rights violators, courts in a number of jurisdictions are being asked to develop citizens’ human rights protections. This is exemplified by the US Supreme Court’s current consideration of the extraterritorial scope of the ATS in *Kiobel v. Royal Dutch Petroleum Company*.

25. **[I will address all three areas of future development in a little more detail before concluding.]**