HORIZONTAL RIGHTS AND FREEDOMS: THE NEW ZEALAND BILL OF RIGHTS ACT 1990 IN PRIVATE LITIGATION

Jan Stemplewitz*

This article discusses the impact of the New Zealand Bill of Rights Act 1990 (NZBORA) on substantive law issues in litigation between private individuals. It argues that both the law in its various expressions and individual court decisions constitute acts of public power susceptible to NZBORA standards in private litigation. To determine the proper reach of the rights and freedoms in these cases, a primary distinction should be drawn between the different ways that litigants rely on the NZBORA. Where it is invoked to defend private actions as an exercise of guaranteed rights and freedoms, its role and effect (on an abstract level) will be similar to that in litigation with public actors. Conversely, if it is relied upon to actively claim something from another private individual, its impact will be limited to ensuring that the general regulatory framework adequately protects rights and freedoms from private interference. Where guaranteed rights and freedoms can (or must) be interpreted to contain a protective dimension, courts will be under a duty to provide an NZBORA-consistent remedy, even if the general law previously has not recognised any appropriate cause of action.

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

* *Rechtsreferendar* (law clerk) at the Regional Court of Appeal in Hamburg (Germany); LLM (Victoria University of Wellington), German State Examination in Law and DipLaw (University of Münster).

citizen limiting the powers of the State.[1] Section 3 of the New Zealand Bill of Rights Act 1990 (NZBORA) provides that:[2]

> This Bill of Rights applies *only* to acts done –
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> (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
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> (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 NZBORA does not – at least not directly – apply to any act done by a person in his or her private capacity.[3] Consequently, it does not render unlawful the acts of private individuals which would be in breach of the Act if they had been done by someone acting in a public capacity. As such, the Act does not create any duties or obligations for individuals acting in a private capacity.[4] During the second reading of the New Zealand Bill of Rights Bill, the then Prime Minister made it plain that "[c]itizens will not be able to invoke its provisions in order to sue one another."[5]

This, however, does not (and arguably should not) necessarily mean that fundamental rights and freedoms affirmed in the NZBORA are irrelevant to private relationships. While – quite apart from section 3 – some rights by their very nature solely speak to the State (for example, the rights to certain minimum standards of criminal procedure contained in section 25), other guarantees such as the section 19 right to freedom from discrimination could conceptually also be invoked against private individuals. Considering the worldwide political trend towards privatisation, actual power to interfere with civil rights and liberties has become increasingly concentrated in private hands.[6]

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1 See *A Bill of Rights for New Zealand: A White Paper* (House of Representatives, Wellington, 1985) AJHR A6, para 10.20; Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Auckland, 2003) 113; see also *Living Word Distributors Ltd v Human Rights Action Group Inc* [2000] 3 NZLR 570, para 41 Richardson P for the majority ("The Bill of Rights is a limitation on governmental, not private conduct.").

2 New Zealand Bill of Rights Act 1990, s 3 (emphasis added).

3 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."

4 See Rishworth and others, above n 1, 108–109.

5 Rt Hon Geoffrey Palmer (14 August 1990) 510 NZPD 3450.

6 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 [Hunt "Human Rights and the Public–Private Distinction"]; Gavin Phillipson "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999) 62 MLR 824, 847 [Phillipson "The Human Rights Act, 'Horizontal Effect' and the Common Law"].

In 1971, Peter Archer MP speaking in the House of Commons succinctly pointed out that:[7]

> 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 banking sector.[8] It is, therefore, not surprising that the historical concept of fundamental rights and freedoms, their applicability and protection have been equally increasingly called into question. Over the years, especially since the passage of the Human Rights Act 1998 (UK), which incorporated the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[9] 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[10] and judicial[11] arenas.

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7 Peter Archer MP (2 April 1971) HC Debs cols 1861–1862.

8 Compare Phillipson "The Human Rights Act, 'Horizontal Effect' and the Common Law", above n 6, 847; Mark Tushnet "The Issue of State Action / Horizontal Effect in Comparative Constitutional Law" (2003) 1 Int'l J Const L 79.

9 European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 221.

10 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 Ox JLS 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 [Hunt "The 'Horizontal Effect' of the Human Rights Act"]; 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; Phillipson "The Human Rights Act, 'Horizontal Effect' and the Common Law", above n 6; Thomas Raphael "The Problem of Horizontal Effect" [2000] EHRLR 493; H W R Wade "Horizons of Horizontality" (2000) 116 LQR 217.

11 *Venables and Thompson v News Group Newspapers Ltd* [2001] 2 WLR 1038 (Fam D); *Douglas v Hello! Ltd* [2001] QB 967 (CA); *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch); *Campbell v MGN Ltd* [2004] 2 AC 457 (HL).

The question of horizontality is, of course, not confined to the United Kingdom. While other jurisdictions such as the United States,[12] Germany[13] and Canada[14] have all largely settled the issue in favour of at least some form of consideration given to fundamental rights and freedoms even in private litigation, the situation in New Zealand – 16 years after the NZBORA came into force – still appears to be somewhat hazy. Even though the issue has arisen in a number of cases,[15] it has only been resolved to a certain degree, mainly in relation to the question of whether the (private) common law is in general susceptible to NZBORA scrutiny.[16]

Perhaps influenced by the controversial discussions surrounding the Human Rights Act 1998 (UK), horizontality in New Zealand continues be a constitutional "can of worms". In last year's judgment of the Court of Appeal in *Hosking v Runting*[17] – an action brought by a television 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

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12 The leading decisions of the United States Supreme Court on the issue of horizontality are *Shelley v Kraemer* (1948) 334 US 1 and *New York Times Co v Sullivan* (1964) 376 US 254. For a further instructive description and critical appraisal of the United States "state action doctrine", see A S Butler "Constitutional Rights in Private Litigation: A Critique and Comparative Analysis" (1993) 22 Anglo-Am L R 1 [Butler "Constitutional Rights in Private Litigation"]; Stephen Gardbaum "The 'Horizontal Effect' of Constitutional Rights" (2003) 102 Mich L Rev 387; and Tushnet, above n 8.

13 The 1958 *Lüth* decision of the German Federal Constitutional Court (1958) 7 BVerfGE 198, 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 English translation at <http://www.ucl.ac.uk/laws/global_law/german-cases/> (last accessed 31 August 2006). 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.

14 *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573 [*Dolphin Delivery*]; Peter Hogg *Constitutional Law of Canada* (4 ed, 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 [Leigh "Horizontal Rights, The Human Rights Act and Privacy"].

15 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 Communicado Ltd* [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).

16 *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 15; *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA); see also A S Butler "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] NZLJ 261 [Butler "The New Zealand Bill of Rights and Private Common Law Litigation"]; Rishworth and others, above n 1, 100–108.

17 *Hosking v Runting*, above n 15.

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."[18]

Hosking v Runting, along with 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-citizen relations might be complex, but is far from a 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?[19] Can an airline company submit its employees to random drug and alcohol tests?[20] Should a same-sex partner qualify as a member of a tenant's "family" to be entitled to succeed to an assured tenancy?[21] 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,[22] or where a news magazine relied on the right to freedom of expression in a defamation lawsuit brought by a former Prime Minister.[23]

This article will attempt to at least partially untangle the complexity of which Gault J was wary. It does not give definitive solutions for each and every set of circumstances in which the question of horizontal application of the NZBORA might arise. It does, 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[24]), the article 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 NZBORA 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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18 *Hosking v Runting*, above n 15, para 114.

19 *Campbell v MGM Ltd*, above n 11.

20 *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Air New Zealand Ltd* (2004) 7 HRNZ 539 (Emp Ct).

21 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL).

22 *Re J* [1996] 2 NZLR 134 (CA).

23 *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 15.

24 See New Zealand Bill of Rights Act 1990, s 29.

Instead, the article will suggest that a primary distinction must be made according to the way in which the NZBORA 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 and sword dichotomy, the extent to which the NZBORA 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 NZBORA does not impose any duties on private individuals – or, more precisely, on individuals in their private capacity. Section 3(b) of the Act provides that private individuals *can* in fact be directly bound by NZBORA guarantees so long as 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 NZBORA does not apply – *to them*. This is probably what the Court of Appeal in *R v H* had in mind when stating that "[w]holly private conduct is left to be controlled by the general law of the land."[25]

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.[26] Nevertheless, the Court's obiter comment contains an important starting point for the problem of horizontality: while the NZBORA 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 these seem to fall squarely into the public realm, which opens up the question to what extent *they* may be subject to the NZBORA and thereby import fundamental rights and freedoms into an otherwise "private" relationship. The following two sections will discuss these secondary connecting factors for the NZBORA 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

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25 *R v H*, above n 15, 147 Richardson J for the Court.

26 This article 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 NZBORA; see Rishworth and others, above n 1, 89 and Andrew S Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) paras 5.8.1– 5.8.9 for a discussion. Instead, it will focus on the role and effect which the NZBORA may have on such individuals that indisputably do not come within the ambit of section 3.

(public[27] 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 number 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[28]). It is this last group which is of particular interest for this article, since neither entity will trigger the applicability clause of the NZBORA.

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[29] – 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 NZBORA therefore applies to any form of such structuring law.

While this result is uncontroversial as regards acts done by the legislative and executive branches, there has been some debate about whether the common law should be susceptible to NZBORA scrutiny. The discussion was mainly driven by concerns that subjecting the common law to the NZBORA would usurp Parliament's deliberate exclusion of private individuals from section 3.[30] 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 relationships 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;[31] they are also subject to section 6 of the Act, which mandates that whenever possible an enactment must be given a meaning consistent with the rights and freedoms

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27 Including such persons or bodies envisaged by section 3(b) of the NZBORA.

28 Even though there may not be a concrete or individualised relationship between any two people, such as a work contract 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.

29 Hunt "Human Rights and the Public–Private Distinction", above n 6, 84.

30 See Rishworth and others, above n 1, 100.

31 Compare generally Rishworth and others, above n 1, 72 ("The only relevant 'act' that can be 'done' by Parliament, as such, is the passing of legislation."); see also Tushnet, above n 8, 82.

contained in the NZBORA.[32] 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 NZBORA standards.[33]

Since the legislature, through section 6 of the NZBORA, obligated the courts to interpret – wherever possible – even its own Acts of Parliament consistently with the rights and freedoms contained in the Act, the contention that it intended to specifically preclude the common law from any NZBORA 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[34]), whose susceptibility to the Act appears to be uncontested,[35] shows that the issue of subjecting private individuals to NZBORA standards cannot be equated with the question of applying the Act to the common law. Those wishing to exclude any potential influence of the Act on private 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 NZBORA 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 binding the judiciary was, *inter alia*, to subject the common law to the NZBORA,[36] 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".[37]

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32 See A S Butler "Is This a Public Law Case?" (2000) 31 VUWLR 747, 760; compare Hunt "Human Rights and the Public–Private Distinction", above n 6, 84, on the similar interpretation rule in section 3 of the Human Rights Act 1998 (UK).

33 Hunt "Human Rights and the Public–Private Distinction", above n 6, 85; Raphael, above n 10, 497.

34 See *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) and discussion by Rishworth and others, above n 1, 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."

35 See Rishworth and others, 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."

36 *Television New Zealand Ltd v Newsmonitor Services Ltd*, above n 15, 96 Blanchard J:

> [Counsel's argument] 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. 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.

37 *Duff v Communicado Ltd*, above n 15, 99 Blanchard J.

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)".[38]

Meanwhile, 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 NZBORA] should accordingly recognise the Bill of Rights protections as and where appropriate in evolving the common law".[39] 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*, where she expressed the view that:[40]

> [T]he New Zealand Bill of Rights Act protections are to be 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.

It would therefore now seem to be well established that the NZBORA is applicable to the common law.[41] 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 NZBORA as an act of public power, it becomes clear that the potential function of the NZBORA 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 NZBORA standards.[42] This normative effect[43] of the Act is one of the key elements in understanding and determining its proper reach as between private individuals.

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38 *Solicitor-General v Radio New Zealand Ltd*, above n 34, 58 Judgment of the Full Court.

39 *R v H*, above n 15, 147 Richardson J for the Court.

40 *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 15, 32 Elias J.

41 Hunt "Human Rights and the Public–Private Distinction", above n 6, 77; *The Laws of New Zealand* (LexisNexis NZ, Wellington, 2003) Human Rights, para 17 (last updated 21 April 2005); Rishworth and others, above n 1, 102.

42 See *Du Plessis v De Klerk* 1996 (3) SA 850, 914H (Const Ct SA) Kriegler J dissenting; Hunt "The 'Horizontal Effect' of the Human Rights Act", above 10, 434.

43 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.

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 NZBORA not only leads to the application of the Act to the common law, but also subjects any court to NZBORA directions and guarantees in its decision-making process. This is directly apparent in relation to section 27(1) of the 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", that is, in both criminal and civil proceedings. Another example already mentioned above would be section 6 of the Act, which directs the courts to interpret enactments, if possible, consistently with the NZBORA – 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 the Act.[44] This conclusion has found scattered objection,[45] which, however, fails to succeed. First, it seems to follow from the natural and ordinary meaning of section 3(a) 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.[46]

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",[47] is unconvincing. If it were correct, most executive bodies which also "apply" the NZBORA – just as they do 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 *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd*,[48] which held that the issuance of a court decision did not constitute governmental action for the purposes of applying the Canadian Charter of Rights

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44 *The Laws of New Zealand*, above n 41, Human Rights, paras 16–17; Butler "The New Zealand Bill of Rights and Private Common Law Litigation", above n 16, 261; Butler "Is This a Public Law Case?", above n 32, 756; Butler and Butler, above n 26, paras 5.6.8 and 5.8.10.

45 See Rishworth and others, above n 1, 101.

46 Butler "The New Zealand Bill of Rights and Private Common Law Litigations", above n 16, 261.

47 Rishworth and others, above n 1, 101.

48 *Dolphin Delivery*, above n 14; Rishworth and others, above n 1, 101–102.

and Freedoms.[49] The Charter, however, unlike the NZBORA, does not list the judiciary in its applicability section.[50] 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 NZBORA, 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 new elements arising out of the application of the law to the individual facts of the case. While some judicial determinations are just of a 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 the prohibited grounds listed in section 21 of that Act. A decision by the Human Rights Review Tribunal finding that a club has engaged in such activity would add nothing to the limitation of the right to freedom of association[51] already imposed by section 44(3). As regards this initial limitation, it would be sufficient to scrutinise the statutory provision for NZBORA compliance, bearing in mind, of course, that the conflicting interest of the affected members not to be discriminated against is also protected under the NZBORA.[52]

In contrast, certain general limitations on the right to freedom of expression imposed by the Copyright Act 1994 ("restricted acts"[53]) are subject to exceptions that use the rather woolly concept

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49 *Dolphin Delivery*, above n 14, 600 McIntyre J (emphasis added):

> 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.

50 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.

51 New Zealand Bill of Rights Act 1990, s 17.

52 New Zealand Bill of Rights Act 1990, s 19 (freedom from discrimination); compare Ian Leigh "The UK's Human Rights Act 1998: An Early Assessment" in Huscroft and Rishworth (eds), above n 6, 323, 338.

53 See for example Copyright Act 1994, s 30: "The copying of a work is a restricted act in relation to every description of copyright work."

of "fair dealing". For example, section 42(2) of that Act 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 NZBORA in their abstract form.[54]

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 NZBORA, again irrespective of the public or private nature of the entities or individuals that are party to the litigation. Blanchard J summarised this result in *Duff v Communicado Ltd* by describing how the law of contempt of court should both in general and as applied in the specific case (that is, the individual outcome) be tested for consistency with the NZBORA:[55]

> 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.
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> 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 NZBORA compliance. This will usually be the case where an applicant seeks the intervention of the courts in matters that have been left unregulated.

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54 For an analysis of the compliance of New Zealand copyright law with the NZBORA see Jo Oliver "Copyright, Fair Dealing, and Freedom of Expression" (2000) 19 NZULR 89.

55 *Duff v Communicado Ltd*, above n 15, 99–100 Blanchard J.

Here, a 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 NZBORA. This situation might already foreshadow to a certain degree the different ways in which the NZBORA can be advanced in private (as in public) litigation – and that its respective level of influence need not necessarily be the same.

C The Different Roles of the NZBORA – The "Shield and Sword" Dichotomy

In any adversarial judicial proceeding there will be at least two opposing parties to the dispute. In 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 NZBORA – not against their respective opponent, but in relation to the applicable law and the court's decision.

Considering the traditional role of the NZBORA as a collection of *defensive* rights, its primary function could be seen in acting as a "shield" to defend private conduct as an exercise of fundamental rights and freedoms. This should arguably be the least controversial class of cases in which the issue of horizontality arises: for example, a litigant who invokes the right to freedom of expression against being held in contempt of court in civil proceedings,[56] or against a claim for damages brought in a private defamation lawsuit.[57] Here one can hardly speak of the private claimant being bound to observe the NZBORA. Since it will be the respondent's actions that give rise to the litigation, there is nothing the claimant might have done in conflict with the respondent's fundamental rights and freedoms. A (potential) infringement of these rights and freedoms only comes into play if the law and/or a court decision actually imposes a sanction for the benefit of the claimant. What is decisive as the relevant act of public power susceptible to NZBORA scrutiny is thus the imposition of the sanction, and not the private nature of the claimant. In fact, it would make little difference if the opposing party was actually a public entity directly bound by section 3(a) of the Act – either way the guarantees of the NZBORA could be invoked to attempt to justify private actions.[58]

The situation becomes less straightforward when the tables are turned. In *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Air New Zealand Ltd*,[59] it was the claimants – trade unions acting on behalf of their members employed by the airline – who (successfully) advanced the right to freedom from unreasonable search and seizure[60] against the introduction of a

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56 *Duff v Communicado Ltd*, above n 15.

57 *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 15.

58 See for example *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 (HC), where the right to freedom of expression was (unsuccessfully) invoked against an abatement notice that required the removal of a swastika that had been painted on the side of a house.

59 *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Air New Zealand Ltd*, above n 20.

60 New Zealand Bill of Rights Act 1990, s 21.

random drug test policy under the concept of lawful and reasonable employer command. While one could argue that the employees sought to "defend" their right to freedom from unreasonable search and seizure (that is, they also tried to "shield" themselves from interferences with this right), the situation is nevertheless functionally different from the one described in the preceding paragraph. Here, the use of the NZBORA is not defensive, but rather "offensive" in character. It is not relied upon to justify certain behaviour, but to establish that the actions of another individual are unlawful. As with the "shield" function, this second type, which could be dubbed a "sword" function, is far from peculiar to litigation between private individuals. It is often an instrument for challenging acts done by public authorities, for example the lawfulness of a police search or detention.

The significant difference in private litigation such as the *Air New Zealand* case lies in the fact that *private actions* (random drug testing) are said to limit the rights of another private individual under the NZBORA. Using the NZBORA as a means to claim something from another private individual (damages, specific performance, forbearance, and so on) seems problematic, if one recalls the Prime Minister's statement that "citizens will not be able to invoke [NZBORA] provisions in order to sue one another".[61] The statement, however, only precludes what is commonly referred to as a "direct" or "full" horizontal effect of fundamental rights provisions:[62] a private individual cannot be taken to court *on the sole basis* that he or she has breached provisions of the NZBORA – 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.[63] 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 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 NZBORA 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 NZBORA are, of course, only guaranteed subject to sections 4 and 5 of that Act. The refusal to

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61 Rt Hon Geoffrey Palmer, above n 5.

62 For the views of a proponent of "direct horizontality" (under the Human Rights Act 1998 (UK)) see H W R Wade, above n 10; see also discussion by Hunt in "The 'Horizontal' Effect of the Human Rights Act", above n 10, 428 and "Human Rights and the Public–Private Distinction", above n 6, 78.

63 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 section 5(1)(b)).

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 that can be demonstrably justified in a free and democratic society".[64] For example, as regards non-contact 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.[65] Therefore, in order to achieve overall consistency with the NZBORA, both the law governing private relationships and 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,[66] since the State cannot itself rely on the rights and freedoms guaranteed by the NZBORA. A certain sphere of private autonomy is thereby preserved.

Furthermore, it should be emphasised that the function of the NZBORA 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.[67] The question whether the State has a duty to protect citizens from rights-infringing actions by other private individuals may become relevant, 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 NZBORA 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 Act should not apply in these circumstances. Along the same lines, the Employment Court in the *Air New Zealand* case held that:[68]

> [The NZBORA] 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 [NZBORA].

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64 New Zealand Bill of Rights Act 1990, s 5.

65 New Zealand Bill of Rights Act 1990, s 18.

66 Rishworth and others, above n 1, 102–103; see also Butler and Butler, above n 26, para 5.8.10.

67 Contrast discussion by Rishworth and others, above n 1, 57–60. Lester and Pannick, above n 10, 383 argue that (emphasis added):

> [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*.

68 *NZ Amalgamated Engineering Printing & Manufacturing Union Inc v Air New Zealand Ltd*, above n 20, para 208 Judgment of the Court.

This might actually go one step further than requiring individual acts of public power such as a court decision to comply with the NZBORA. If fundamental rights considerations are – at least partly – determinative of what is "reasonable" in private (as in public[69]) relationships, the NZBORA might be seen to normatively concretise the general law of the land. In that case, the Act 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.[70]

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 any causes of action reflecting fundamental rights norms contained in the NZBORA 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)[71] stipulates that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy" and that "[e]veryone has the right to the protection of the law against such interference". While privacy in inter-citizen relations is accorded some protection by the Trespass Act 1986 and the common law doctrine of breach of confidence, New Zealand law (still) does not recognise an all-embracing tort of invasion of privacy.[72] Even though the long title of the NZBORA states that it was enacted to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights", a person seeking a remedy against a private individual who invades his or her privacy would still be powerless in the absence of an appropriate cause of action.

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69 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.

70 This is the approach to horizontality developed by the German Federal Constitutional Court in its *Lüth* decision, above n 13; see also Hans D Jarass and Bodo Pieroth *Grundgesetz für die Bundesrepublik Deutschland – Kommentar* (7 ed, C H Beck, Munich, 2004) Vorb vor Art 1, para 3; Bodo Pieroth and Bernhard Schlink *Grundrechte – Staatsrecht II* (20 ed, C F Müller, Heidelberg, 2004) 46; Michael Sachs (ed) *Grundgesetz – Kommentar* (3 ed, C H Beck, Munich, 2003) vor Art 1, para 32; Bruno Schmidt-Bleibtreu (ed) *Kommentar zum Grundgesetz* (10 ed, Wolters, Neuwied, 2004) Vorb v Art 1, para 8; Claus-Wilhelm Canaris *Grundrechte und Privatrecht* (de Gruyter, Berlin, 1999); Claus-Wilhelm Canaris "Grundrechtswirkungen und Verhältnismäßigkeitsprinzip in der richterlichen Anwendung und Fortbildung des Privatrechts" [1989] JuS 161.

71 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171 [ICCPR].

72 See for example *Hosking v Runting*, above n 15. For the situation in the United Kingdom see *Campbell v MGN Ltd*, above n 11; Ivan Hare "Verticality Challenged: Private Parties, Privacy and the Human Rights Act" [2001] EHRLR 526; Leigh "Horizontal Rights, The Human Rights Act and Privacy", above n 14; 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.

If a claimant cannot use the NZBORA directly against another private individual, the question arises whether it may instead be relied upon in relation to structural deficiencies in law and/or the consequential decision of a court declining to give effect to a particular fundamental right or freedom.[73] In this context, the NZBORA 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 – is in fact an omission. While certain things "omitted" by public authorities may in general very well come within the ambit of section 3 of the NZBORA (for example, the failure to inform a detained person of his or her right to consult a lawyer[74]), 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 for creating and, more importantly, competent to create 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[75]), using the NZBORA as a "sword" would *a priori* be limited to what lies in the court's inherent 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 done in the private sphere that are unregulated by legislation."[76] The statement demonstrates that the debate has 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.

The preceding paragraphs are an attempt to show that for the purpose of an analysis of the so-called horizontal effect of the NZBORA, a primary distinction should be made according to the way it is relied upon in private litigation. In summary, the NZBORA may be invoked to defend or justify private actions against claims by other private individuals, and it can – with certain limitations, especially where the general law does not recognise 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 NZBORA may play in private litigation, the following two parts will now take a closer look at the actual impact and effect of using the NZBORA as a "shield" or "sword" respectively.

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73 Compare *The Laws of New Zealand*, above n 41, para 31.

74 New Zealand Bill of Rights Act 1990, s 23(1)(b).

75 Rishworth and others, above n 1, 74.

76 Rishworth and others, above n 1, 104, n 196.

III THE NZBORA AS A "SHIELD" TO DEFEND PRIVATE ACTIONS AGAINST CLAIMS BY OTHER PRIVATE INDIVIDUALS

As has been pointed out above, using the NZBORA as a shield in private litigation does not actually subject the private opponent to NZBORA standards. Rather, the Act is invoked in order to challenge the law (and/or the court decision) that sanctions certain private actions. Although the various forms of law (statutory and common law, primary and subordinate legislation) may be considered together for the purpose of establishing a general susceptibility of so-called "private law" to NZBORA scrutiny, the potential impact on the outcome of the case can vary significantly depending on the nature of the rule said to be in conflict with fundamental rights and freedoms. This becomes immediately obvious when looking at section 4 of the Act, which provides that *enactments* (but no other form of law) found to be inconsistent with the NZBORA must nevertheless be applied.

Consequently, it would appear useful to examine the effect of the NZBORA by reference to the different sources of law. Since it is not the parties but the law itself that serves as a gateway for NZBORA considerations in private litigation, it may not come as a surprise that the result will often mirror that in litigation involving public actors who are directly bound by section 3 of the Act.[77]

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*,[78] the starting point for application of the NZBORA to primary and delegated[79] legislation is section 6 of the 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 Rishworth rightly remarks:[80]

> [T]he Bill of Rights may well be applicable even in litigation between two private parties, neither of whom is caught by s. 3 [of the 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.

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77 This convergence of public and private law for the purposes of human rights scrutiny is the core element in the horizontality discussion by Hunt "Human Rights and the Public–Private Distinction", above n 6, 83–85.

78 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 (CA) Tipping J for the Court.

79 Section 6 of the NZBORA 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 bylaws; see Rishworth and others, above n 1, 137. Apart from being directly subject to NZBORA standards, delegated legislation is ultimately controlled through scrutiny of the relevant statutory empowering provisions.

80 Rishworth and others, above n 1, 80.

Where the law appears to permit or require a remedy that touches upon the opposing party's fundamental rights or freedoms, the court must first inquire whether such a remedy would in fact be consistent with the NZBORA.[81] This will involve an application of section 5 of the Act: if granting the remedy constitutes a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society, the defendant's "overall" rights under the NZBORA would be preserved.[82] Conversely, if the remedy fails to meet this test, the court must proceed to determine whether the applicable enactment can be interpreted so as to enable 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.[83] This is, however, an inherent problem of section 6 of the Act and not peculiar to private litigation.[84] To the extent that an enactment cannot be given a meaning allowing for an NZBORA-consistent determination, section 4 of the Act ultimately directs the courts to accept such inconsistency and adjudicate the dispute accordingly. However, a declaration of inconsistency may be made.[85]

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 NZBORA itself must be taken to reflect Parliament's intention to legislate consistently with

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81 Compare *The Laws of New Zealand*, above n 41, Human Rights, para 42.

82 It is debatable whether "consistency" within the meaning of section 6 of the NZBORA actually requires prior consideration of section 5. It could also be understood as mandating 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 78, 16 Tipping J for the Court. 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 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 article, however, the distinction is not of primary importance, since it concerns the *general reach* of section 6 – both in public and private litigation.

83 Rishworth and others, above n 1, 133.

84 For a discussion of the various techniques to accommodate rights and freedoms in enactments see Rishworth and others, above n 1, 147–152, 163–166.

85 *Moonen v Film and Literature Board of Review*, above n 78, 17 Tipping J for the Court.

guaranteed rights and freedoms:[86] "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."[87] Consequently, broadly formulated phrases will ordinarily be capable of being given an NZBORA-consistent meaning so as to only authorise remedies that no more than reasonably limit fundamental rights and freedoms.

The same principle ultimately controls the NZBORA compliance of subordinate legislation that affects the relationship between private individuals. Although regulations may themselves be subject to NZBORA scrutiny, as described above, their respective statutory empowering provisions can generally be interpreted as authorising only such delegated legislation as is consistent with the NZBORA. If the regulations are inconsistent, or require judicial determinations that would be inconsistent, they exceed the power conferred by the empowering enactment and are therefore *ultra vires*.[88]

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 number of nuanced positions and approaches that have been generated especially in this area, two issues should be kept separate. On the one hand, the general question of *susceptibility* of the common law to NZBORA scrutiny has already been dealt with above[89] and should, for the reasons given there, be answered in the affirmative. On the other hand, there is disagreement about the actual *extent* of any impact of the NZBORA on the common law.[90] While a narrower view[91] – similar to the approach under the Canadian Charter of Rights and Freedoms[92] – only sees a duty to take fundamental rights and freedoms into account when developing the common

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86 Rishworth and others, above n 1, 164.

87 *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, 575 (HL) Lord Browne-Wilkinson; *Ngati Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659, para 82 (CA) Elias CJ.

88 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA). See generally Jan Stemplewitz, above n 82; Rishworth and others, above n 1, 160.

89 See above Part II A The Law as an Intermediary for Fundamental Rights and Freedoms in Private Relationships.

90 Compare Hunt "Human Rights and the Public–Private Distinction", above n 6, 78.

91 Rishworth and others, above n 1, 100–101; *Hosking v Runting*, above n 15, para 229 (CA) Tipping J.

92 See *Dolphin Delivery*, above n 14, para 39 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").

law, a broader view[93] argues for an obligation of the courts to *make consistent* with the NZBORA any inconsistent common law rule.[94]

On closer examination, the two views are not necessarily mutually exclusive; in fact, as the following sections will attempt to show, they are both valid – albeit in different circumstances. For the "shield" situation that is of interest here (that is, where private actions are sanctioned by a common law rule in a manner that adversely touches upon fundamental rights and freedoms), the NZBORA 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 NZBORA standards any common law doctrine that imposes an unjustifiable limitation on the rights and freedoms of one private individual for the benefit of another.[95] The reasons for this are the following. While the interpretation direction in section 6 only applies to enactments, there is nothing to suggest that Parliament intended its own acts and omissions to be subject to a higher level of NZBORA 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 NZBORA. However, the decisive difference between the common law and enactments lies in the fact that where enactments cannot be given a meaning consistent with section 5 of the 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.[96] This effectively leads 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. In respect of such rules it would not be sufficient to merely take the values of the NZBORA into account and nevertheless leave the common law rule in question unchanged.

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93 Butler "The New Zealand Bill of Rights and Private Common Law Litigation", above n 16; *The Laws of New Zealand*, above n 41, Human Rights, para 17.

94 Phillipson "The Human Rights Act, 'Horizontal Effect' and the Common Law", above n 6, 830–831, describes the same two approaches as "weak indirect horizontality" and "strong indirect horizontality".

95 As an example, compare *Lange v Atkinson and Australian Consolidated Press NZ Ltd*, above n 15, where, in the High Court, 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 NZBORA. The case is, in fact, only a hybrid example for conforming the common law to NZBORA standards, since (at 32) "[t]he compromises achieved by the law of defamation are largely the result of judicial decision, modified by statute". In the end, however, Elias J extended the *common law* defence of qualified privilege which had been expressly preserved by the Defamation Act 1992.

96 The common law is "law" for the purposes of section 5; see *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435, 440 (CA) Cooke P; *The Laws of New Zealand*, above n 41, Human Rights, para 17.

In summary, the NZBORA can be relied upon in private litigation as a "shield" to ensure that any judicial determination (whether based on statutory or common law) restricting private actions will be consistent[97] with the NZBORA – save for the case where express statutory language mandates an inconsistent resolution of the dispute.

IV THE NZBORA AS A "SWORD" TO SUPPORT CLAIMS AGAINST OTHER PRIVATE INDIVIDUALS

This Part deals with the effect of the NZBORA under the opposite scenario – where fundamental rights and freedoms are invoked to support an action against another private individual. Since the private opponent does not come within the ambit of section 3 and consequently does not owe any duty directly under the NZBORA, the focus must again be on the general law governing the relationship between the parties to the litigation as well as the relevant court decisions.

A The Impact on Existing Causes of Action

A claimant will usually invoke the NZBORA 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[98] that simply bar actions after a prescribed period of time.[99] 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 NZBORA review and have the same impacts as described above for the "shield" situation. In particular, section 6 of the Act requires courts to interpret and apply not only provisions that actually establish a right against another private individual, but also any applicable defensive counterparts, as consistently with the NZBORA as possible. Furthermore:[100]

> [S]tatutory 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.

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97 Of course, "consistent" does not necessarily mean that the claim against him or her will be dismissed; see above Part III A The Impact on Primary and Delegated Legislation.

98 See for example Limitations Act 1950, s 4.

99 Compare also *The Laws of New Zealand*, above n 41, 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 Co Ltd* [1973] IR 334.

100 Rishworth and others, 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 NZBORA.[101] 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:[102]

> Neither 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 of 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.[103] For example, while the law sets out rules against 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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101 See above Part III B The Impact on the Common Law.

102 *Campbell v MGN Ltd*, above n 11, paras 132–133 Baroness Hale of Richmond. For New Zealand – although not in the context of private litigation – see for example *Baigent's Case*, above n 16, 676 (CA) Cooke P:

> Section 3 [of the Bill of Rights Act] also makes it clear that the Bill of Rights 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.

103 See also the general remarks on this issue by Butler, above n 32, 761; Butler and Butler, above n 26, paras 5.8.18–5.8.21.

But maybe the applicant should have such a right. After all, his or her guaranteed fundamental rights and freedoms are – albeit indirectly – affected.[104] 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 NZBORA 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 Human Rights Act 1998 (UK), the Lord Chancellor remarked:[105]

> 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.

Two general issues can be distilled from this statement. 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 NZBORA is conceived not only to restrain governmental conduct, but also to impose positive obligations or duties on the State to secure rights against infringement by private individuals. Secondly, the judiciary would have to be the proper governmental actor for discharging any such obligations by widening or adapting the range of common law causes of action.

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104 In the case of a right against invasion of privacy, matters are further complicated by the fact that the NZBORA does not expressly recognise such a right, notwithstanding Article 17 of the ICCPR, above n 71, 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 has a NZBORA counterpart. On the possibilities for giving 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.

105 Lord Irvine of Lairg, Hansard, HL Vol 583, 24 November 1997, col 785.

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[106] – at least to those which are not already formulated in an prescriptive way, for example the right to be informed of the reasons for an arrest or detention.[107] Against this background, 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"[108] appears quite daring. The contrary view is expressed, for example, by Paul Rishworth who generally sees fundamental rights only as a fetter on State power and not as a reason for its exercise.[109]

A useful starting point for a deeper exploration of this issue might be the long title of the NZBORA. It states in paragraph (a) that the Act is intended to "affirm, protect, and promote human rights and fundamental freedoms in New Zealand". At first sight, the words "promote" and "protect" both seem to point towards 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, that is, to strengthen human rights principles and their observance by combining them in a single, prominent constitutional instrument.[110] Through their very inclusion in an Act, fundamental rights and freedoms are "promoted" and "protected".[111]

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 NZBORA.[112] 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

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106 See for example *Mendelssohn v Attorney-General* [1999] 2 NZLR 268, 272 (CA) Keith J for the Court.

107 New Zealand Bill of Rights Act 1990, s 23(1)(a).

108 Hunt "Human Rights and the Public–Private Distinction", above n 6, 77.

109 Rishworth and others, above n 1, 57 ("They are reasons for governmental restraint rather than action.").

110 See Johan Steyn "Democracy through Law" [2002] EHRLR 723, 731.

111 Rishworth and others, above n 1, 61.

112 *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.

least some of the rights in the ICCPR from interference by private individuals.[113] 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"[114] and to "adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant".[115] 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.[116]

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 Human Rights and Fundamental Freedoms.[117] In *X and Y v The Netherlands*, the ECHR noted that:[118]

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113 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 (Art. 17)" (8 April 1988) para 1 (emphasis added) <http://www.unhchr.ch/tbs/doc.nsf/> (last accessed 31 August 2006):

> 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.

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" (10 March 1992) para 2 (emphasis added) <http://www.unhchr.ch/tbs/doc.nsf/> (last accessed 31 August 2006):

> 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*.

114 ICCPR, above n 71, art 2(1).

115 ICCPR, above n 71, art 2(2).

116 ICCPR, above n 71, 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 arguably implying that an effective remedy must *a fortiori* be provided for any violation by private individuals.

117 See Clare Ovey and Robin White *Jacobs & White – European Convention on Human Rights* (3 ed, Oxford University Press, Oxford, 2002) 38.

118 *X and Y v The Netherlands* (1986) 8 EHRR 235, para 23 (ECHR) (emphasis added).

> [A]lthough 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*.

In *Glaser v United Kingdom*, the Court added that:[119]

> [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,[120] 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:[121]

> [G]enuine, 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 confronted with issues of fundamental rights and freedoms.[122] Considering New Zealand's international obligations and commitment to the ICCPR, affirmed by the long title of the NZBORA, it seems both necessary and prudent to recognise positive obligations to protect rights and freedoms against interference by private individuals at least to the extent required under the Covenant.

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119 *Glaser v United Kingdom* [2000] 3 FCR 193, para 63 (Section III, ECHR).

120 See for example *Airey v Ireland* (1979–80) 2 EHRR 305 (ECHR) and *Artico v Italy* (1981) 3 EHHR 1 (ECHR).

121 *Plattform "Ärzte für das Leben" v Austria* (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 (Article 3 of the Convention), and *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38 (ECHR) in relation to freedom of assembly (Article 11 of the Convention).

122 See Rishworth and others, 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 11; *X (a woman formerly known as Mary Bell) v SO* [2003] EWHC 1101; *Douglas v Hello! Ltd*, above n 11.

2 Positive obligations of the courts – legitimacy issues

This, of course, does not say anything about whether – on the domestic level and under the NZBORA – courts are the proper forum to address 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".[123] Indeed, the legislature could be seen as best placed to make decisions on competing interests in society:[124]

> 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.[125] As section 5 of the NZBORA 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".

In reality, the concerns have little to do with the respective ability of Parliament and the courts to make certain value judgments. They relate much more to the concept of separation of powers[126] – 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

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123 Paul Rishworth and others, above n 1, 101.

124 Patrick J Monahan "Judicial Review and Democracy: a Theory of Judicial Review" (1987) 21 U Brit Colum L Rev 87, 97.

125 Butler "Constitutional Rights in Private Litigation", above n 12, 15; compare also Tushnet, above n 8, 97, who describes how these objections could conceptually be just as powerful when deployed against the ordinary decision-making of common law judges.

126 See Tushnet, above n 8, 95.

arguments,[127] it is important to stress that such views fail to appreciate from the outset that the NZBORA itself:[128]

> [… 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*.

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.[129]

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 interpreted to contain a positive obligation to protect against certain interferences by private individuals;[130] and (2) Parliament has not (sufficiently) incorporated that protective dimension into the general law of the land. In all other cases, especially in the absence of a positive obligation to protect, the judiciary will meet its responsibility under the NZBORA by taking into account the values and standards expressed therein when assessing the need for a development of the common law. The narrower view[131] of the impact of the NZBORA on the common law is thereby accommodated through the overall scheme of applying fundamental rights and freedoms in private litigation.

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127 See Steyn, above n 110, 724.

128 Rishworth and others, above n 1, 120 (emphasis added).

129 See Stemplewitz, above n 82, 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.

130 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 121, para 32 ("Like Article 8, Article 11 *sometimes* requires positive measures to be taken" (emphasis added)).

131 See above Part III B The Impact on the Common Law.

V CONCLUSION

This article has tried to systematically approach the various issues that arise in connection with the NZBORA 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 NZBORA is far from irrelevant to the substantive determination of legal disputes between private individuals.[132] Its role as a shield from inconsistent limitations at the hands of private law rules and corresponding court decisions very much reflects the familiar *modus operandi* of NZBORA litigation involving public actors that come within the ambit of section 3 of the Act. This is the logical consequence of common law and judicial determinations as relevant acts of public power that need to conform to NZBORA 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 limited ability of the NZBORA to act as a sword in protecting rights and freedoms against infringements by private individuals. Instead of speaking of a "horizontal application" of fundamental rights and freedoms as between private individuals, the term "horizontal effect"[133] would therefore 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*-type[134] public law tort action. Finally, the determination of what constitutes a reasonable limitation demonstrably justified in a free and democratic society under section 5 of the Act will inevitably be different where private entities are concerned on either side of the equation.[135]

The fear that a significant effect of the NZBORA on interpersonal relationships will be able to 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 NZBORA 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 NZBORA only guarantees a limited number of rights and freedoms that may become relevant as between private individuals. Since it does not include certain social, economic and property rights elsewhere

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132 As regards procedure, it has always been uncontested that certain guarantees such as the right to natural justice (section 27(1)) and the right to appeal (section 27(2)) apply equally to private litigation.

133 Shaun D Pattinson and Deryck Beyleveld, above n 10, 626.

134 *Baigent's Case*, above n 16.

135 *The Laws of New Zealand*, above n 41, Human Rights, para 28; Butler and Butler, above n 26, para 5.8.10.

recognised, for example, in the German Basic Law[136] or under the United States Constitution,[137] the problem of horizontality remains confined to a manageable framework.[138] 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 NZBORA is more than a "drunk-drivers' charter", and that it can rather offer something to all New Zealanders.

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136 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) 2003/2004" in R Miller and P Zumbansen (eds) *Annual of German and European Law, Vol 2* (Berghan Books, Oxford/New York, 2006) 361.

137 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.

138 For a general discussion of the impact of social democratic constitutional norms on the issue of horizontality see Tushnet, above n 8, 88–92, who, however, argues (at 97) that nations which are comfortable with providing social welfare rights in their constitutions are less likely to find the horizontal effect problem a difficult one.