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HORIZONTAL RIGHTS AND FREEDOMS

AN ANALYSIS OF THE ROLE AND EFFECT OF THE NEW ZEALAND  
BILL OF RIGHTS ACT 1990 IN PRIVATE LITIGATION

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## I INTRODUCTION

Bills of rights are generally considered to apply only to the state and not as between private individuals. This is understandable since they were traditionally designed as defensive rights of the citizen limiting the powers of the state.<sup>1</sup> When looking at section 3 of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights Act") which provides that

"[t]his Bill of Rights applies *only* to acts done – (emphasis added)

- (a) by the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law"

the wording leaves no doubt that the Bill of Rights Act does not – at least not directly – apply to any act done by a person in private capacity.<sup>2</sup> Consequently, it does not render unlawful acts of private individuals which would be in breach of the Bill of Rights Act if they had been done by someone acting in public capacity. As such, the Bill of Rights Act does not create any duties or obligations for individuals acting in private capacity.<sup>3</sup> During the third reading of the Bill of Rights Act, the then Prime Minister made it plain that "[c]itizens will not be able to invoke its provisions to sue one another".<sup>4</sup>

This, however, does not (and arguably should not) necessarily mean that fundamental rights and freedoms contained in the Bill of Rights Act are irrelevant to private relationships. While some rights – quite apart from section 3 – by their very nature solely speak to the state, for example the rights to certain minimum standards of criminal procedure contained in section 25 of the Bill of Rights Act, other guarantees such as the section 19 right to freedom from discrimination could conceptually also be invoked against private individuals. Considering the

<sup>1</sup> See *A Bill of Rights for New Zealand: A White Paper* (House of Representatives, Wellington, 1985) AJHR – A6, para 10.20; Paul Rishworth, Grant Huscroft, Scott Optican, Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003), 113; see also *Living Word Distributors Ltd v Human Rights Action Group* [2000] 3 NZLR 570, 584 ("The Bill of Rights is a limitation on governmental, not private conduct.").

<sup>2</sup> Contrast, for example, Article 8(2) of the Constitution of the Republic of South Africa which expressly provides that fundamental rights may apply directly as between private actors: "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."

<sup>3</sup> See Paul Rishworth and ors, above n 1, 108-109.

<sup>4</sup> Rt Hon Geoffrey Palmer (14 August 1990) 510 NZPD 3450.



worldwide political trend towards privatisation, factual power to interfere with civil rights and liberties has become increasingly concentrated in private hands.<sup>5</sup> In 1971, Peter Archer MP speaking in the House of Commons succinctly pointed out that<sup>6</sup>

“there are other relationships, not only relationships between the individual and government, which can also blight lives, and which for many individuals can result in tragedy. Very serious distress can be caused by an employer, by a landlord, or by a neighbour. Not all wrecked lives are caused by governments.”

This list is certainly not exhaustive. One might be inclined to add, at least, the media and the bank sector.<sup>7</sup> It is therefore not surprising that the historical concept of fundamental rights and freedoms, their applicability and protection has been equally increasingly called into question. Over the years, especially since the passage of the United Kingdom's Human Rights Act 1998 which incorporated the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>8</sup>, a debate has developed about the proper effect of human rights on private relationships, and the appropriate role of the courts in protecting fundamental values against the exercise of private power. Under the general term of “horizontal effect” or “horizontal application”, a wide spectrum of nuanced positions has emerged both in the academic<sup>9</sup> as well as the judicial<sup>10</sup> arena.

<sup>5</sup> Murray Hunt “Human Rights and the Public-Private Distinction” in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 71; Gavin Phillipson “The Human Rights Act, ‘Horizontal Effect’ and the Common Law: a Bang or a Whimper?” (1999) 62 MLR 824, 847.

<sup>6</sup> Peter Archer MP (2 April 1971) H.C. Debs. cols 1861-1862.

<sup>7</sup> Compare Gavin Phillipson, above n 5, 847; Mark Tushnet “The Issue of State Action / Horizontal Effect in Comparative Constitutional Law” (2003) 1 Int'l J. Const. L. 79.

<sup>8</sup> (4 November 1950) 213 UNTS 221, ETS 5 (1993).

<sup>9</sup> Nicholas Bamforth “The True ‘Horizontal Effect’ of the Human Rights Act 1998” (2001) 117 LQR 34; Deryck Beyleveld and Shaun D Pattinson “Horizontal Applicability and Horizontal Effect” (2002) 118 LQR 623; Andrew J Bowen “Fundamental Rights in Private Law” (2000) 20 SLT 157; Richard Buxton “The Human Rights Act and Private Law” (2000) 116 LQR 48; Christoph B Graber and Gunther Teubner “Art and Money: Constitutional Rights in the Private Sphere?” (1998) 18 OxJLS 61; Ivan Hare “Verticality Challenged: Private Parties, Privacy and the Human Rights Act” [2001] EHRLR 526; Murray Hunt “The ‘Horizontal Effect’ of the Human Rights Act” [1998] PL 423; Antony Lester and David Pannick “The Impact of the Human Rights Act on Private Law: the Knight's Move” (2000) 116 LQR 380; Ian Loveland “The Horizontal Direct Effect of the Human Rights Act” (2000) 150 NLJ No 6957, 1595; Dawn Oliver “The Human Rights Act and Public/Private Law Divides” [2000] EHRLR 343; Gavin Phillipson, above n 5; Thomas Raphael “The Problem of Horizontal Effect” [2000] EHRLR 493; H W R Wade “Horizons of Horizontality” (2000) 116 LQR 217.

<sup>10</sup> *Venables and Thompson v News Group Newspapers Ltd* [2001] 1 All ER 908, [2001] 2 WLR 1038 (Fam D); *Douglas and Zeta Jones and Ors v Hello! Ltd* [2001] QB 967 (CA); *Douglas and Zeta Jones and Ors v Hello! Ltd* [2003] EWHC 786 (Ch); *Campbell v MGN Ltd* [2004] UKHL 22 (HL).



The question of horizontality is, of course, not confined to the United Kingdom. While other jurisdictions such as the United States<sup>11</sup>, Germany<sup>12</sup> and Canada<sup>13</sup> all have largely settled the issue in favour of at least some form of consideration to be given to fundamental rights and freedoms even in private litigation, the situation in New Zealand – fifteen years after the Bill of Rights Act has come into force – still appears to be somewhat hazy. Even though the issue has arisen in a number of cases,<sup>14</sup> it has only been resolved to a certain degree, mainly in relation to the question whether the (private) common law is in general susceptible to Bill of Rights scrutiny.<sup>15</sup>

Maybe influenced by the controversial discussions surrounding the United Kingdom's Human Rights Act, horizontality in New Zealand continues to be a constitutional can of worms. In last year's judgment of the Court of Appeal in *Hosking v Runting* – an action brought by a TV presenter to enjoin a press photographer from taking (and publishing) pictures of his children in the street – Gault J preferred to decide the matter “[w]ithout addressing the complex question of the extent to which the Courts are to give effect to the rights and freedoms affirmed in the Bill of Rights Act in disputes between private litigants.”<sup>16</sup>

<sup>11</sup> The leading decisions of the US Supreme Court on the issue of horizontality are *Shelley v Kraemer* (1947) 334 US 1 and *New York Times Co v Sullivan* (1964) 376 US 254. For a further instructive description and critical appraisal of the US “state action doctrine” see Andrew S Butler, “Constitutional Rights in Private Litigation: a Critique and Comparative Analysis” (1993) 22 *Anglo-Am. L. Rev.* 1; Stephen Gardbaum “The ‘Horizontal Effect’ of Constitutional Rights” (2003) 102 *Mich. L. Rev.* 387; and Mark Tushnet, above n 7.

<sup>12</sup> The 1958 *Lüth* decision of the German Federal Constitutional Court, (1958) 7 BVerfGE 198, English translation available at <[http://www.ucl.ac.uk/laws/global\\_law/german-cases/cases\\_bverge.shtml?15jan1958](http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverge.shtml?15jan1958)> (last accessed 30 May 2005), which established the doctrine of “mittelbare Drittwirkung” (indirect horizontal effect), has been followed to date and remains the high water mark for the application of fundamental rights in private litigation. See also Tilman Ulrich Amelung “Damage Awards for Infringement of Privacy – The German Approach” (1999) 14 *Tul. Eur. & Civ. L. F.* 15; Ralf Brinktrine “The Horizontal Effect of Human Rights in German Constitutional Law: the British Debate on Horizontality and the Possible Role Model of the German Doctrine of Mittelbare Drittwirkung der Grundrechte” [2001] *EHRLR* 421; and Basil S Markesinis “Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany” (1999) 115 *LQR* 47.

<sup>13</sup> *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573 (SCC); Peter Hogg, *Constitutional Law of Canada* (4ed, Carswell, Scarborough, 1997), para 34.2(g); Ian Leigh “Horizontal Rights, The Human Rights Act and Privacy: Lessons from the Commonwealth” (1999) 48 *ICLQ* 57, 62-66.

<sup>14</sup> See, for example, *R v H* [1994] 2 NZLR 143 (CA); *Television New Zealand v Newsmonitor Services Ltd* [1994] 2 NZLR 91 (HC); *Duff v Comunicado* [1996] 2 NZLR 89 (HC); *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 (HC); [1998] 3 NZLR 424 (CA); *R v N* [1999] 1 NZLR 713 (CA); *Hosking v Runting* [2005] 1 NZLR 1 (CA).

<sup>15</sup> *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 14; *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA); see also Andrew S Butler “The New Zealand Bill of Rights and Private Common Law Litigation” [1991] NZLJ 261; Paul Rishworth and ors, above n 1, 100-108.

<sup>16</sup> *Hosking v Runting*, above n 14, 31, para 114.



*Hosking v Runting*, alongside a series of other recent cases both in New Zealand and the United Kingdom, shows that the role of human rights and fundamental freedoms in inter-private relations might be a complex, but far from purely academic question. Should a supermodel on privacy grounds be safe from having a photograph of her leaving Narcotics Anonymous published in a tabloid newspaper?<sup>17</sup> Can an airline company submit its employees to random drug and alcohol tests?<sup>18</sup> Should a same-sex partner qualify as a member of a tenant's "family" to be entitled to succeed to an assured tenancy?<sup>19</sup> These questions fall into the same category as earlier disputes where, for example, parents rejected the administration of blood transfusions to their child based on religious belief,<sup>20</sup> or where a news magazine relied on the right to freedom of expression in a defamation lawsuit brought by a former Prime Minister.<sup>21</sup>

This paper will attempt to somewhat untangle the complexity that Gault J was so wary of. It will not be able to give definitive solutions for each and every set of circumstances in which the question of horizontal application of the Bill of Rights Act might arise. It can, however, try to highlight a framework of principles which might offer guidance to those who will be called upon to find and formulate such solutions.

By sketching the theoretical background for applying fundamental guarantees as between private individuals (including those with legal personality<sup>22</sup>), the paper will clarify some general misconceptions amongst commentators and courts which seem to add greatly to the perceived level of complexity. These include, for example, the focus of the debate primarily on the effect of the Bill of Rights on the common law, and the range of contradictory conclusions that are drawn by distinguishing public from private law, common from statutory law, and primary from subordinate legislation. While all of these attributes are relevant for determining the proper reach of fundamental guarantees in private relations, none of the distinctions are by themselves capable of providing a comprehensive answer.

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<sup>17</sup> *Campbell v MGM Ltd*, above n 10.

<sup>18</sup> *NZ Amalgamated Engineering Printing & Manufacturing Union Inc. v Air New Zealand Ltd* (2004) 7 NZELC 97, 367; (2004) 7 HRNZ 539 (Emp Ct).

<sup>19</sup> *Fitzpatrick v Sterling Housing Association Ltd* [1999] 3 WLR 1113 (HL).

<sup>20</sup> *Re J* [1996] 2 NZLR 134.

<sup>21</sup> *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 14.

<sup>22</sup> See New Zealand Bill of Rights Act 1990, s 29.



Instead, the paper will suggest that a first, primary distinction must be made according to the way in which the Bill of Rights is relied upon in private litigation – whether as a ‘shield’ to defend certain actions or as a ‘sword’ to actively claim something from another private individual. Following this ‘shield & sword’ dichotomy, the extent to which the Bill of Rights may affect the outcome will then be analysed in each of the two situations.

## II THEORETICAL BACKGROUND FOR USING BILLS OF RIGHTS AS BETWEEN PRIVATE INDIVIDUALS

As has been mentioned above, the Bill of Rights Act does not impose any duties on private individuals – or, more precisely, on individuals in their private capacity. Section 3(b) of the Bill of Rights Act shows that private individuals *can* in fact be directly bound by Bill of Rights guarantees if only they are performing a public function, power or duty conferred upon them by or pursuant to law. Conversely, if there is no such qualifying public element attached to either individual, the Bill of Rights Act does not apply – *to them*. This is probably what the Court of Appeal in *R v H* had in mind when stating that “wholly private conduct is left to be controlled by the general law of the land.”<sup>23</sup>

The deciding factor for triggering section 3 is, of course, not so much whether the conduct takes place (wholly) in private or public, but rather whether it can be attributed to a public function, power or duty.<sup>24</sup> Nevertheless, the Court’s obiter comment contains an important starting point for the problem of horizontality: While the Bill of Rights Act may not apply to private individuals acting outside public functions, powers or duties, there remains the controlling “general law of the land” as well as a judicial system of courts and tribunals entrusted with its interpretation and application. Both of them seem to fall squarely into the public realm, which opens up the question to what extent *they* may be subject to the Bill of Rights Act and thereby import fundamental rights and freedoms into an otherwise “private” relationship. The following two sections

<sup>23</sup> *R v H* [1994] 2 NZLR 143, 147.

<sup>24</sup> This paper will not address the multiple problems surrounding the question of when a non-governmental person or entity can be seen as performing a public function, power or duty within the meaning of section 3(b) of the Bill of Rights Act; see Paul Rishworth and others, above n 1, 89 for a discussion. Instead, it will focus on the role and effect which the Bill of Rights Act may have on such individuals that indisputably do not come within the ambit of section 3.



will therefore discuss these secondary connecting factors for the Bill of Rights Act in private litigation.

#### *A The Law as an Intermediary for Fundamental Rights and Freedoms in Private Relationships*

Law structures relationships between different entities by setting out systems of rights and duties, privileges and responsibilities, liberties and restrictions, all based on certain policy considerations. Taking into account the respective character of the entities involved on either side (public<sup>25</sup> or private), these relationships can be divided into three groups: First, the "public/public" group comprising relationships between two or more public entities (for example, local government bodies vis-à-vis the national government); secondly, the "public/private" group consisting of all those relationships between public authorities and private individuals (for example, the police vis-à-vis a suspected criminal, or the Department of Inland Revenue vis-à-vis the taxpayers); and finally, the "private/private" group encompassing the vast amount of relationships among private individuals themselves (for example, private landlord and tenant, private sector employer and employee, neighbours, families, or simply two people passing in the street<sup>26</sup>). It is this last group which is of particular interest for this paper, since neither entity will trigger the applicability clause of the Bill of Rights Act.

By providing regulatory frameworks for each of the groups, law as an expression of public power itself introduces a "public" element in all of the relationships<sup>27</sup> – regardless of the nature of the entities concerned. Depending on the body which formulates them, such rules can generally be classified as acts of the legislative (statutory law), the executive (subordinate legislation) or the judicial (common law) branch of government. Broadly speaking, the Bill of Rights Act therefore applies to any form of such structuring law.

While this result is uncontroversial as regards acts done by the legislative and executive branch, there has been some debate about whether the common law

<sup>25</sup> Including such persons or bodies envisaged by section 3(b) of the Bill of Rights Act.

<sup>26</sup> Even though there may not be a concrete or individualised relationship between any two people such as a work contact or tenancy agreement, the law nevertheless structures their relations, for example, by requiring each to observe certain general duties of care, or by affording each certain defensive rights against the other.

<sup>27</sup> Murray Hunt, above n 5, 84.



should at all be susceptible to Bill of Rights scrutiny. The discussion was mainly driven by concerns that subjecting the common law to the Bill of Rights Act would usurp Parliament's deliberate exclusion of private individuals from section 3.<sup>28</sup> Although the underlying aim to honour legislative intent is certainly commendable, the portrayed risk is no greater regarding the common law than any other rule governing the relationship between private individuals.

Not only are "private law" statutes such as, for example, the Residential Tenancies Act 1986 regulating the relationship between landlord and tenant clearly "acts done" by the legislature.<sup>29</sup> They are also equally subject to section 6 of the Bill of Rights Act which mandates that whenever possible an enactment must be given a meaning consistent with the rights and freedoms contained in the Bill of Rights.<sup>30</sup> Whether a rule forms part of the common law or can be found in a statute book is often entirely fortuitous. It would be a wholly arbitrary distinction if only the statutory part of the legal framework within which private relations are conducted were subjected to scrutiny for compliance with Bill of Rights standards.<sup>31</sup>

Since the legislature, through section 6 of the Bill of Rights Act, obligated the courts to interpret – wherever possible – even its own Acts of Parliament consistently with the rights and freedoms contained in the Bill of Rights, the contention that it intended to preclude the common law from any Bill of Rights examination seems far fetched. In addition, the fact that there are not only "private" but also "public" common law rules (for example contempt of court<sup>32</sup>) whose susceptibility to the Bill of Rights Act appears to be uncontested,<sup>33</sup> shows that issue of subjecting private individuals to Bill of Rights standards cannot be equated to the question of applying the Bill of Rights Act to the common law. Those wishing to exclude potential influence of the Bill of Rights Act on private

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<sup>28</sup> See Paul Rishworth and ors, above n 1, 100.

<sup>29</sup> Compare generally Paul Rishworth and ors, above n 1, 72 ("The only relevant 'act' that can be 'done' by Parliament, as such, is the passing of legislation."); see also Mark Tushnet, above n 7, 82.

<sup>30</sup> Compare Murray Hunt, above n 5, 84, on the similar interpretation rule in section 3 of the Human Rights Act 1998 (UK).

<sup>31</sup> Murray Hunt, above n 5, 85; Thomas Raphael, above n 9, 497.

<sup>32</sup> See *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC, Full Court) and discussion by Rishworth and ors, above n 1, 105-106: "Though the law of contempt was common law, it was every bit as public as if there had been a statute conferring the court's contempt power."

<sup>33</sup> See Paul Rishworth and ors, above n 1, 99: "Where parties bound by the Bill of Rights rely upon common law doctrines to justify their allegedly rights-infringing actions, those doctrines will need to pass Bill of Rights scrutiny."



individuals cannot point to any characteristic of the common law in general that would convincingly assist their line of argumentation.

A general susceptibility of the common law to Bill of Rights scrutiny has consequently been accepted in a number of New Zealand court decisions. While Blanchard J in the 1994 decision of *Television New Zealand Ltd v Newsmonitor Services Ltd* was still sceptical of the view that the effect of section 3 of the Bill of Rights Act binding the judiciary was, *inter alia*, to subject the common law to the Bill of Rights,<sup>34</sup> two years later he held in *Duff v Communicado Ltd* that “[c]ontempt of court, like any other part of the common law, is subject to the Bill of Rights by virtue of s 3(a) thereof”<sup>35</sup>. His Honour relied on a decision of the Full Court of the High Court in *Solicitor-General v Radio New Zealand Ltd*, a case which also concerned the common law of contempt of court and where it was accepted as “common ground that the New Zealand Bill of Rights Act 1990 applies to these proceedings as applying to acts done by the judicial branch of the Government under s 3(a)”<sup>36</sup>.

In the meanwhile, also the Court of Appeal had noted in *R v H* that there was “considerable force in the view that the Courts [by virtue of section 3(a) of the Bill of Rights Act] should accordingly recognise the Bill of Rights protections as and where appropriate in evolving the common law.”<sup>37</sup> However, the strongest statement in this context was made by Elias J in the High Court decision of *Lange v Atkinson and Australian Consolidated Press NZ Ltd* expressing the view that<sup>38</sup>

“the New Zealand Bill of Rights Act protections are to given effect by the court in applying the common law. [...] The application of the Act to the common law seems to me to follow from the language of s. 3 which refers to acts of the judicial branch of the Government of New Zealand [...]. The New Zealand Bill of Rights Act 1990 is important contemporary legislation which is directly relevant to the policies served by the common law of defamation. It is idle to suggest that the common law need not conform to the judgments in such legislation.”

<sup>34</sup> *Television New Zealand Ltd v Newsmonitor Services Ltd*, above n 14, 96: “If it was intended that the Bill of Rights is directly to apply in relation to every question of statutory interpretation and every other substantive judicial decision Parliament might have been expected to so enact in plain terms. [...] [This] would indistinguishably embrace non-statutory decision making, eg the granting of an injunction to restrain the dissemination of confidential information which was not protected by a statute.”

<sup>35</sup> *Duff v Communicado Ltd*, above n 14, 99.

<sup>36</sup> *Solicitor-General v Radio New Zealand Ltd*, above n 32, 58.

<sup>37</sup> *R v H*, above n 23, 147.

<sup>38</sup> *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 14, 32.



It would therefore now seem to be well established that the Bill of Rights Act is applicable to the common law.<sup>39</sup> If it is then accepted accordingly that any form of law governing the relationship between different entities – whether public or private – is subject to the Bill of Rights as an act of public power, it becomes clear that the potential function of the Bill of Rights in private relations can and should be assessed independently of the private nature of the entities concerned. It is the law in its various expressions governing the relationship between private individuals that, in principle, needs to conform to Bill of Rights standards.<sup>40</sup> This normative effect<sup>41</sup> of the Bill of Rights Act is one of the key elements in understanding and determining the proper reach of the Bill of Rights as between private individuals.

### ***B The Role of the Courts in Giving Effect to Fundamental Rights and Freedoms in Private Relationships***

The other secondary connecting factor for giving effect to fundamental rights and freedoms in private relationships can be seen in the involvement of the courts whenever disputes between private individuals are actually litigated. The express mention of the judicial branch of government in section 3(a) of the Bill of Rights Act not only leads to the application of the Bill of Rights Act to the common law, but also subjects any court to Bill of Rights directions and guarantees in its decision-making process. This is directly apparent in relation to section 27(1) of the Bill of Rights Act, which requires courts to observe principles of natural justice whenever they “make a determination in respect of [a] person’s rights, obligations, or interests protected or recognized by law”, ie also in civil proceedings. Another example already mentioned above would be section 6 of the Bill of Rights Act which directs the courts to interpret enactments, if possible, consistently with the Bill of Rights – regardless of the nature of the proceedings.

However, on an even broader basis, any judicial determination made by a court will in itself constitute an act done by the judiciary triggering section 3(a) of

<sup>39</sup> Murray Hunt, above n 5, 77; *The Laws of New Zealand* (LexisNexis NZ, Wellington, 2003) Human Rights, para 17 (last updated 15 December 2003) <www.lexisnexis.co.nz>; Paul Rishworth and ors; above n 1, 102.

<sup>40</sup> See *Du Plessis v De Klerk* 1996 (3) S.A. 850, 914H (Const Ct SA) Kriegler J dissenting; Murray Hunt, above 9, 434.

<sup>41</sup> Compare Max Du Plessis and Jolyon Ford “Developing the Common Law Progressively – Horizontality, the Human Rights Act and the South African Experience” [2004] EHRLR 286, 290.



the Bill of Rights Act.<sup>42</sup> This conclusion has found scattered objection,<sup>43</sup> which, however, fails to succeed.

First, it seems to follow from the natural and ordinary meaning of section 3(a) of the Bill of Rights Act that the determination of legal disputes is an “[act] done by the [...] judicial branch of government”. The fact that judges have “opportunities for choice, decision and judgment” demonstrates that their decisions are “conscious and deliberate” acts.<sup>44</sup>

Secondly, the argument that courts are not acting as a branch of government when deciding a case since they are only “*applying* the Bill of Rights”,<sup>45</sup> is unconvincing. If it were correct, most executive bodies which also “apply” the Bill of Rights Act – just as any other Act of Parliament – in their decision-making process would fall outside section 3(a). Furthermore, proponents of this argument mistakenly rely on the reasoning of the Canadian Supreme Court in *Dolphin Delivery*,<sup>46</sup> which held that the issuance of a court decision did not constitute governmental action – for the purposes of applying the Canadian Charter of Rights and Freedoms.<sup>47</sup> The Charter, however, unlike the New Zealand Bill of Rights Act, does not list the judiciary in its applicability section.<sup>48</sup> For court decisions to come within the ambit of the Charter, they had to be acts of the “government”. While the Canadian Supreme Court denied the governmental nature of court orders – and never questioned their character as “acts” – this issue has been resolved by section 3(a) of the Bill of Rights Act itself, which expressly considers the judiciary as part of the “government of New Zealand.”

A court’s decision is in fact essential for giving the proper effect to fundamental rights and freedoms in any legal relationship, since it may contain

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<sup>42</sup> *The Laws of New Zealand*, above n 39, Human Rights, paras 16-17; Andrew Butler, above n 15, 261.

<sup>43</sup> See Paul Rishworth and ors, above n 1, 101.

<sup>44</sup> Andrew Butler, above n 15, 261.

<sup>45</sup> Paul Rishworth and ors, above n 1, 101.

<sup>46</sup> Paul Rishworth and ors, above n 1, 101-102.

<sup>47</sup> *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd*, above n 13, 600 (SCC) McIntyre J: “While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate *for the purposes of Charter application* the order of a court with an element of governmental action.” (emphasis added).

<sup>48</sup> Canadian Charter of Rights and Freedoms, s 32(1): “This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”



new elements arising out of the application of the law to the individual facts of the case. While some judicial determinations are just of declaratory nature, in essence repeating what the law has already decided, others might be based on provisions that confer discretionary powers or are simply broadly formulated.

For example, section 44(3) of the Human Rights Act 1993 deems it unlawful for a club to grant privileges to members of other clubs in a way that discriminates on prohibited grounds listed in section 21 of the Human Rights Act 1993. A decision by the Complaint Review Tribunal finding that a club has engaged in such activity would add nothing to the limitation of the right to freedom of association<sup>49</sup> already imposed by section 44(3) of the Human Rights Act 1993. As regards this initial limitation, it would be sufficient to scrutinize the statutory provision for Bill of Rights compliance, bearing in mind, of course, that the conflicting interest of the affected members not to be discriminated against is also protected under the Bill of Rights.<sup>50</sup>

In contrast, certain general limitations on the right to freedom of expression imposed by the Copyright Act 1994 ("restricted acts"<sup>51</sup>) are subject to exceptions that use the rather woolly concept of "fair dealing". For example, section 42(2) of the Copyright Act 1994 provides that fair dealing with a work for the purposes of reporting current events by means of a sound recording, film, broadcast, or cable programme does not infringe copyright in the work. The actual limitation of the right to freedom of expression in this context thus depends greatly on how a court would judge the facts of the case and whether it would come to the conclusion that the limit of "fair dealing" has been exceeded. Conversely, it would be difficult to make any definitive assessment of the provisions' consistency with the Bill of Rights Act in their abstract form.

Therefore, not only the structuring law, but also its individual application in the form of a judicial decision must meet the requirements set out by the Bill of Rights Act, again irrespective of the public or private nature of the entities or individuals that are party to the litigation. Blanchard J summarized this result in

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<sup>49</sup> New Zealand Bill of Rights Act 1990, s 17.

<sup>50</sup> New Zealand Bill of Rights Act 1990, s 19 (Freedom from discrimination); compare also Ian Leigh "The UK's Human Rights Act 1998: An Early Assessment" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 323, 338.

<sup>51</sup> See, for example, Copyright Act 1994, s 30: "The copying of a work is a restricted act in relation to any description of copyright work."



*Duff v Communicado Ltd* by describing how the law of contempt of court should both in general and as applied in the specific case, ie the individual outcome, be tested for consistency with the Bill of Rights:<sup>52</sup>

“There are three ways of examining the relationship between the Bill of Rights and the law of contempt. First, one could take the whole doctrine of the common law of contempt and ‘test’ it against the right to freedom of expression. The question would then be whether contempt of Court as a doctrine constitutes a reasonable limit on the freedom of expression. [...]

Or the Court could determine what effect to give to the Bill of Rights guarantee on a case-by-case basis, balancing the right to freedom of expression against the interference with the administration of justice in the particular case. The question would then be whether a determination that there has been a contempt on the facts of the particular case would result in a reasonable limit on the freedom of expression in those circumstances.

Thirdly, the Court could do both of these things, which I think is preferable. In as far as it involves taking the second approach, it reflects the reality that every case of contempt of Court involves balancing the benefits of freedom of expression against the benefits of protecting the administration of justice. That balancing is best done on the facts of each case, rather than in the abstract. The result of adopting the first method is that the ‘balancing’ process takes place at a high level of abstraction. This can misrepresent the true nature of the decision that must be made in each case, namely, whether the particular interference with the administration of justice is so serious as to warrant overriding the freedom of expression. At the same time, there is good reason to assess the doctrine overall against the Bill of Rights.”

The decision of the court becomes even more important when there is simply no rule – neither statute nor common law – that can be tested for Bill of Rights compliance. This will usually be the case where an applicant seeks the intervention of the courts in matters that have been left unregulated. Here, the court’s involvement when called upon by private individuals will be the only act of public authority within the meaning of section 3 of the Bill of Rights Act. This situation might already foreshadow to a certain degree the different ways in which the Bill of Rights can be advanced in private (as in public) litigation – and that its respective level of influence need not necessarily be the same.

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<sup>52</sup> *Duff v Communicado Ltd*, above n 14, 99-100.



*C The Different Roles of the Bill of Rights Act in Private Litigation – The ‘Shield & Sword’ Dichotomy*

In any adversarial judicial proceeding there will be at least two opposing parties to the dispute. As for private litigation, one will usually claim something from, or assert a right against the other. Since both parties are private individuals, each of them could in principle invoke the Bill of Rights – not against their respective opponent, but in relation to the applicable law and the court’s decision.

However, considering the traditional role of the Bill of Rights as a collection of *defensive* rights, on a first intuitive approach there would probably seem to be room for any Bill of Rights considerations only on the *defendant’s* side. More precisely, the Bill of Rights acts as a “shield” to defend private conduct against claims by other private individuals as an exercise of guaranteed fundamental rights or freedoms. This should arguably be the least controversial setting of cases in which the issue of horizontality arises: for example, a defendant who invokes the right to freedom of expression against being held in contempt of court,<sup>53</sup> or against a claim for damages brought in a private defamation lawsuit.<sup>54</sup> In this constellation, one can hardly speak of the private claimant being bound to observe the Bill of Rights Act. Since it will be the defendant’s actions that give rise to the litigation, there is nothing the claimant might have done in conflict with the Bill of Rights Act. A (potential) infringement of the defendant’s fundamental rights and freedoms only comes into play if the law and/or a court actually impose a sanction on such actions to the benefit of the claimant. What is decisive is thus the imposition of the sanction as the relevant act of public power susceptible to Bill of Rights scrutiny, not the private nature of the claimant.

The situation becomes less straightforward when the tables are turned. In *NZ Amalgamated Engineering Printing & Manufacturing Union Inc. v Air New Zealand Ltd*, it was the claimants – trade unions acting on behalf of its members employed by the airline – who (successfully) advanced the right to freedom from unreasonable search and seizure<sup>55</sup> against the introduction of a random drug test policy under the concept of lawful and reasonable employer command.<sup>56</sup> The

<sup>53</sup> *Duff v Communicado Ltd*, above n 14.

<sup>54</sup> *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 14.

<sup>55</sup> New Zealand Bill of Rights Act 1990, s 21.

<sup>56</sup> *NZ Amalgamated Engineering Printing & Manufacturing Union Inc. v Air New Zealand Ltd*, above n 18.



significant difference here lies in the fact that *private actions* were said to limit rights of another private individual under the Bill of Rights Act.

Using the Bill of Rights as a “sword” to claim something (damages, specific performance, forbearance, etc.) from another private individual seems, at first sight, rather unorthodox. This impression is reinforced if one recalls the Prime Minister’s statement that “citizens will not be able to invoke [Bill of Rights] provisions to sue one another”.<sup>57</sup> The statement, however, only precludes what is commonly referred to as a “direct” or “full” horizontal effect of fundamental rights provisions:<sup>58</sup> a private individual cannot be taken to court *on the sole basis* that he or she has breached provisions of the Bill of Rights – for the simple reason that those provisions do not bind private individuals in the first place.

Instead, a claimant will have to seek a remedy through the “ordinary” law governing the relationships between private individuals. This body of law will usually contain causes of action that reflect the principles created or affirmed by fundamental rights instruments.<sup>59</sup> Where, however, the reflection of such principles in setting out requirements for a remedy appears inadequate, or where a court fails to properly consider fundamental rights implications and thereby refuses to grant a remedy otherwise available, it remains entirely possible for a claimant to demand a Bill of Rights consistent judicial determination. Otherwise, the law and/or court decision – both acts of public power – positively authorising the defendant’s actions would breach the claimant’s rights under the Bill of Rights Act vis-à-vis the two respective branches of government.

At this point, it is convenient to remind oneself that the rights and freedoms contained in the Bill of Rights are, of course, only guaranteed subject to sections 5 and 4 of the Bill of Rights Act. The refusal to grant a specific remedy in particular circumstances – whether by a court or the regulatory framework itself – may very well constitute a “reasonable [limit] prescribed by law as can be demonstrably justified in a free and democratic society”.<sup>60</sup> For example, as regards non-contact

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<sup>57</sup> Rt Hon Geoffrey Palmer, above n 4.

<sup>58</sup> For a proponent of “direct horizontality” (under the UK’s Human Rights Act 1998) see H W R Wade, above n 9; see also discussion by Murray Hunt, above n 9, 428; and above n 5, 78.

<sup>59</sup> A good example is the Domestic Violence Act 1995. Whereas a victim of domestic violence may not invoke the section 9 right not to be subjected to cruel or degrading treatment directly against a violent partner, he or she can make an application for a protection order under Part II of the Act whose express purpose it is to ensure effective legal protection for victims of physical, sexual or psychological abuse (see Domestic Violence Act 1995, s 5(1)(b)).

<sup>60</sup> New Zealand Bill of Rights Act 1990, s 5.



protection orders under the Domestic Violence Act 1995, the applicant's interest in a restrictive order will generally be in conflict with the defendant's right to freedom of movement.<sup>61</sup> Therefore, in order to achieve overall consistency with the Bill of Rights Act, both the law governing private relationships as well as the individual judicial determination will often have to balance a multiplicity of legitimate rights, freedoms or interests. This balancing exercise will usually result in private persons being permitted to act in ways that the state could not,<sup>62</sup> since the state cannot itself rely on the rights and freedoms guaranteed by the Bill of Rights Act. A certain sphere of private autonomy is thereby preserved.

Furthermore, it should be emphasized that the function of the Bill of Rights Act to support claims against private individuals under *existing* rules of private law does not necessarily depend on interpreting fundamental rights provisions to impose so-called "positive obligations" on the state.<sup>63</sup> The question whether the state has a duty to protect citizens from rights infringing actions by other private individuals may become decisive, if the structuring law does not offer any suitable cause of action *at all* – a point that will be discussed below. Where the law does provide rules applicable to a dispute, a court must discharge its conventional obligations under the Bill of Rights Act to interpret and apply such rules – as far as possible – consistently with the guaranteed rights and freedoms of the claimant (and, of course, the defendant). There is nothing to suggest that, for example, section 6 of the Bill of Rights Act should not apply in these circumstances. Along the same lines, the Employment Court in the *Air New Zealand* case held that<sup>64</sup>

"the [Bill of Rights Act] is legislation that [...] is valid to be considered when the question for decision is whether an employer's action is reasonable when it cuts across fundamental rights recognised by the [Bill of Rights Act]."

This might actually go one step further than to just require individual acts of public power such as a court decision to comply with the Bill of Rights Act. If

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<sup>61</sup> New Zealand Bill of Rights Act 1990, s 18.

<sup>62</sup> Rishworth and ors, above n 1, 102.

<sup>63</sup> Contrast, however, discussion by Rishworth and ors, above n 1, 57-60. Antony Lester and David Pannick, above n 9, argue that "[the correct approach] involves applying the constitutional guarantee of human rights not only to the relationship between the state and the individual but also to relations between private individuals, *but only where the State has a duty [...] to protect the human rights of one of the parties as against the other, whether by way of claim or defence.*" (emphasis added).

<sup>64</sup> *NZ Amalgamated Engineering Printing & Manufacturing Union Inc. v Air New Zealand Ltd*, above n 18, para 208.



fundamental rights considerations are – at least partly – determinative of what is “reasonable” in private (as in public<sup>65</sup>) relationships, the Bill of Rights might be seen to normatively concretize the general law of the land. In that case, the Bill of Rights does not only confer subjective rights on the individual, but also constitutes what could be called an objective order of values for the legal system as a whole.<sup>66</sup>

So far, the discussion of the “sword” function has proceeded on the basis that a remedy against a private individual is at least potentially available. There still remains the situation in which the regulatory framework does not offer causes of action reflecting fundamental rights norms contained in the Bill of Rights Act or in international human rights treaties to which New Zealand is a party. For example, article 17 of the International Covenant on Civil and Political Rights (“ICCPR”)<sup>67</sup> stipulates that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy [...]” and that “everyone has the right to the protection of the law against such interference [...]”. While privacy in inter-private relations is accorded some protection through the Trespass Act 1986 and the common law doctrine of breach of confidence, New Zealand law (still) does not recognize an all-embracing tort of invasion of privacy.<sup>68</sup> Even though the long title of the Bill of Rights Act states that the Bill of Rights was enacted to “affirm New Zealand’s commitment to the International Covenant on Civil and Political

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<sup>65</sup> In *R v N (No 2)* (1999) 5 HRNZ 72, the Court of Appeal affirmed a District Court’s pre-trial ruling to admit evidence that had been obtained by private individuals in the course of unlawfully detaining the later accused person. The District Court had considered whether admitting the evidence was “fair” at common law in light of the accused’s guaranteed right to liberty and security.

<sup>66</sup> This is the approach to horizontality developed by the German Federal Constitutional Court in its *Lüth* decision, above n 12; see also Hans D Jarass and Bodo Pieroth *Grundgesetz für die Bundesrepublik Deutschland – Kommentar* (7ed, C.H. Beck, Munich, 2004), Vorb. vor Art. 1, para 3; Bodo Pieroth and Bernhard Schlink *Grundrechte – Staatsrecht II* (20ed, C.F. Müller, Heidelberg, 2004), 46; Michael Sachs (ed) *Grundgesetz – Kommentar* (3ed, C.H. Beck, Munich, 2003), vor Art. 1, para 32; Bruno Schmidt-Bleibtreu (ed) *Kommentar zum Grundgesetz* (10ed, Wolters, Neuwied, 2004), Vorb. v. Art. 1, para 8; Canaris, Claus-Wilhelm *Grundrechte und Privatrecht* (de Gruyter, Berlin, 1999); Claus-Wilhelm Canaris “Grundrechtswirkungen und Verhältnismäßigkeitsprinzip in der richterlichen Anwendung und Fortbildung des Privatrechts” [1989] JuS 161.

<sup>67</sup> (16 December 1966) 999 UNTS 171.

<sup>68</sup> See, for example, *Hosking v Runting*, above n 14; for the similar situation in the United Kingdom see *Campbell v MGN Ltd*, above n 10; Ivan Hare “Verticality Challenged: Private Parties, Privacy and the Human Rights Act” [2001] EHRLR 526; Ian Leigh, above n 13; Jonathan Morgan “Privacy in the House of Lords, Again” (2004) 120 LQR 563; Gavin Phillipson “Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously” [2003] EHRLR 54; Gavin Phillipson “Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act” (2003) 66 MLR 726.



Rights”<sup>69</sup>, a person seeking a remedy against a private individual who invades his or her privacy would still be powerless without a corresponding cause of action.

If then a claimant cannot use the Bill of Rights Act directly against another private individual, the question arises whether it may instead be relied upon in relation to the deficient structuring law and/or the consequential decision of a court declining to give effect to a particular fundamental right or freedom.<sup>70</sup> In this context, the Bill of Rights might require the state to establish or expand rights within the regulatory framework to adequately protect a claimant’s fundamental rights interests. The obvious difficulty with such an approach lies in the fact that at least the primary “act” of public power – the missing cause of action – constitutes an omission. While certain acts “omitted” by public authorities may in general very well come within the ambit of section 3 of the Bill of Rights Act (for example, the failure to inform a detained person of his or her right to consult a lawyer<sup>71</sup>), the omission to provide for certain rights in a regulatory framework is of an entirely different nature. Given the multiple sources of law, it would already be difficult to determine – supposing that a certain right should in fact exist – which branch of government would have been responsible and, more importantly, competent for creating the right.

In addition, since Parliament is not a party to private lawsuits (and could not in any event be forced to enact specific pieces of legislation<sup>72</sup>), using the Bill of Rights Act as a “sword” would *a priori* be limited to what lies in the court’s original duties and powers. And this leads to what really lies at the heart of the horizontality discussion. In the words of Paul Rishworth, referring to Canadian constitutional law commentator Peter Hogg, “[t]he debate is essentially about when the ordinary processes of democracy might be bypassed to extract remedies from courts for wrongs in the private sphere that are unregulated by legislation.”<sup>73</sup> The statement demonstrates that the debate has also political implications. It is about the distribution of power between Parliament and the judiciary, and where to strike a balance between liberalism and necessary governmental intervention in the private realm.

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<sup>69</sup> New Zealand Bill of Rights Act 1990, long title (b).

<sup>70</sup> Compare *The Laws of New Zealand*, above n 39, para 31.

<sup>71</sup> New Zealand Bill of Rights Act 1990, s 23(1)(b).

<sup>72</sup> Rishworth and ors, above n 1, 74.

<sup>73</sup> Paul Rishworth and ors, above n 1, 98, n 196.



The preceding paragraphs tried to show that for an analysis of the so-called horizontal effect of the Bill and Rights Act a primary distinction should be made according to the way it is relied upon in private litigation. In summary, the Bill of Rights may be invoked to defend or justify private actions against claims by other private individuals, and it can – with certain reserves, especially where the general law does not recognize any cause of action – be relied upon to support claims directed against the actions of other private individuals said to unduly affect fundamental rights and freedoms. While this primarily describes the different *roles* the Bill of Rights Act may play in private litigation, the following two parts will now take a closer look at the actual *impact and effect* of using the Bill of Rights Act as a “shield” or “sword” respectively.

### ***III THE BILL OF RIGHTS AS A ‘SHIELD’ TO DEFEND PRIVATE ACTIONS AGAINST CLAIMS BY OTHER PRIVATE INDIVIDUALS***

As has been pointed out above, using the Bill of Rights as a “shield” in private litigation actually does not subject the private opponent to Bill of Rights standards. Rather, the Bill of Rights is invoked against the law (and/or the court decision) that sanctions the defendant’s action. Although the various forms of law (statutory and common law, primary and subordinate legislation) make no difference in establishing a general susceptibility of so-called “private law” to Bill of Rights scrutiny, the potential impact on the outcome of the case can vary significantly depending on the nature of the rule in conflict with fundamental rights and freedoms. This becomes immediately obvious when looking at section 4 of the Bill of Rights Act which provides that *enactments* found to be inconsistent with the Bill of Rights must nevertheless be applied.

Consequently, it would appear useful to examine the effect of the Bill of Rights according to the different sources of law. Since it is not the parties but the law itself that serves as a gateway for Bill of Rights considerations in private litigation, it may not come as a surprise that the result will often follow the same lines as in litigation involving public actors who are directly bound by section 3 of the Bill of Rights Act.<sup>74</sup>

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<sup>74</sup> This convergence of public and private law for the purposes of human rights scrutiny is the core element in the horizontality discussion by Murray Hunt, above n 5, 83-85.



## A *The impact on primary and delegated legislation*

Roughly following the steps outlined by the Court of Appeal in *Moonen v Film and Literature Board of Review*<sup>75</sup>, the starting point for an application of the Bill of Rights to primary and delegated<sup>76</sup> legislation is section 6 of the Bill of Rights Act. It requires that enactments which have a potentially detrimental effect on fundamental rights and freedoms must be interpreted and applied as consistently with those rights and freedoms as possible. This direction, of course, also applies to enactments governing the relationship between private individuals. As one commentator rightly remarks<sup>77</sup>

“the Bill of Rights may well be applicable even in litigation between two private parties, neither of whom is caught by s. 3 [of the Bill of Rights Act]. If their dispute involves the interpretation and operation of an enactment, the Bill of Rights is relevant. Failure to appreciate this has led to several decisions, which are essentially about statutory interpretation, taking the unnecessary preliminary step of inquiring whether the party relying on the statute is caught by s. 3.”

Where the law appears to permit or require a remedy as demanded by a claimant that touches upon the defendant's fundamental rights or freedoms, the court must first inquire whether the sanction would (already) be consistent with the Bill of Rights.<sup>78</sup> This will involve an application of section 5 of the Bill of Rights Act:<sup>79</sup> if granting the remedy constitutes a reasonable limit of the

<sup>75</sup> [2000] 2 NZLR 9, 16 (CA).

<sup>76</sup> Section 6 of the Bill of Rights Act applies to “enactments”. Pursuant to section 29 of the Interpretation Act 1999, the word “enactment” means “the whole or a portion of an Act or regulations” (emphasis added). The term “regulations” comprises all delegated legislation except local authority by-laws; see Paul Rishworth and ors, above n 1, 137. Apart from being directly subject to Bill of Rights standards, delegated legislation is ultimately controlled through scrutiny of the relevant statutory empowering provisions; see discussion below p 21.

<sup>77</sup> Paul Rishworth and ors, above n 1, 80.

<sup>78</sup> Compare *The Laws of New Zealand*, above n 39, Human Rights, para 42.

<sup>79</sup> It is debatable whether “consistency” within the meaning of section 6 of the Bill of Rights Act actually requires prior consideration of section 5. It could also be understood in the way that an interpretation should be preferred which least affects guaranteed rights and freedoms in their absolute form, see *Moonen v Film and Literature Board of Review*, above n 75, 16. In other words, where an enactment can be given a meaning that does not limit fundamental rights and freedoms at all, that meaning should be preferred. This would not contradict the decision by the Court of Appeal in *Ministry of Transport v Noort* [1992] 3 NZLR 260, which only rejected the view that where a right or freedom cannot be upheld in its entirety, section 4 would preclude a court from upholding it in at least a reasonably limited form. The decision says nothing to the effect that an enactment should *a priori* always be given a meaning which only upholds a fundamental right or freedom in a limited form; see also Jan Stemplewitz “Section 6 of the New Zealand Bill of Rights Act 1990: A Case for Parliamentary Responsibility for Human Rights and Freedoms” (2002) 33 VUWLR 409, 417. For the purposes of this paper, however, the distinction is not of primary importance, since it concerns the *general reach* of section 6 – both in public and private litigation.



defendant's rights or freedoms prescribed by law as can be demonstrably justified in a free and democratic society, the defendant's "overall" rights under the Bill of Rights Act would be preserved. Conversely, if the sanction sought by the claimant fails to meet this test, the court must proceed to determine whether the applicable enactments can be interpreted so as to achieve a resolution of the dispute that is (at least more) consistent with the standard set by section 5 – for example, by granting a different remedy or possibly by dismissing the claim altogether.

Whether such alternatives are in fact open to the court depends on the general principles of interpretation that can generate different meanings of enactments.<sup>80</sup> This is, however, an inherent problem of section 6 of the Bill of Rights Act and not peculiar to private litigation.<sup>81</sup> To the extent that an enactment cannot be given a meaning allowing for a Bill of Rights consistent determination, section 4 of the Bill of Rights Act ultimately directs the courts to accept such inconsistency and adjudicate the dispute accordingly. However, a declaration of inconsistency may be made.<sup>82</sup>

The situation of inconsistency should not arise where legislation governing the relationship between private individuals falls back on general standards or vague phrases such as "fair dealing", "reasonable" or "the interests of justice". In the absence of any specific overriding legislative direction, the Bill of Rights Act itself must be taken to reflect Parliament's intention to legislate consistently with guaranteed rights and freedoms.<sup>83</sup> "Basic rights are not to be overridden by the general words of a statute since the presumption is against the impairment of such basic rights."<sup>84</sup> Consequently, broadly formulated phrases will ordinarily be capable of being given a Bill of Rights consistent meaning so as to only authorise remedies against a defendant in private litigation that no more than reasonably limit his or her fundamental rights and freedoms.

The same principle ultimately controls Bill of Rights compliance of subordinate legislation that affects the relationship between private individuals. Although regulations may themselves be subject of Bill of Rights scrutiny as

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<sup>80</sup> Paul Rishworth and ors, above n 1, 133.

<sup>81</sup> For a discussion of the various techniques to accommodate rights and freedoms in enactments see Paul Rishworth and ors, above n 1, 147-152, 163-166.

<sup>82</sup> *Moonen v Film and Literature Board of Review*, above n 75, 17.

<sup>83</sup> Paul Rishworth and ors, above n 1, 164.

<sup>84</sup> *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 575 (HL) Lord Browne-Wilkinson; see also *Ngati Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659, 712 (CA) Elias CJ ("basic rights cannot be overridden by general or ambiguous words in a statute").



described above, their respective statutory empowering provisions can generally be interpreted as authorising only such delegated legislation as is consistent with the Bill of Rights. If they are inconsistent, or require judicial determinations that would be inconsistent, they exceed the power conferred by the empowering enactment and are therefore *ultra vires*.<sup>85</sup>

### **B The impact on the common law**

A large part of the debate about horizontality revolves around the common law. In order to keep track of a considerable amount of nuanced positions and approaches that has been generated especially in this area, two issues should be kept separate.

On the one hand, the general *susceptibility* of the common law to Bill of Rights scrutiny. This question has already been dealt with above<sup>86</sup> and should, for the reasons given there, be answered in the affirmative. On the other hand, the disagreement about the actual *extent* of any impact of the Bill of Rights on the common law.<sup>87</sup> While a narrower view<sup>88</sup> – similar to the approach under the Canadian Charter of Rights and Freedoms<sup>89</sup> – only sees a duty to take fundamental rights and freedoms into account when developing the common law, a broader view<sup>90</sup> argues for an obligation of the courts to ensure that the common law is consistent with the Bill of Rights.<sup>91</sup>

On closer examination, the two views are not necessarily mutually exclusive; in fact, they are both valid – albeit in different circumstances. For the situation where a common law doctrine adversely touches upon fundamental rights and freedoms of a defendant in private litigation, the Bill of Rights can be invoked to ensure that the limitation is reasonable and demonstrably justified in a free and democratic society. In other words, courts are under an obligation to make consistent with Bill of Rights standards any common law doctrine that

<sup>85</sup> *Drew v Attorney-General* [2002] 1 NZLR 58 (CA). See also generally Jan Stemplewitz, above n 79; and Paul Rishworth and ors, above n 1, 160.

<sup>86</sup> See above Part II A (pp 6-9).

<sup>87</sup> Compare Murray Hunt, above n 5, 78.

<sup>88</sup> Paul Rishworth and ors, above n 1, 100-101; *Hosking v Runting*, above n 14, 55 (CA) Tipping J.

<sup>89</sup> See *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd*, above n 13, 603 (SCC) McIntyre J (“the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution”).

<sup>90</sup> Andrew S Butler, above n 15; *The Laws of New Zealand*, above n 39, Human Rights, para 17.

<sup>91</sup> Gavin Philippon, above n 5, 830-831, describes the same two approaches as “weak indirect horizontality” and “strong indirect horizontality”.



imposes an unjustifiable limitation on the rights and freedoms of one private individual for the benefit of another.<sup>92</sup> The reasons for this are fairly straightforward:

While the interpretation direction in section 6 of the Bill of Rights Act only applies to enactments, there is nothing to suggest that Parliament intended its own acts to be subject to a higher level of Bill of Rights influence and scrutiny than the common law. Consequently, courts must interpret and apply their own set of rules equally consistently with the rights and freedoms contained in the Bill of Rights. However, the decisive difference between the common law and private law enactments lies in the fact that where enactments cannot be given a meaning consistent with section 5 of the Bill of Rights Act, section 4 ultimately preserves them. As there is no comparable savings provision for the common law, any of its limits to fundamental rights or freedoms that do not meet the standard of section 5 are unlawful, and, according to the doctrine of Parliamentary sovereignty under which statutory law (in this case section 5) overrides the common law, must not be applied.<sup>93</sup> This leads effectively to a duty of the courts to bring common law rules that sanction private actions and thereby unreasonably limit a defendant's rights or freedoms within the requirements of section 5 of the Bill of Rights Act.

In summary, a defendant in private litigation can rely on the Bill of Rights Act as a "shield" to ensure that any judicial determination (whether based on statutory or common law) made against him or her will be consistent<sup>94</sup> with the Bill of Rights – save for the case where express statutory language mandates an inconsistent resolution of the dispute.

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<sup>92</sup> As an example, compare *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 14, where Elias J (as she then was) adapted the common law of defamation to adequately protect the defendant's right to freedom of expression and to avoid a decision that would have otherwise been inconsistent with the Bill of Rights Act. The case is, in fact, only a hybrid example for conforming the common law to Bill of Rights standards, since "the compromises achieved by the law of defamation are largely the result of judicial decision, modified by statute" (above n 14, 32). In the end, however, Elias J extended the *common law* defence of qualified privilege which had been expressly preserved by the Defamation Act 1992.

<sup>93</sup> The common law is clearly "law" for the purposes of section 5; see *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435, 440 (CA); *The Laws of New Zealand*, above n 39, Human Rights, para 17.

<sup>94</sup> Of course, "consistent" does not necessarily mean that the claim against him or her will be dismissed; see above Part III A (p 20).



#### *IV THE BILL OF RIGHTS AS A 'SWORD' TO SUPPORT CLAIMS AGAINST OTHER PRIVATE INDIVIDUALS*

The following chapter will deal with the effect of the Bill of Rights Act under the opposite scenario – where a claimant seeks to rely on fundamental rights and freedoms to support his or her action against another private individual. Since the private respondent does not owe any duty directly under the Bill of Rights Act, the focus must again be on the general law governing the relationship between the parties to the litigation.

##### *A The impact on existing causes of action*

A claimant will usually invoke the Bill of Rights if he or she is of the view that the general law is too restrictive in making available certain remedies against private actions that affect the claimant's fundamental rights and freedoms. A good example would be statutory limitation periods<sup>95</sup> that simply bar actions after a prescribed period of time.<sup>96</sup> Similarly, defence provisions and exceptions, such as section 31 of the Human Rights Act 1993 which allows discrimination on political grounds in certain employment matters, can effectively deny an otherwise available remedy. However, as enactments, they are logically subject to the same kind of Bill of Rights review and impact described above for the "shield" situation. In particular, section 6 of the Bill of Rights Act requires courts to interpret and apply both provisions that actually establish a right against another private individual, as well as any applicable defensive counterparts, as consistently with the Bill of Rights as possible. Furthermore,<sup>97</sup>

"statutory implications required to achieve rights-consistency need not be sourced in any specific legislative intent, for the Bill of Rights itself reflects a general statement of Parliamentary intent to legislate consistently with rights. In that way the Bill of Rights can be conceived as a delegation of authority to read down [defence provisions and exceptions] and read in [extensions of restrictive requirements] where this would not be inconsistent with legislative purpose."

<sup>95</sup> See, for example, Limitations Act 1950, s 4.

<sup>96</sup> Compare also *The Laws of New Zealand*, above n 39, Human Rights, para 30, citing decisions by the Irish Supreme Court in *O'Brien v Keogh* [1972] IR 144 and *O'Brien v Manufacturing Engineering Ltd* [1973] IR 334.

<sup>97</sup> Paul Rishworth and ors, above n 1, 164.



Since it cannot make any significant difference whether a cause of action happens to be based on statutory or common law, the same principles must generally apply in relation to the common law – of course with the qualification that any common law rule imposing unreasonable requirements for obtaining a remedy to redress rights infringing actions by private individuals will be unlawful under section 5 of the Bill of Rights Act.<sup>98</sup> In *Campbell v MGN Ltd*, a case that hinged on the question of adapting existing common law causes of action to protect privacy, Baroness Hale of Richmond correctly remarked that<sup>99</sup>

“[n]either party to this appeal has challenged the basic principles which have emerged from the Court of Appeal in the wake of the [Human Rights Act 1998]. The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' convention rights. [...] [W]here existing remedies are available, the court not only can but must balance the competing convention rights of the parties.”

### **B A duty to create new causes of action?**

What remains to be addressed then is the question how fundamental rights and freedoms might influence the outcome of private litigation in areas where the relationship between private individuals has (thus far) been left unregulated. For example, while the law sets out rules against the uninvited physical intrusion onto private property, it does not regulate the use of a telephoto lens to surreptitiously take pictures of individuals in private surroundings. A court confronted with an application for a remedy against private actions in these circumstances will inevitably face the problem that there is no legal basis for granting relief. Where the general law does not provide for any appropriate cause of action, the respondent is under no duty to refrain from his or her actions. Correspondingly, the applicant has no right against him or her.

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<sup>98</sup> See above Part III B (p 22).

<sup>99</sup> *Campbell v MGN Ltd*, above n 10, para 132-133 (HL). For New Zealand – although not in the context of private litigation – see for example *Simpson v Attorney-General [Baigent's Case]*, above n 15, 676 (CA) Cooke P (“Section 3 [of the Bill of Rights Act] also makes it clear that the Act applies to acts done by the Courts. The Act is binding on us, and we would fail in our duty if we did not give an effective remedy to a person whose legislatively affirmed rights have been infringed”).



But maybe the applicant should have such a right. After all, his or her guaranteed fundamental rights and freedoms are – albeit indirectly – affected.<sup>100</sup> Although both the state in general and the legislature in particular must be given a margin of appreciation as regards the implementation of certain policies into the legal matrix that governs private and public relationships, the Bill of Rights sets standards to which the actions of the state must conform.

The lack of a right within that matrix might therefore trigger a right against the state. In the context of private litigation, given that the judiciary cannot establish new *statutory* rights and duties, a court might be under a duty to develop new *common law* causes of action where existing statutory and common law both fail to protect fundamental rights and freedoms against infringement by private individuals. Such a proposition is, of course, not uncontested. During the passage of the United Kingdom's Human Rights Act 1998, the Lord Chancellor remarked:<sup>101</sup>

“I would not agree with any proposition that the courts as public authorities will be obliged to fashion a law on privacy because of the terms of the Bill. That is simply not so. If it were so, whenever a law cannot be found either in the statute book or as a rule of common law to protect a convention right, the courts would in effect be obliged to legislate by way of judicial decision and to make one. That is not the true position. [...] In my opinion, the court is not obliged to remedy the failure by legislating via the common law either where a convention right is infringed by incompatible legislation or where, because of the absence of legislation – say, privacy legislation – a convention right is left unprotected. In my view, the courts may not act as legislators and grant new remedies for infringement of convention rights unless the common law itself enables them to develop new rights or remedies.”

Leaving aside the correctness or otherwise of the Lord Chancellor's opinion, two general issues can be distilled from his statement:

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<sup>100</sup> In the case of a right against invasion of privacy, matters are further complicated by the fact that the Bill of Rights Act does not expressly recognize such a right, notwithstanding article 17 of the International Covenant on Civil and Political Rights, above n 67, to which New Zealand is a party. Similar problems arise in relation to the protection of family, home and correspondence, and certain prohibited grounds of discrimination contained in article 26 of the ICCPR, neither of which have a Bill of Rights counterpart. On the possibilities to give effect to unincorporated international human rights instruments, see *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA); *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA); Claudia Geiringer “*Tavita* and all that: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law” (2004) 21 NZULR 66.

<sup>101</sup> Lord Irvine of Lairg, Hansard, HL Vol 583, 24 November 1997, col 785.



First and foremost, courts could only be "obliged" to create a new common law cause of action as a matter of fundamental rights and freedoms, if the Bill of Rights is conceived not only to restrain governmental conduct, but also to impose positive obligations or duties on the state to secure it against infringement by private individuals. Secondly, the judiciary would have to be the proper governmental actor for discharging any such obligations by widening the range of common law causes of action.

### *1 Positive obligations to protect fundamental rights and freedoms*

New Zealand courts have so far been reluctant to ascribe a protective or positive dimension to fundamental rights and freedoms<sup>102</sup> – at least to those which are not already formulated in an obligatory way, for example the right to be informed of the reasons for an arrest or detention.<sup>103</sup> Insofar, Murray Hunt's plain assertion "that all fundamental rights have a positive dimension which imposes on the State a positive obligation to act to secure those rights where threatened by other actors"<sup>104</sup> appears somewhat daring. The contrary view is expressed, for example, by Paul Rishworth who generally sees fundamental rights and freedoms only as a fetter on state power and not a reason for its exercise.<sup>105</sup>

A useful starting point for a deeper exploration of this issue might be the long title of the Bill of Rights Act. It states in paragraph (a) that the Bill of Rights Act is to "affirm, protect, and promote human rights and fundamental freedoms in New Zealand"<sup>106</sup>. At first sight, the words "promote" and "protect" both seem to point in favour of some form of protective dimension. However, the more immediate reason for their insertion in the long title appears to relate to the traditional function of a Bill of Rights, ie to strengthen human rights principles and their observance by combining them in a single, prominent constitutional instrument.<sup>107</sup> Through their very inclusion in a Bill of Rights, fundamental rights and freedoms are "promoted" and "protected".<sup>108</sup>

<sup>102</sup> See for example *Mendelssohn v Attorney-General* [1999] 2 NZLR 268, 272 (CA).

<sup>103</sup> New Zealand Bill of Rights Act 1990, s 23(1)(a).

<sup>104</sup> Murray Hunt, above n 5, 77.

<sup>105</sup> Paul Rishworth and ors, above n 1, 57 ("They are reasons for governmental restraint rather than action").

<sup>106</sup> New Zealand Bill of Rights Act 1990, long title (a).

<sup>107</sup> See also Johan Steyn "Democracy through Law" [2002] EHRLR 723, 731.

<sup>108</sup> Paul Rishworth and ors, above n 1, 61.



However, paragraph (b) of the long title may take matters further. It affirms New Zealand's commitment to the ICCPR, so that jurisprudence and commentary generated thereunder are of importance to the interpretation and application of the Bill of Rights Act.<sup>109</sup> The general comments of the United Nations Office of the High Commissioner for Human Rights in fact establish that – as a matter of public international law – there are positive obligations incumbent on a state to protect at least some of the rights in the ICCPR from interference by private individuals.<sup>110</sup> Furthermore, as a signatory state to the ICCPR New Zealand is obligated “to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”<sup>111</sup> and to “adopt such laws or other measures as may be necessary to give effect to the rights in the present Covenant”.<sup>112</sup> According to article 2(3)(a) of the ICCPR this includes the obligation to provide an effective remedy for violations of the Covenant – irrespective of whether they have been committed by governmental actors or private individuals.<sup>113</sup>

The recognition of a protective dimension of certain fundamental rights and freedoms is also supported by the jurisprudence of the European Court of Human Rights (“ECHR”) with respect to the European Convention for the Protection of

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<sup>109</sup> *R v Goodwin (No 2)* [1993] 2 NZLR 390, 393 (CA) Cooke P; *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385, 404 (CA) Eichelbaum CJ.

<sup>110</sup> United Nations Office of the High Commissioner for Human Rights *General Comment 16: The Right to Respect of Privacy, Home and Correspondence, and Protection of Honour and Reputation* <<http://www.unhchr.ch/tbs/doc.nsf/>> (last accessed 30 May 2005), para 1:

“Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks *whether they emanate from State authorities or from natural or legal persons*. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.” (emphasis added)

*General Comment 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment* <<http://www.unhchr.ch/tbs/doc.nsf/>> (last accessed 30 May 2005), para 2:

“The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity *or in a private capacity*” (emphasis added).

<sup>111</sup> ICCPR, above n 67, art 2(1).

<sup>112</sup> ICCPR, above n 67, art 2(2).

<sup>113</sup> ICCPR, above n 67, art 2(3)(a) requires states to provide an effective remedy for violations “notwithstanding that the violation has been committed by persons acting in an official capacity”, thereby implying that an effective remedy must *a fortiori* be provided for any violation by private individuals.



Human Rights and Fundamental Freedoms.<sup>114</sup> In *X an Y v The Netherlands*, the ECHR noted that<sup>115</sup>

“although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life [...]. These obligations may involve the adoption of measures designed to secure respect for private life *even in the sphere of the relations of individuals between themselves.*” (emphasis added)

In *Glaser v United Kingdom*, the Court added that<sup>116</sup>

“[this includes] both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific steps. [...] [R]egard must be had to the fair balance which has to be struck between the competing interests of the individual and the community, including other concerned third parties, and the state's margin of appreciation”.

The same principles are articulated in a number of other decisions by the ECHR,<sup>117</sup> and not just in relation to the protection of the right to life. For example, in *Plattform 'Ärzte für das Leben' v Austria*, the Court held that<sup>118</sup>

“genuine, effective freedom of peaceful assembly cannot [...] be reduced to a mere duty on the part of the state not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.”

Although these European decisions are not binding on the New Zealand judiciary, they are nevertheless persuasive authorities that should be given considerable weight in guiding courts when confronted with issues of fundamental

<sup>114</sup> See Clare Ovey and Robin White *Jacobs & White - European Convention on Human Rights* (3ed, Oxford University Press, Oxford, 2002), 38.

<sup>115</sup> (1986) 8 EHRR 235, para 23 (ECHR).

<sup>116</sup> [2000] 3 FCR 193, para 63 (Section III, ECHR).

<sup>117</sup> See, for example, *Airey v Ireland* (1979-80) 2 EHRR 305 (ECHR) and *Artico v Italy* (1981) 3 EHRR 1 (ECHR).

<sup>118</sup> (1991) 13 EHRR 204, para 32 (ECHR). See also *A v United Kingdom* (1998) 27 EHRR 611 (ECHR) in relation to the right not to be subjected to torture or to inhumane or degrading treatment, art. 3 of the Convention, and *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38 (ECHR) in relation to freedom of assembly, art. 11 of the Convention.



rights and freedoms.<sup>119</sup> Considering New Zealand's international obligations and commitment to the ICCPR, affirmed by the long title of the Bill of Rights Act, it seems both necessary and prudent to recognize positive obligations to protect rights and freedoms against interference by private individuals at least to the extent required under the Covenant.

## 2 *Positive obligations of the courts – Legitimacy issues*

This of course does not say anything about whether – on the domestic law level and under the Bill of Rights Act – courts are the proper addressee of those (limited) positive obligations. One could equally, and probably more naturally, place them on the legislative branch of government. Paul Rishworth accordingly voices the concern that courts are “institutionally unsuited to making more than incremental adjustments to common law.”<sup>120</sup> Indeed, the legislature could be seen as best placed to make decisions on competing interests in society:<sup>121</sup>

“Balancing of interests is a quintessentially legislative task. We normally look to the political rather than the legal branches of government for calculations of general welfare. Only the legislature is equipped to deal with the vast array of data that is relevant to such an inquiry. Not only do the courts lack the expertise and the resources to consider these legislative facts, the litigants in a private lawsuit are unlikely to place them on the record.”

This argument, however, relates more to the appropriateness of the general concept of human rights review under a Bill of Rights. It is not an argument confined to or specific to the role and effect of fundamental rights and freedoms in private litigation.<sup>122</sup> As section 5 of the Bill of Rights Act shows, Parliament expressly requires the judiciary to balance interests when determining whether a limit to fundamental rights and freedoms is “reasonable” and “demonstrably justified in a free and democratic society”.

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<sup>119</sup> See Paul Rishworth and ors, above n 1, 65. For examples of the impact on decisions by courts in the United Kingdom, see *Venables and Thompson v News Group Newspapers Ltd*, above n 10; *X (a woman formerly known as Mary Bell) v SO* [2003] EWHC 1101; *Douglas and Zeta Jones and Ors v Hello! Ltd*, above n 10.

<sup>120</sup> Paul Rishworth and ors, above n 1, 101.

<sup>121</sup> Patrick J Monahan “Judicial Review and Democracy: a Theory of Judicial Review” (1987) 21 *U.Brit.Colum.L.Rev.* 87, 97.

<sup>122</sup> Andrew S Butler, above n 11, 15.



In reality, the concerns have little to do with the respective ability of Parliament and the courts to make certain value judgments. They much more relate to the concept of separation of powers – and thereby to the *distribution of power* between the executive and judicial branch of government. The creation of new common law causes of action is often seen as an undue encroachment on parliamentary sovereignty. To disguise the rather political nature of this assertion, it is usually cloaked in arguments about democracy: for example, that judges are not democratically elected and that they cannot be held accountable by the people. Not dwelling on the questionable merits of these arguments,<sup>123</sup> it is important to stress that such views fail to appreciate from the outset that the Bill of Rights Act itself<sup>124</sup>

“[reflects] an embryonic new ‘settlement’ as to the respective roles of legislature and judiciary in the protection of rights, one in which the judicial role is not premised on a deemed legislative intent to be searched for in each enactment, but on an *independent judicial responsibility and allegiance to the rights and freedoms themselves.*” (emphasis added)

Where Parliament fails to comply with international obligations to provide adequate means for the protection of fundamental rights and freedoms within the regulatory framework, the judiciary should act under its own “responsibility and allegiance” to those rights and freedoms. This is in no way incompatible with the doctrine of parliamentary sovereignty, as the legislature is, of course, at liberty to *expressly* amend any new common law developments should it reach different conclusions on the basis of broader policy considerations. However, mere silence and idleness do not suffice. In the context of fundamental rights and freedoms, parliamentary sovereignty comes at the price of exercising parliamentary responsibility.<sup>125</sup>

In conclusion, a duty of the courts to develop the common law so as to provide an adequate cause of action for the protection of fundamental rights and freedoms arises under the following preconditions: (1) the affected right or freedom can or, as a matter of New Zealand’s international obligations, must be

<sup>123</sup> For a discussion see Johan Steyn, above n 107, 724.

<sup>124</sup> Paul Rishworth and ors, above n 1, 120.

<sup>125</sup> See Jan Stemplewitz, above n 79, 410, 423. Compare also discussion in *Lange v Atkinson* [1998] 3 NZLR 424, 462 (CA) on the argument (rejected by the Court of Appeal) that the creation of a new defence of “political expression” should be left to the legislature.



interpreted to contain a positive obligation to protect against certain interferences by private individuals;<sup>126</sup> and (2) Parliament has not (sufficiently) incorporated that protective dimension into the general law of land. In all other cases, especially in the absence of a positive obligation to protect, the judiciary will meet its responsibility under the Bill of Rights Act by taking into account the values and standards expressed therein when assessing the need for a development of the common law. The narrower view<sup>127</sup> on the impact of the Bill of Rights on the common law is thereby accommodated to the overall scheme of applying fundamental rights and freedoms in private litigation.

## V CONCLUSION

This paper has tried to systematically approach the various issues that arise in connection with the Bill of Rights Act in private litigation, and to either point out or develop possible solutions on an abstract level. As a result, it appears fair to say that the Bill of Rights Act is far from irrelevant to the substantive determination of legal disputes between private individuals.<sup>128</sup> Its role to shield from inconsistent limitations at the hands of private law rules and corresponding court decisions very much follows the familiar *modus operandi* of Bill of Rights litigation with public actors that actually come within the ambit of section 3 of the Bill of Rights Act. This is the logical consequence of focussing on the law and judicial determinations as relevant acts of public power that need to conform to Bill of Rights standards.

The transgression of the public/private divide in relation to the nature of the litigants does not contradict the exclusion of private individuals from the applicability clause in section 3. First and foremost, a direct duty to observe guaranteed rights and freedoms does not "apply" to them. This explains the only limited ability of the Bill of Rights to act as a sword in protecting rights and freedoms against infringements by private individuals. Insofar, instead of speaking of a "horizontal application" of fundamental rights and freedoms as

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<sup>126</sup> As the ECHR's decisions mentioned above demonstrate, an obligation to protect fundamental rights and freedoms does not necessarily arise under all circumstances; see, for example, *Plattform 'Ärzte für das Leben' v Austria*, above n 118, para 32 ("Like Article 8, Article 11 sometimes requires positive measures to be taken" (emphasis added)).

<sup>127</sup> See above Part III B (p 21).

<sup>128</sup> As regards procedure, it has always been uncontested that certain guarantees such section 27(1) (right to natural justice) and section 27(2) (right to appeal) equally apply to private litigation.



between private individuals, the term “horizontal effect”<sup>129</sup> would seem more accurate and maybe less intimidating. Furthermore, the distinction made by section 3 remains highly relevant, for example, for the possibility of a *Baigent*<sup>130</sup> type public law tort action. Moreover, the determination of what constitutes a reasonable limitation demonstrably justified in a free a democratic society under section 5 of the Bill of Rights Act will inevitably be different where private entities are concerned on either side of the equation.<sup>131</sup>

The fear that a significant effect of the Bill of Rights on interpersonal relationships will threaten personal autonomy is by and large unfounded. As the “shield” function demonstrates, it even enhances personal liberty. Besides, the argument is somewhat misplaced, since nothing would prevent a sovereign legislature from imposing rules and “public standards” on private relationships in areas that were previously unregulated. Again, the standards and balancing exercises to be observed by the legislature under the Bill of Rights would rather act as a safeguard to the liberty of conducting one’s own affairs as freely as possible. Finally, what needs to be kept in mind is that the New Zealand Bill of Rights Act only guarantees a fairly limited amount of rights and freedoms that may become relevant as between private individuals. Since it does not include certain social, economic and property rights elsewhere recognized, for example, in the German Basic Law<sup>132</sup> or under the United States Constitution<sup>133</sup>, the problem of horizontality remains confined to a manageable framework. In return, the New Zealand judiciary should fully embrace the principles of giving effect to fundamental rights and freedoms in private litigation. This would – last but not least – also enhance the perception of the public that the Bill of Rights is more than a “drunk-drivers’ charter”, that it can rather offer something to all New Zealanders.

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<sup>129</sup> Shaun D Pattinson and Deryck Beyleveld, above n 9, 626.

<sup>130</sup> *Simpson v Attorney-General [Baigent’s Case]*, above n 15.

<sup>131</sup> *The Laws of New Zealand*, above n 39, Human Rights, para 28.

<sup>132</sup> See, for example, articles 2, 12 and 14 of the Basic Law which guarantee freedom of contract, freedom to choose and pursue a profession, and freedom from interference with property. For an example of the “constitutionalisation” of the German law of guarantees and assumption of debt see the recent decision of the Federal Supreme Court in BGHZ 156, 302, translated summary by Jan Stemplewitz “Report – Bundesgerichtshof-Zivilsachen (Federal Court of Justice – Private Law) 2003” in Russel Miller and Peer Zumbansen (eds) *Annual of German and European Law, Vol. 2, 2004* (Berghan Books, Oxford/New York, 2005) *forthcoming*.

<sup>133</sup> See, for example, the takings clause in the Fifth Amendment to the Constitution prohibiting the confiscation of private property without just compensation; or the right to privacy found to be implicit in the First, Third, Fourth and Fifth Amendments, see *Griswold v Connecticut* (1965) 381 US 479, 484.



## Bibliography

- Amelung, Tilman Ulrich "Damage Awards for Infringement of Privacy – The German Approach" (1999) 14 Tul. Eur. & Civ. L. F. 15
- Bamforth, Nicholas "The True 'Horizontal Effect' of the Human Rights Act 1998" (2001) 117 LQR 34
- Bamforth, Nicholas "The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies" (1999) 58 CLJ 159
- Beyleveld, Deryck and Shaun D Pattinson "Horizontal Applicability and Horizontal Effect" (2002) 118 LQR 623
- Borrie, Sir Gordon "The Regulation of Public and Private Power" [1989] PL 552
- Bowen, Andrew J "Fundamental Rights in Private Law" (2000) 20 SLT 157
- Brinktrine, Ralf "The Horizontal Effect of Human Rights in German Constitutional Law: the British Debate on Horizontality and the Possible Role Model of the German Doctrine of *Mittelbare Drittwirkung der Grundrechte*" [2001] EHRLR 421
- Butler, Andrew S and Petra Butler "Human Rights" in *The Laws of New Zealand* (Lexis Nexis, Wellington, 2003)
- Butler, Andrew S "Constitutional Rights in Private Litigation: a Critique and Comparative Analysis" (1993) 22 Anglo-Am. L. Rev. 1
- Butler, Andrew S "The New Zealand Bill of Rights and Private Common Law Litigation" (1991) NZLJ 261
- Buxton, Richard "The Human Rights Act and Private Law" (2000) 116 LQR 48
- Canaris, Claus-Wilhelm *Grundrechte und Privatrecht* (de Gruyter, Berlin, 1999)
- Canaris, Claus-Wilhelm "Grundrechtswirkungen und Verhältnismäßigkeitsprinzip in der richterlichen Anwendung und Fortbildung des Privatrechts" [1989] JuS 161
- Classen, Claus Dieter "Drittwirkung der Grundrechte in der Rechtsprechung des BVerfG" (1997) 122 Archiv des öffentlichen Rechts (AöR) 63
- Clayton, Richard "Developing Principles for Human Rights" [2002] EHRLR 175
- Dreier, Horst (ed) *Grundgesetz – Kommentar – Band I* (2<sup>nd</sup> ed, Mohr Siebeck, Tübingen, 2004)
- Du Plessis, Max and Jolyon Ford "Developing the Common Law Progressively – Horizontality, the Human Rights Act and the South African Experience" [2004] EHRLR 286



- Gardbaum, Stephen "The 'Horizontal Effect' of Constitutional Rights" (2003) 102 Mich. L. Rev. 387
- Geiringer, Claudia "Tavita and all that: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law" (2004) 21 NZULR 66
- Graber, Christoph Beat and Gunther Teubner "Art and Money: Constitutional Rights in the Private Sphere?" (1998) 18 OxJLS 61
- Hare, Ivan "Verticality Challenged: Private Parties, Privacy and the Human Rights Act" [2001] EHRLR 526
- Hogg, Peter *Constitutional Law of Canada* (4<sup>th</sup> ed, Carswell, Scarborough, 1997)
- Hunt, Murray "Human Rights and the Public-Private Distinction" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 71
- Hunt, Murray "The 'Horizontal Effect' of the Human Rights Act" [1998] PL 423
- Huscroft, Grant and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002)
- Jarass, Hans D and Bodo Pieroth *Grundgesetz für die Bundesrepublik Deutschland – Kommentar* (7 ed, C.H. Beck, München, 2004)
- Lester, Antony and David Pannick "The Impact of the Human Rights Act on Private Law: the Knight's Move" (2000) 116 LQR 380
- Leigh, Ian "Horizontal Rights, The Human Rights Act and Privacy: Lessons from the Commonwealth" (1999) 48 ICLQ 57
- Loveland, Ian "The Horizontal Direct Effect of the Human Rights Act" (2000) 150 NLJ No 6957, 1595
- Markesinis, Basil S "Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany" (1999) 115 LQR 47
- Monahan, Patrick J "Judicial Review and Democracy: a Theory of Judicial Review" (1987) 21 U.Brit.Colum.L.Rev. 87
- Morgan, Jonathan "Privacy in the House of Lords, Again" (2004) 120 LQR 563
- Oliver, Dawn "The Human Rights Act and Public/Private Law Divides" [2000] EHRLR 343
- Ovey, Clare and Robin White *Jacobs & White - European Convention on Human Rights* (3 ed, Oxford 2002)
- Phillipson, Gavin "Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously" [2003] EHRLR 54



- Phillipson, Gavin "The horizontal effect of the Human Rights Act: the story so far" (2003) 38 S. L. Rev. 14
- Phillipson, Gavin "The Human Rights Act, 'horizontal effect' and the common law: a bang or a whimper?" (1999) 62 MLR 824
- Phillipson, Gavin "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" (2003) 66 MLR 726
- Pieroth, Bodo and Bernhard Schlink *Grundrechte – Staatsrecht II* (20 ed, C.F. Müller, Heidelberg, 2004)
- Quint, Peter E. "Free Speech and Private Law in German Constitutional Theory" (1998) 48 Maryland LR 247
- Raphael, Thomas "The Problem of Horizontal Effect" [2000] EHRLR 493
- Rishworth, Paul, Grant Huscroft, Scott Optican, Richard Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003)
- Sachs, Michael (ed) *Grundgesetz – Kommentar* (3 ed, C.H. Beck, Munich, 2003)
- Schmidt-Bleibtreu, Bruno (ed) *Kommentar zum Grundgesetz* (10 ed, Wolters, Neuwied, 2004)
- Schwabe, Jürgen "Bundesverfassungsgericht und Drittwirkung der Grundrechte" (1975) 100 Archiv des öffentlichen Rechts (AöR), 442
- Stemplewitz, Jan "Report – Bundesgerichtshof-Zivilsachen (Federal Court of Justice – Private Law) 2003" in Russel Miller and Peer Zumbansen (eds) *Annual of German and European Law, Vol. 2, 2004* (Berghan Books, Oxford/New York, 2005) [page not yet available]
- Stemplewitz, Jan "Section 6 of the New Zealand Bill of Rights Act 1990: A Case for Parliamentary Responsibility for Human Rights and Freedoms" (2002) 33 VUWLR 409
- Steyn, Johan "Democracy through Law" [2002] EHRLR 723
- Taylor, Greg "The Horizontal Effect of Human Rights, the German Model and its Applicability to Common Law Jurisdictions" (2002) 13 King's Coll. L.J. 187
- Tushnet, Mark "The Issue of State Action / Horizontal Effect in Comparative Constitutional Law" (2003) 1 Int'l J. Const. L. 79
- United Nations Office of the High Commissioner for Human Rights *General Comment 16: The Right to Respect of Privacy, Home and Correspondence, and Protection of Honour and Reputation* <<http://www.unhchr.ch/tbs/doc.nsf/>> (last accessed 30 May 2005)



United Nations Office of the High Commissioner for Human Rights *General Comment 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment* <<http://www.unhchr.ch/tbs/doc.nsf/>> (last accessed 30 May 2005)

Wade, H. W. R. "Horizons of Horizontality" (2000) 116 LQR 217

Young, Alison L. "Remedial and Substantive Horizontality" [2002] PL 232

### **Table of Cases**

*A v United Kingdom* (1999) 27 EHRR 611 (ECHR)

*Airey v Ireland* (1979-80) 2 EHRR 305 (ECHR)

*Artico v Italy* (1981) 3 EHHR 1 (ECHR)

*Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA)

*Baker v Canada* [1999] 2 SCR 817 (SCC)

*Campbell v MGN Ltd* [2004] UKHL 22 (HL)

*Douglas and Zeta Jones and ors v Hello! Ltd* [2001] QB 967 (CA)

*Douglas and Zeta Jones and Ors v Hello! Ltd* [2003] EWHC 786 (Ch)

*Drew v Attorney-General* [2002] 1 NZLR 58 (CA)

*Du Plessis v De Klerk* 1996 (3) S.A. 850, 914H (Const Ct SA)

*Duff v Communicado* [1996] 2 NZLR 89 (HC)

*Fitzpatrick v Sterling Housing Association Ltd* [1999] 3 WLR 1113 (HL)

*Hosking v Runting* [2005] 1 NZLR 1 (CA)

*Glaser v United Kingdom* [2000] 3 FCR 193 (Section III, ECHR)

*Griswold v Connecticut* (1965) 381 US 479, 484.

*Lange v Atkinson* [1998] 3 NZLR 424 (CA)

*Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 (HC)

*Lüth* (1958) 7 BVerfGE 198 (German Federal Constitutional Court) English translation available at <[http://www.ucl.ac.uk/laws/global\\_law/german-cases/cases\\_bverge.shtml?15jan1958](http://www.ucl.ac.uk/laws/global_law/german-cases/cases_bverge.shtml?15jan1958)> (last accessed 30 May 2005)



- Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA)
- Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA)
- New York Times Co v Sullivan* (1964) 376 US 254
- Ngati Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659 (CA)
- Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA)
- NZ Amalgamated Engineering Printing & Manufacturing Union Inc. v Air New Zealand Ltd* (2004) 7 NZELC 97, 367; (2004) 7 HRNZ 539 (Emp Ct)
- Plattform 'Ärzte für das Leben' v Austria* (1991) 13 EHRR 204 (ECHR)
- R v Butcher* [1992] 2 NZLR 257 (CA)
- R v Goodwin (No 2)* [1993] 2 NZLR 390 (CA)
- R v H* [1994] 2 NZLR 143 (CA)
- R v N* [1999] 1 NZLR 713 (CA)
- R v N (No 2)* (1999) 5 HRNZ 72 (CA)
- R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539 (HL)
- Re J* [1996] 2 NZLR 134 (CA)
- Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573 (SCC)
- Shelley v Kraemer* (1947) 334 US 1
- Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA)
- Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC)
- Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA)
- Television New Zealand v Newsmonitor Services Ltd* [1994] 2 NZLR 91 (HC)
- TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435 (CA)
- Venables and Thompson v News Group Newspapers Ltd* [2001] 1 All ER 908, [2001] 2 WLR 1038 (Fam D)
- X (A woman formerly known as Mary Bell) v SO* [2003] EWHC 1101
- X and Y v The Netherlands* (1986) 8 EHRR 235 (ECHR)
- Young, James and Webster v United Kingdom* (1982) 4 EHHR 38 (ECHR)



### **Table of International Instruments**

European Convention for the Protection of Human Rights and Fundamental Freedoms

(4 November 1950) 213 UNTS 221, ETS 5 (1993)

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171

### **Table of Statutes and Constitutions**

Basic Law for the Federal Republic of Germany, English translation by Tschentscher, Axel *The Basic Law (Grundgesetz) – The Constitution of the Federal Republic of Germany (May 23<sup>rd</sup>, 1949)* (Jurisprudentia, Würzburg/Bern, 2003), also available at <[http://www.oefre.unibe.ch/law/the\\_basic\\_law.pdf](http://www.oefre.unibe.ch/law/the_basic_law.pdf)> (last accessed 30 May 2005).

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), sch B)

Constitution of the Republic of South Africa, Act 108 of 1996

Copyright Act 1994

Domestic Violence Act 1995

Human Rights Act 1993

Human Rights Act 1998 (UK)

Interpretation Act 1999

Limitations Act 1950

New Zealand Bill of Rights Act 1990

United States Constitution

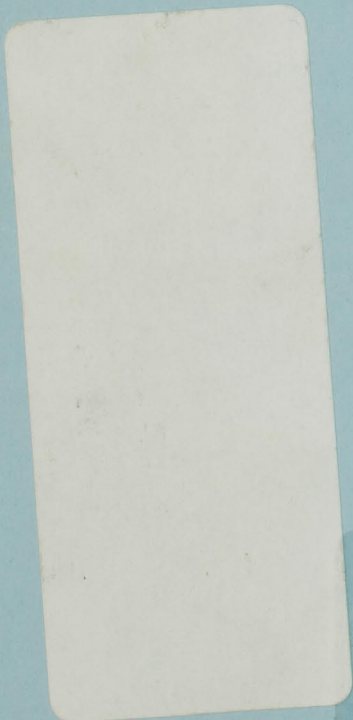
### **Table of Legislative Materials**

*A Bill of Rights for New Zealand: A White Paper* (House of Representatives, Wellington, 1985) AJHR – A6



AS741  
VUW  
A66  
S824  
2005

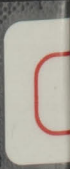




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