HORIZONTAL RIGHTS, THE HUMAN RIGHTS ACT AND PRIVACY: LESSONS FROM THE COMMONWEALTH?

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PROTECTION of privacy is one of the areas most often claimed as having the potential for significant development as a result of incorporation of the European Convention on Human Rights ("the Convention"). As is well known, English law lacks a general remedy for infringement of privacy *per se*: although the courts have lamented the lack of protection for private individuals (notably from the press), they have hitherto left it to Parliament to intervene. After flirtation with introducing either a specific statutory code applicable to intrusive journalistic activities or a general statutory tort of infringement of privacy, the Conservative government abandoned the idea altogether.[1] Perhaps because of the lack of legislative concern (politicians, after all, have reasons of strong self-interest not to provoke the press), the judiciary has expressed renewed interest, at least through extra-judicial pronouncements[2] and broad hints in one recent House of Lords decision that the time for reconsideration may be fast approaching.[3]

Much of the press comment at the time of publication of the Human Rights Bill speculated on the possibility of creating a new right of privacy in UK law, enforceable, for example, against intrusive reporters and newspapers. Fear of the possibility was sufficient to rouse the Chairman of the Press Complaints Commission, Lord Wakeham, to air misgivings over the potential restraint of the press—a strange case of the quarry turned gamekeeper turned poacher's lobbyist. In response during the Second Reading

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1. *Government Response to the House of Commons National Heritage Select Committee Report on Privacy and Media Intrusion*, Cm.2918 (1995), rejecting a statutory Press Tribunal, a new civil wrong (proposed earlier in the Lord Chancellor's discussion paper, *Infringement of Privacy* (1993)) or a new civil wrong and criminal offence of placing a surveillance device and taking a photograph on private property without consent in order to obtain personal information with a view to publication (as proposed in the Calcutt Report, *Review of Press Self-Regulation*, Cm.2135 (1993), chap.7). Note, however, the scope of the Protection from Harassment Act 1997, s.1.

2. Esp. Lord Bingham: "Should There be a Law to Protect Rights of Personal Privacy?" [1996] E.H.R.L.R. 450, 461–462 and "The Way We Live Now" [1998] 1 Web. J.C.L.I.

3. In *R.* v. *Khan* [1996] 3 All E.R. 289 Lord Browne-Wilkinson stated it was "not necessary" to decide whether English law recognises a right of privacy but that in view of Arts.8 and 13 the issue was likely to recur (p.291 and cf. Lord Nicholls at p.302).

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debate on the Bill, the Lord Chancellor gave a somewhat confused and contradictory account of the government's intention: while it was not intended to create new rights against private individuals, incorporation of Article 8 might make the creation by the judges of a new right of privacy against newspapers easier, but in doing so the courts would be merely following the emerging direction of the common law.[4] On the other hand, David Pannick QC argued that incorporation ought not to bring about a significant change of attitude on the part of UK courts when faced with claims of privacy raised against newspapers.[5] In the ensuing controversy the Lord Chancellor's ideas on press regulation[6] apparently gave way to those of the Home Secretary when amendments were made to the Bill to protect the press from *ex parte* injunctions protecting privacy.[7] In the froth of media and parliamentary comment some fundamental points about the relevance of the Convention and of the Human Rights Act to private litigation generally, and of Article 8 specifically to privacy issues between private individuals, were somewhat obscured.

The privacy issue is merely the most conspicuous example of an unresolved question—the extent to which the Human Rights Act will, in addition to protecting individuals against the State ("vertical" effect), confer rights on private individuals against one another—"horizontal" effect.[8] Some domestic enthusiasts of incorporation have argued that it might provide the impetus for the creation of new *civil* rights, that is,

4. Lord Irvine of Lairg, *HL Hansard*, Vol.582, cols.1231–1232 (3 Nov. 1997); for a similar, more fully explained, argument see P. Milmo QC, "Human Rights, Privacy and the Press" (1997) 147 N.L.J. 1631.

5. David Pannick QC, "Why the PCC Will Still Have a Role", *The Times*, 18 Nov. 1997.

6. E.g. an interview in which he argued that the Press Complaints Commission might have powers to fine newspapers and of prior restraint: *New Statesman*, 6 Feb. 1998, pp.24–25.

7. The government introduced a new clause (now s.12), which applies wherever a court is considering granting relief which might affect the exercise of the Convention right of freedom of expression: *HC Hansard*, Vol.315, cols.534 *et seq.* (2 July 1998). It will apply mainly to applications for pre-publication injunctions for breach of confidence. Criminal proceedings are excluded. S.12 requires that if the newspaper is not present or represented the court must be satisfied that all practicable steps have been taken to notify it, or that there are compelling reasons why it should not be notified. The court is not permitted to grant an order unless at trial the applicant is "likely to establish" that the publication should not be allowed (this in contrast to the "arguable case" test for interlocutory injunctions). The court is required to have "particular regard" to Art.10 and must also consider the extent to which the information has been or is about to become available to the public, the public interest in publication, and any relevant privacy code (e.g. from the Press Complaints Commission, the Independent Television Commission or the broadcaster itself).

8. In this article I avoid the term, derived from German constitutional law, adopted by Convention scholars to describe the phenomenon—*Drittwirkung*. There are two reasons: first, the several types of *Drittwirkung* appear to be closely tied to features of German constitutional law which have no parallel in the application of the Convention in the UK (e.g. a separate Constitutional Court). (For similar reasons of constitutional difference I avoid reference to the US doctrine of "State action".) Second, "horizontal effect" is the term used in relation to the countries to which I draw the closest comparison *infra*: Canada, South Africa and New Zealand.

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between individuals, and not merely between the individual and the State.[9] The Labour Party's 1996 consultative document, *Bringing Rights Home*, came out generally against horizontal rights. It argued that the Convention's purpose was to protect individuals against the misuse of State power, rather than against one another. The drafting of the Human Rights Act does not, however, deal with the issue explicitly and leaves open a number of possible horizontal arguments.[10] The question has provoked disagreement among constitutional commentators. Wade has argued that the Act will apply horizontally because of the inclusion of courts in the definition of public authorities under section 6.[11] This view is, however, disputed by Kentridge,[12] and Marshall regards the question as open.[13]

The first part of this article introduces the debate about horizontal effect by explaining the theoretical difficulty in separating constitutional or human rights from private law rights. The approach to horizontal effect in three countries recently adopting domestic Bills of Rights is then explored for lessons applicable to the United Kingdom. The next parts analyse different types of horizontal effect which may arise under the Human Rights Act. Finally, the possibility of potential domestic direct horizontal effect for Article 8 of the European Convention is assessed in the light of the approach at Strasbourg and the pre-incorporation attitude of the UK courts.

I. PRIVATE LAW RIGHTS AND CONVENTION RIGHTS[14]

BEFORE considering the drafting of the Human Rights Act for the ways in which horizontal effect might occur, it is helpful to clarify the different

9. For a recent example see C. Graber and G. Teubner, "Art and Money: Constitutional Rights in the Private Sphere" (1998) 18 Ox. J.L.S. 61.

10. This had been urged as a strategy in its own right in earlier proposals in the 1970s: see the House of Lords Select Committee, *Report of the Select Committee on a Bill of Rights*, HL 176 (1977–78), para.41. A Home Office discussion paper was inconclusive: *Legislation on Human Rights With Particular Reference to the European Convention: A Discussion Document* (1976), paras.2.18–2.19 and 4.14–4.15, arguing that the position could be left open or that a bill of incorporation could embody a "State action" doctrine whereby the courts assumed responsibility for ensuring adequate protection of citizens' rights, whatever the source of the threat. The Northern Ireland Standing Advisory Commission on Human Rights preferred a clear statement that the Bill was not intended to apply between private individuals: *The Protection of Human Rights by Law in Northern Ireland*, Cmnd.7009 (1977), para.7.11.

11. University of Cambridge Centre for Public Law, *Constitutional Reform in the United Kingdom; Practice and Principles* (1998), pp.62–64.

12. *Idem*, p.70; and see his judgment in *Du Plessis* v. *De Klerk* (*infra*).

13. *Idem*, pp.79–80; see also the argument of Murray Hunt (n.126 *infra*).

14. "Convention rights" follows the usage of the Human Rights Act 1998, s.1 and Sched.1. Part of my argument is that domestic interpretation of these rights is likely to develop in ways that are not identical with the Strasbourg interpretation, because the margin of appreciation will not apply to domestic courts. Also s.6(1) makes it unlawful for a public authority to act contrary to a person's Convention rights and this may bind bodies domestically for which the

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ways in which Convention rights could theoretically apply in legal disputes between private individuals. The best-known way of classifying private legal relations is the scheme expounded by Hohfeld.[15] Hohfeld distinguished between situations in which one person owes another a legal *duty* and, therefore, a correlative *claim-right* applies, and where the first person has an absence of such a duty (a "*privilege*", called by later writers a "*liberty*") and the second therefore has a "*no-right*". Under Hohfeld's scheme a second set of jural relations concerns the presence or absence of a legal *power* (the capacity to change the legal relations between two individuals). Where one party has a *power*, the second is described as being under a "*liability*". The absence of such a power Hohfeld described as a "*disability*"; the other party enjoys a corresponding *immunity*. This method of analysis, while powerful and precise, fails to capture the dimension that rights commonly come in bundles, that is, we need to employ several of Hohfeld's descriptions at once to arrive at a true picture of the position between two individuals.

The argument against horizontal effect revolves around the lack of positive impact of Convention rights between private parties: because the Convention does not have a visible effect in producing an enforceable *duty* similar to the member State's duty to protect Convention rights, it is usually regarded as inapplicable. Hohfeld, of course, was concerned to expose the fallacy that a "right" (in a generic sense) was always correlative to a duty by cataloguing the variety of legal relations. Using his terminology, the lack of impact of the Convention could equally well be described in rights language. Indeed, where the law recognises a Convention right this will usually manifest itself in relations between private individuals as a negative; in Hohfeld's terms the existence of the right implies a liberty as regards others, often coupled with an immunity. To take the case of free speech: where the right under Article 10 applies, X is free to speak (or not) and Y can neither compel nor forbid X's speech; X has a liberty and Y a no-right. Moreover, Y can do nothing to change X's freedom to speak or not, so we may say that Y is under a disability, while X has an immunity, protecting his liberty. A description of this type is a fuller way of explaining the shorthand that the Convention has no application

UK would not be liable at Strasbourg. Although the Strasbourg jurisprudence is obviously important in interpreting Convention rights (s.2(1) of the Act states that courts should take it into account) it is not strictly binding. Strasbourg rulings on the horizontality of Convention rights (Art.8, considered *infra*) are therefore not determinative and it is appropriate to make comparison with Bills of Rights from similar constitutional settings. It would also be appropriate to consider rulings from the courts of other member States of the Convention where the Convention rights have a comparable domestic status. Lack of space and of accessible material precludes further discussion of this issue.

15. W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1923).

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between X and Y concerning free speech. More accurately, it has no *positive* impact between them. On the other hand, a claim that X has Convention rights against Y would generally be understood to be an argument that Y owes a duty to X *because* of the Convention or, perhaps, that X owes Y a duty but that this duty should be qualified because of X's Convention liberty. This richer rights discourse shows that the Convention could be valuable source material in private litigation, notwithstanding that it does not create enforceable duties or claim-rights between the parties.[16] The important lesson for this discussion is that the law (and State institutions, notably the courts) is no less concerned with protecting an individual's rights when the rights in question are liberties and immunities claimed against another person, than when they are claim-rights.

This may seem an unconventional conclusion, but an example from the field of privacy will help to illustrate and support it. Under the existing law an investigative journalist (A) who trespasses on another's property in order to obtain a photograph of him (B) cannot generally be prevented from publishing the photograph. Hohfeld would say that A has a liberty to publish the photograph (B has a no-right that he should not), notwithstanding that B has a claim-right that A should not trespass on his land (and A has a duty not to do so). Suppose, however, that Parliament made the taking of a photograph by A in these circumstances both an offence and a tort,[17] and added a restraint on the publication of photographs. A could then argue plausibly—although whether successfully or not does not presently matter—that such legislation infringed his rights under Article 10. Equally, we can see that B might be incensed if the police and CPS failed to take action against a persistent journalist who repeatedly entered his property, and their failure to act might be characterised as failing to respect his private life and home under Article 8. If we can accept that there would be at least arguable Convention claims where legislation of this type applied, why should the absence of legislation mean that the Convention is therefore deemed inapplicable? Certainly, a Convention claim might be harder to bring, but why should the form of law which regulates the relationship between A and B be decisive? In the first situation A's liberty and B's no-right derive from common law, whereas in the

16. Judicial reference to (usually) Art.10 of the Convention in cases concerning breach of confidence or unfair dismissal of "whistleblowing" employees fits this analysis, although where disclosure of the source against a third party (e.g. a newspaper) is contemplated under s.10 of the Contempt of Court Act 1981 the State is more obviously involved. "Whistleblowing" cases would fall into my categories (below) of *indirect horizontality*, in the case of development of the common law of breach of confidence, *direct statutory horizontality*, in the question of interpretation of unfair dismissal legislation (under the old law) or of the Public Interest Disclosure Act 1998 (under the new), or *remedial horizontality*, where disclosure of sources is concerned.

17. As recommended by the Calcutt Committee, *op. cit. supra* n.1.

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second B's right and A's duty derive from statute. It may be argued that the decisive difference is that the effect of legislating is to interpose the State as a third party which may infringe A's putative liberty by imposing a duty not to photograph/publish or B's right by not further restraining those who owe duties not to enter his property. On further reflection, however, this is not a convincing justification: the State is no less present between the parties under the common law position in allowing A to publish and in refusing B a remedy. Hohfeld teaches us that much.

Clearly, then, a conceptually watertight distinction between constitutional or human rights enjoyed against the State and private law rights is problematic. Many legal systems have faced this difficulty when introducing a Bill of Rights and both the forms of argument employed and the results are helpful in considering the UK position. The account here will focus selectively on three countries which have undergone recent constitutional reform: Canada, South Africa and New Zealand.[18] In each case a shared legal heritage makes lessons about the interrelationship of constitutional law, statute law and the common law relevant to the United Kingdom, although, inevitably, there are important differences between the status and applications of the various Bills of Rights.

II. A COMPARATIVE SURVEY

CANADIAN experience following adoption of the Charter of Rights in 1982 is instructive. In the well-known decision of *Dolphin Delivery*[19] the Supreme Court held that an injunction issued by the British Columbia Court of Appeal to prevent secondary industrial action was capable of restricting the appellants' rights of freedom of expression under section 2(b) of the Charter (although amounting to a reasonable limitation under section 1), but that the Charter did not bind the actions of courts, or create enforceable rights between private individuals. The Supreme Court was

18. Hong Kong experience is worth briefly noting. Initial drafts of the Bill of Rights contained wording expressly binding persons acting in a private capacity: Hong Kong Bill of Rights Ordinance 1991, s.7. These, however, were diluted in the face of objections raised by the commercial sector and the final text bound only the government, public authorities and persons acting on their behalf: A. Byrnes, "The Hong Kong Bill of Rights and Relations Between Private Individuals", in J. Chan and Y. Ghai (Eds), *The Hong Kong Bill of Rights: A Comparative Approach* (1993). The Hong Kong Court of Appeal has held that the effect of this provision is to prevent horizontal effect and that in effect it overrode a more general provision in the Ordinance requiring legislation which infringed a right to be repealed: *Tam Hing-yee* v. *Wu Tai-wai* [1992] 1 H.K.L.R. 185; see Y. Ghai, "Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights" (1997) 60 M.L.R. 459, 466, and A. Byrnes (1991) 21 H.K.L.J. 377.

19. *Retail Wholesale and Department Store Union Local 580 et al.* v. *Dolphin Delivery Ltd* (1985) 33 D.L.R. (4th) 174, [1986] 2 S.C.R. 573. See G. W. Anderson, "The Limits of Constitutional Law: The Canadian Charter of Rights and Freedoms and the Public-Private

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able to reach this conclusion because although section 52(1) of the Constitution Act 1982 gave the Charter priority over any inconsistent law (including the common law), it was the "government" which was bound under section 32(1) and this did not include the courts.[20] Where governmental, rather than private, action relying on the common law was challenged the Charter would apply. In purely private cases Charter rights would not apply but the court should generally try to develop the common law consistently with Charter *values*; the implication was that clearly inconsistent common law rules applying in private litigation could not be overridden.

McIntyre J stated:[21]

> It is my view that s.32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation ... *It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom* [emphasis added to final sentence].

In the later decision of *McKinney* v. *University of Guelph* La Forest J explained:[22]

> The exclusion of private activity from the *Charter* was ... a deliberate choice which must be respected ... Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual.

La Forest J argued that subjecting all private and public action to constitutional review would mean reopening whole areas of settled law and would be "tantamount to setting up an alternative tort system"[23] and that this "could strangle the operation of society".[24] Similarly, in *Dolphin*

Divide", in C. Gearty and A. Tomkins (Eds), *Understanding Human Rights* (1996); A. Hutchinson and A. Petter, "Private Rights/Public Wrongs: The Libel Lie of the Charter" (1982) 38 Tor. L.J. 278; B. Slattery, "The Charter's Relevance to Private Litigation" (1987) 32 McGill L.J. 905.

20. *Dolphin Delivery, idem* (S.C.R.), pp.600–601. S.32(1) states: "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."

21. *Idem*, pp.598–599.

22. [1990] 3 S.C.R. 229, 262.

23. *Idem*, p.263.

24. *Idem*, p.262.

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Delivery McIntyre J feared that "all private litigation would be subject to the Charter".[25]

Subsequent decisions demonstrate that governmental action can take the form of invoking common law rules as prosecutor in criminal proceedings[26] or seeking a publication ban,[27] or the issue of an injunction on a judge's own motion against a union picketing a court building.[28] Inevitably, *Dolphin Delivery* was followed by a series of cases in which plaintiffs attempted to invoke the Charter by arguing that the defendant was a governmental entity.[29]

In emphasising that the common law should develop in a manner consistent with Charter principles, McIntyre J drew a distinction between private litigants founding a cause of action on the Charter and judges exercising their inherent jurisdiction to develop the common law:[30]

> Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that *this is a distinct issue from the question whether 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. The answer to this question must be in the affirmative* [emphasis added]. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law. But this is different from the proposition that one private party owes a constitutional duty to another, which proposition underlies the

25. *Dolphin Delivery, supra* n.19 (S.C.R.), at p.601.

26. *R.* v. *Salituro* [1991] 3 S.C.R. 654 (common law rule prohibiting spouses, including irreparably separated spouses, from testifying against each other was found to be inconsistent with Charter values, especially equality of women and human dignity). *R.* v. *Swain* [1991] 1 S.C.R. 933 (common law rule allowing the Crown to raise insanity defence, over objections by the accused, violated s.7 of the Charter and therefore modified to comply with Charter).

27. In *Dagenais* v. *Canadian Broadcasting Corp* [1994] 3 S.C.R. 835 a broadcasting company challenged a publication ban which prevented them from broadcasting one of their programmes. It was held that where the common law rule on publication bans conflicted with Charter values, the common law rule must be varied in such a manner as to enable the court to consider both the objective of a publication ban and the proportionality of the ban's effect on protected Charter rights. See further I. Leigh, "Secret Proceedings in Canada" (1996) 34 Osgoode Hall L.J. 113, 121–122.

28. *B.C.G.E.U.* v. *British Columbia (Attorney General)* [1988] 2 S.C.R. 214 (common law rule giving rise to the picketing injunction breached s.2(b) but justified under s.1).

29. *Lavigne* v. *Ontario Public Service Employees Union* (1991) 81 D.L.R. (4th) 454, [1991] 2 S.C.R. 211 (community college acting as "government" in collecting mandatory union dues in violation of s.2(d) (freedom of association), but limitation justified under s.1); *McKinney* v. *University of Guelph* (1990) 76 D.L.R. (4th) 545, [1990] 3 S.C.R. 229 (university imposing mandatory age retirement policy not government action under s.32); *Stoffman* v. *Vancouver General Hospital* (1990) 76 D.L.R. (4th) 700, [1990] 3 S.C.R. 483 (hospital not "government" in imposing age limit on access for doctors); *Eldridge* v. *AG of British Columbia* (1997) 3 B.H.R.C. 137 (hospital subject to Charter in implementing government policy of ensuring all residents receive medical services free of charge).

30. *Dolphin Delivery, supra* n.19 (S.C.R.), at p.603.

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purported assertion of Charter causes of action or Charter defences between individuals.

Indirect promotion of Charter values in the common law may strengthen arguments for protection of privacy.[31] In *Hill* v. *Church of Scientology of Toronto*[32] the Supreme Court considered whether the common law of defamation complied with Charter values. A Crown attorney sued the church for comments made at a press conference at the time the church instigated unsuccessful criminal contempt proceedings against him. The majority held that the attorney's action for damages did not constitute government action within the Charter; although he was a provincial government employee and the action was funded by his employer, the comments impugned his own character, competence and integrity as a lawyer, and not those of the government. Moreover, the proceedings were brought in his own capacity and neither at the instigation nor under the control of the Ministry. Nevertheless, the common law had to be interpreted in a manner consistent with Charter values under the inherent jurisdiction of the courts to modify or extend the common law to comply with prevailing social conditions and values. Protection of reputation was not specifically mentioned in the Charter, but the good reputation of the individual represented and reflected the innate dignity of the individual, a concept which underlay all the Charter rights, and was closely connected with the right to privacy, which was accorded constitutional protection.[33] The Supreme Court found that the common law of defamation struck an appropriate balance between the twin values of reputation and freedom of expression and there was no need to amend it; freedom of speech had to be balanced against the essential need of individuals to protect their reputation. It therefore declined to adopt the US "actual malice" rule from *New York Times Co.* v. *Sullivan*.[34] In *Hill* Cory J emphasised the distinction between Charter *rights* and Charter *values*. Where the latter applied the court should be more cautious in developing the common law and should be careful not to create new causes of action or to subject all court orders to *Charter* scrutiny. There should also be a more flexible approach to limitation of rights than the *Oakes*[35] approach under section 1 than where Charter *rights* were at stake. In the case of governmental action, once a *prima facie* breach of a right is established the

31. See J. Craig and N. Nolte, "Privacy and Free Speech in Germany and Canada: Lessons for English Privacy Tort" [1998] E.H.R.L.R. 162, 166–167.

32. [1995] 2 S.C.R. 1130.

33. The relevant Charter provision is s.8, which provides security against unreasonable search and seizure. In *Roth* v. *Roth* (1991) 4 O.R. 740, 757, Mandel J, (Ont CJ (Gen Div)) a provincial court held that there was a more general tort of infringement of privacy in Ontario, which s.8 recognised one aspect of.

34. 376 U.S. 254 (1964).

35. *R.* v. *Oakes* [1986] 1 S.C.R. 103.

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onus of justifying it falls on the government. However, Cory J argued that in private litigation the party who is alleging inconsistency should bear the onus of proving both that the common law fails to comply with Charter values and that, when these values are balanced, the common law should be modified. The other party was entitled to rely on the settled common law until then.

In the case of South Africa's Bill of Rights under the Interim Constitution the Constitutional Court held in *Du Plessis and Others* v. *De Klerk and Another*[36] that there was no horizontal effect of the right of freedom of speech by way of defence to an action for defamation. On interpreting section 7(1) of the Interim Constitution (1993)[37] the majority found that it was intended to bind only the legislative and administrative organs and that had it been intended to create a duty on the courts, the legislation would have said so explicitly. The majority judgments cited with approval *Dolphin Delivery*, and referred to the difficulties inherent in the US doctrine of State action, and the approach towards *Drittwirkung* taken by German courts in interpreting the Basic Law. However, "indirect" horizontal effect through informing the development of the common law was left open by section 35(3), which required the courts to have due regard to the spirit, purport and objects of the Constitution in developing the common law. The outcome was, then, in effect identical to *Dolphin Delivery*. Kriegler J argued, however, in a passionate dissenting judgment that the outcome ran the risk of legitimising and protecting from constitutional challenge discrimination by private individuals.

The difference of judicial opinion in *Du Plessis* was not between verticality or horizontality of constitutional rights as such. As in Canada (and, it will be argued, in the United Kingdom), it was common ground that statutes had to be read subject to the constitution even in the private law sphere and that the common law should be *influenced* by the constitution in the private sphere—"indirect" horizontality.[38] Essentially the choice was between full or direct horizontality and these weaker forms. Since it will be argued that the UK courts face a similar choice post-incorporation, it is worth considering the judgments in more detail.

Ackermann J argued that direct horizontality would produce

36. 1996 (3) S.A. 850 and see H. Cheadle and D. Davis, "The Application of the 1996 Constitution in the Private Sphere" (1997) 13 S.A.J.H.R. 44. For earlier academic discussion of potential horizontality see A. Van Aswegen, "The Implication of a Bill of Rights for the Law of Contract and of Delict" (1995) 11 S.A.J.H.R. 50; J. De Waal, "A Comparative Analysis of Provisions of German Origin in the Bill of Rights" (1995) 11 S.A.J.H.R. 1, 9–15.

37. "this Chapter shall bind all legislative and executive organs of state at all levels of government".

38. Also described in the judgments as "diagonal" effect, "seepage" or, borrowing from the German terminology, "radiating" effect.

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uncertainty by unsettling common law rules because, unlike litigation by an individual against the State, each party would be able to invoke constitutional rights, leading to numerous conflicts of rights.[39] Moreover, he stated that it was preferable for reform in private law to proceed incrementally as a result of *indirect* horizontality.[40] Kriegler J argued, however, that once indirect horizontality was accepted there was little real difference in accepting direct horizontality,[41] nor would this involve greater uncertainty.[42] For Mahomed DP, though, this was a reason for rejecting direct horizontality, since it would add little to the (already wide) scope of indirect horizontality;[43] the force of this argument depends on the judge's recognition of the full extent to which private law is underpinned by legal recognition of a variety of rights.[44] Kentridge AJ dismissed the argument that since direct horizontality applies in the case of statutes it is fortuitous whether a particular rule of law has survived under the common law and, therefore, is not subject to direct horizontality.[45] Finally, Ackermann J argued that the constitution was intended to confer rights on individuals, whereas horizontality would result in the imposition of duties.[46] This argument neglects Hohfeld's insight into the variety of rights involved and the fact that indirect horizontality also involves the imposition of duties.

A different approach was advocated by Madala J: that direct horizontal effect should be considered in the context of each specific constitutional right rather than according to a general principle.[47] This approach is adopted by the Bill of Rights in the Final Constitution (1996), which departs from the interim text by including the following: "A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right."[48]

The court's duty in such cases is dealt with in detail in section 8(3), which requires the development of the common law if legislation does not give effect to the right in question, but also permits the common law to

39. *Du Plessis, supra* n.36, at p.900.
40. *Idem*, pp.903 *et seq.*
41. *Idem*, p.910.
42. *Idem*, p.916.
43. *Idem*, pp.891–897.
44. Although Hohfeld is not cited, the similarity with the argument above is clear.
45. *Du Plessis, supra* n.36, at p.879.
46. *Idem*, pp.901–902.
47. *Idem*, pp.925 *et seq.*
48. Constitution of the Republic of South Africa 1996, Chapter 2, Bill of Rights, s.8(2). In addition, s.9(4) imposes a specific duty on private individuals not to discriminate against others on a comprehensive set of grounds. See Cheadle and Davis, *op. cit. supra* n.36, at pp.60–65; A. Butler, "Private Litigation and Constitutional Rights under s.8 of the 1996 Constitution—Assistance from Ireland" (1999) 116 S.A.L.J. (forthcoming).

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belimitation developed to limit rights, if the test of reasonable and justifiable in section 36(1) is satisfied.[49] These provisions were introduced as a direct result of political antipathy (especially by the ANC) to the Constitutional Court's judgment in *Du Plessis*.

Textual and constitutional differences make some other arguments in *Du Plessis* of less interest in a UK context,[50] although differences in drafting are, nevertheless, revealing. Some difficulties arising from full horizontal effect which influenced members of the court do not apply in the United Kingdom. Since the Human Rights Act does not create a separate constitutional court there would be no risk of jurisdictional conflict or that the Constitutional Court would have power to strike down common law rules but not to fill the vacuum so created.[51] Under the Human Rights Act *all* courts have a duty to interpret legislation wherever possible in accordance with Convention rights[52] and this duty sits alongside the normal armoury of judicial techniques for developing the law and not in a separate constitutional jurisdiction. Ackermann J and Sachs J[53] argued that horizontality would impede law reform in the private law sphere, which would then become a matter of constitutional reform rather than of ordinary legislation. The deference shown to parliamentary sovereignty under the Human Rights Act (the Act has the status of ordinary legislation, the judges have no power to strike down legislation and there is no stipulated procedure for legislative amendment or override of the Act) means also that the risk of limiting legislative capacity by treating private rights as constitutional rights does not arise in the United Kingdom in the same way.

49. Cheadle and Davis, *idem*, p.66, describe the effect: "The potential for horizontal application calls into question the private/public divide which previously lay at the centre of the legal system. But it does so not by creating a direct, separate constitutional cause of action, but rather by ensuring that the newly created constitutional action must be mediated by our common law."

50. In favour of direct horizontality it was argued: on textual analysis of the Constitution it was intended to apply to all forms of law as supreme law and that purposive interpretation of the Constitution required constitutional safeguards in private law because of the history of systematic oppression and discrimination under apartheid and before: *Du Plessis*, *supra* n.36, at pp.911 *et seq.* (*per* Kriegler J). Against direct horizontality it was argued that on textual analysis the Constitution was not intended to treat the courts as governmental organs and that "teleological" interpretation of the Constitution showed an intention to treat the public and private spheres differently, with indirect horizontality applying to the latter: *idem*, p.906 (*per* Ackermann J).

51. See Kentridge AJ (*idem*, pp.880 *et seq.*). However, Kriegler J, *idem*, p.919, argued that direct horizontal effect avoided anomalies in separating public and private law. Sachs J referred (*idem*, p.934) to the difficulties which the Constitutional Court would have in developing remedies in private law. This factor seems to have influenced the drafting of s.8 of the final version of the Constitution (*supra*).

52. S.3(1).

53. *Du Plessis*, *supra* n.36, at pp.906 and 931 respectively.

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In New Zealand, despite academic speculation from the inception of the Bill of Rights,[54] the question of horizontal effect has yet to be authoritatively determined by the courts. Arguments for horizontal effect are based on the scope of section 3 of the Bill of Rights Act 1990:

> This Bill of Rights applies only to acts done—
> (a) by the legislative, executive, or judicial branches of the government of New Zealand; or
> (b) by any person or body in performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

The reference to acts done by the judicial branch has been treated as importing the Bill of Rights into decisions about discretionary judicial orders; for example, orders restricting reporting of a criminal trial[55] or a refusal of an adjournment which leaves a defendant unrepresented.[56] In the private law sphere, section 14 of the Bill of Rights Act (protecting freedom of expression) has been held to "strengthen" the common law's reluctance to grant an injunction to restrain an allegedly defamatory broadcast.[57] Conversely, the same provision has been cited as a reason why the Court of Appeal should not strike out an application for an injunction requiring a broadcaster to issue a retraction or right of reply in a defamation action.[58] The rationale is unclear, however—Cooke P argued partly that the Bill of Rights might be relevant because of the broadcaster's statutory obligations as a public authority and its claim of qualified privilege on grounds of public interest (thus bringing it within the scope of the "public function" provision of section 3(b)).[59]

The New Zealand Court of Appeal has also given an extended interpretation to governmental actions under section 3, so that repeated passing of information to the police by an accountant about his employer was subject to the protection from unreasonable search and seizure (section 21 of the Bill of Rights Act), with a corresponding exclusion of unlawfully obtained evidence.[60] While the Act did not apply to a search

54. A. Butler, "The New Zealand Bill of Rights and Private Common Law Litigation" [1991] N.Z.L.J. 261; P. Rishworth, "The Potential of the New Zealand Bill of Rights" [1990] N.Z.L.J. 68; M. Chen, "Self-Regulation or State Regulation? Discrimination in Clubs" (1993) 15 N.Z.U.L.R. 421, 431–436; P. Joseph, *Constitutional and Administrative Law in New Zealand* (1993), pp.855–856.

55. *R.* v. *Liddell* [1955] 1 N.Z.L.R. 538, 546–547 (*per* Cooke J); *Police* v. *O'Connor* [1992] 1 N.Z.L.R. 87, 97–99 (*per* Thomas J).

56. *R.* v. *Shaw*, CA, 20 Aug. 1991, cited in Joseph, *op. cit. supra.* n.54, at p.855.

57. *Auckland Area Health Board* v. *Television New Zealand* [1992] 3 N.Z.L.R. 406, 407 (*per* Cooke P).

58. *TV3 Network Ltd* v. *Eveready NZ Ltd* [1993] N.Z.L.R. 435 (refusal to strike out application for corrective injunction).

59. *Idem*, p.441.

60. *R* v. *H* [1994] 2 N.Z.L.R. 143, 147–148 (*per* Richardson J).

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conducted by one private individual against another, the Court held that police encouragement after the initial contact by the employee gave the subsequent disclosures the character of "governmental action", thus bringing them within the Bill of Rights protections. Citing the reach of the Bill of Rights Act to judicial acts under section 3, Richardson J stated:[61]

> There is considerable force in the view that the courts should ... recognise the Bill of Rights protections as and when appropriate in evolving the common law. But the present case does not on its facts call for consideration of the manner in which the Bill of Rights might be reflected in particular areas of common law.

The issue arose again in *Lange* v. *Atkinson*,[62] where the New Zealand High Court considered the effect of section 14 of the Bill of Rights (guaranteeing freedom of expression) on the scope of the defence of qualified privilege. The former Prime Minister of New Zealand failed in his application to have the defendant's defence of qualified privilege struck out in an action for defamation arising from a magazine article which portrayed him as irresponsible, dishonest, insincere, manipulative and lazy. Elias J used the Bill of Rights Act (and also the Electoral Act 1993 providing for proportional representation) as an authoritative guide to where the "common convenience and welfare" of New Zealand society lay: the legislation demonstrated clearly the fundamental importance attached to representative democracy. In the light of this it was appropriate to reinterpret the common law to extend qualified privilege to give protection for political discussion, and this might apply to discussion of an individual's performance in the highest elected office in New Zealand where the communication was from the media to the population as a whole.[63] However, the judgment leaves open whether the basis for this approach is direct or indirect horizontality. Elias J was prepared to acknowledge that since section 3 of the Bill of Rights bound the judiciary, the Act should therefore apply to the common law, but, in view of the defendant's concession that the Act was a "guiding principle" for development of the common law (in effect "indirect horizontality"), she found that the argument had "no real significance".[64] The judgment seems to proceed as an indirect application of the Bill of Rights.

61. *Idem*, p.147.

62. [1997] 2 N.Z.L.R. 22; affirmed by the New Zealand Court of Appeal: *Lange* v. *Atkinson* (1998) 4 B.H.R.C. 573. In the UK the Court of Appeal has declined to follow *Lange* on the scope of qualified privilege: *Reynolds* v. *Times Newspapers* [1998] 3 W.L.R. 862, 906–7. See also I. Loveland "The Constitutionalism of Political Libels in English Law?" [1998] P.L. 633.

63. [1997] 2 N.Z.L.R. 22, 45–47; and cf. the New Zealand Court of Appeal, *supra* n.62, at p.597 and pp.610–612.

64. *Idem*, p.32. In *Duff* v. *Communicado Ltd* [1996] 2 N.Z.L.R. 89, 99 Blanchard J stated: "contempt of court, like any other part of the common law, is subject to the Bill of Rights by virtue of s.3(a) thereof".

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It is unclear, then, whether the Bill of Rights Act 1990 is a source of law requiring full recognition in the common law between private individuals. However, acknowledgement of its importance as a guiding principle and an indication of public policy, preparedness to recognise its relevance to the exercise of judicial discretion in private litigation, and the extended scope given to governmental acts, all allow for limited horizontal effect. Moreover, as in Britain, the Bill of Rights is relevant to the interpretation of statutes applicable between private persons, since these constitute legislative acts for the purpose of section 3. Clapham has suggested that the New Zealand approach involves a careful balance which avoids the creation of new constitutional causes of action against private individuals, but allows the Bill of Rights some application in private litigation "once the case is before the judge" and that this might be an appropriate approach in the United Kingdom given the interpretative status of the Convention.[65]

III. HORIZONTALITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

PRIOR to incorporation a simple filtering mechanism prevented the development of horizontal effect of the Convention in UK law. Individuals do not possess standing to take proceedings against other individuals under the Strasbourg machinery.[66] Hence, any legal duties imposed on other individuals or qualification of their rights, liberties, powers or immunities as a result of the promotion of another individual's rights, liberties, powers or immunities under the Convention are achieved only through amendment of the law by Parliament or the courts in response to adverse Strasbourg rulings. The same discipline requires applicants to characterise their claims in Strasbourg as a failure by the State (including its courts) to secure their Convention rights (as required under Article 1), even where, more naturally, the legal dispute would be with another private individual, were that route open. For example, a family breakdown becomes characterised as a State's failure to respect or interference with family life under Article 8 because of the unavailability of an order of judicial separation.[67]

The issue of whether the Convention has "horizontal" effect to create rights between private individuals has been considered at the Strasbourg

65. A. Clapham, *Human Rights in the Private Sphere* (1993), pp.341–342.

66. Art.34 allows complaints by individuals, NGOs or groups of individuals claiming to be a victim of a violation "by one of the High contracting Parties", and under Art.35 the Court shall consider an application inadmissible if it is incompatible with the Convention, manifestly ill-founded, or an abuse of the right of petition (references are to the text as amended by Protocol 11). See further Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (1995), pp.630–638.

67. *Airey* v. *Ireland*, Ser.A, Vol.32, paras.31–32.

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level.[68] The Court has argued that in some instances, and especially with regard to Article 8, a member State must protect the positive rights of individuals, rather than merely refraining from interfering itself with their rights.[69] On occasion it has been held that the State may be responsible for failing to prevent legal action by a private individual which impedes the exercise of another's Convention rights.[70] Thus in one case a failure to provide for the possibility of prosecution for sexual assault on a mentally handicapped woman was held to violate Article 8. The Court stated that respect for Article 8 "may invoke the adoption of measures designed to secure respect for private life even in the sphere of the relations between the individuals themselves".[71] However, the European Commission of Human Rights decided in *Winer* v. *UK* that the absence of a right of privacy against private individuals in UK law did not violate the applicant's rights under Article 8.[72] The Commission treated the ability to sue for defamation as sufficient protection. Similarly, in another admissibility decision the Commission found that English law provided sufficient remedies for harassment and so there was no violation of Article 8.[73] In other cases the Commission has treated surveillance by one private individual of another as outside Article 8.[74]

68. For a full account analysing the potential for horizontal effect of each art. of the Convention, see Clapham, *op. cit. supra* n.65, at chap.7; also A. Clapham, "The Privatisation of Human Rights" [1995] E.H.R.L.R. 20.

69. See generally Harris, O'Boyle and Warbrick, *op. cit. supra* n.66, at pp.19–22; esp. *Airey* v. *Ireland*, *supra* n.67; *Marckx* v. *Belgium* (1979–80) 2 E.H.R.R. 330 on the scope of "respect for family life" in Art.8; and *Lopez Ostra* v. *Spain* (1995) 20 E.H.R.R. 277, paras.51–58 (State responsible under Art.8 for environmental pollution to neighbour from waste reprocessing plant since municipality allowed it to be built and failed to take legal action against it, but on the facts some direct State responsibility due to public subsidy); see also *Guerra and Others* v. *Italy* (1998) 26 E.H.R.R. 357.

70. E.g. Art.11 violated by power of trade union: *Young, James and Webster* v. *UK* (1982) 4 E.H.R.R. 38; duty to take reasonable and appropriate measures to protect demonstrators from counter-demonstrators: *Platform Ärzte für das Leben* v. *Austria*, Ser.A 139 (1988).

71. *X and Y* v. *The Netherlands*, Ser.A 91 (1985), para.23. Cf. *A* v. *UK*, judgment of the European Court of Human Rights, 23 September 1998 in which the Court upheld the applicant's claim of a violation of Art.3 for which the UK was responsible, arising from corporal punishment administered by a child's stepfather, notwithstanding the acquittal of the stepfather on criminal charges arising from the incident. In view of its finding on Art.3, the Court did not find it necessary to conclude whether there had also been a violation of Art.8.

72. *Winer* v. *UK*, 1986, Appl. No.10871/84, 48 D. & R. 154. Cf. *Stewart-Brady* v. *UK* (Appl. Nos.27436/95 and 28406/95, admissibility decision 2 July 1997), *N* v. *Sweden*, Appl. No.11366/85 (admissibility decision of 16 Oct. 1986) and *Earl and Countess Spencer* v. *UK* Appl. Nos.28851/95 and 28852/95. See S. Naismith, "Photographs, Privacy and Freedom of Expression" [1996] E.H.R.L.R. 150, 157–158.

73. *Whiteside* v. *UK* Appl. No.20357/92 (decision of 7 Mar. 1994); cf. *V* v. *France*, Appl. No.14636/89 (decision of 18 Oct. 1991).

74. *JS* v. *UK*, Appl. No.191173/91, 3 Jan. 1993 (clandestine surveillance by insurance company in connection with claim); *Basson* v. *France*, Appl. No.21120/93, 1 Feb. 1993 (tape recording of telephone conversation made by co-accused).

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In some ways the broad interpretation of Article 8 at Strasbourg weakens the case for domestic horizontal effect. Feldman has summarised the jurisprudence as moving beyond spatial privacy to encompass personal security, self-fulfilment and personal identity, the organisation of family life and relations, sexual mores and some business activities.[75] He argues that the underlying interests protected can be subsumed under the "moral integrity of the person". This notion is difficult enough to apply in delineating permissible State interference and State obligations towards the individual and the family. However, if applied in the private domestic sphere the result would be destabilising, with every personal tort open to reinterpretation in the light of plausible Article 8 arguments on both sides. Such an undesirable exercise in uncertainty risks seriously damaging the balancing of private interests in the common law.[76] Furthermore, some interests which have been balanced in the development of the common law are missing from the Convention (for example, freedom of contract). This reflects the origin of the Convention as a set of protections against the State. To give it full horizontal effect would result in other inter-personal interests being devalued in the future development of the law. This would be arbitrary, for, had the Convention been drafted with contemplated horizontal effect, rights such as freedom of contract and testamentary freedom would surely have featured and other inter-personal rights, such as privacy and marriage, might have been both more specific and more qualified.

In the case of a putative domestic right of privacy built upon the Convention there is a further problem: the drafting of Article 8 clearly reflects its origin as an international right for the individual against the State. The qualifications permitted to the right of respect for private life, home and correspondence refer only to those permitted by a "public authority"[77] (although these do include within the list of reasons "for the protection of rights and freedoms of others"). If Article 8 were lifted out of this context and applied in a simple fashion horizontally it could be argued that the right of privacy against a private individual is unlimited. The Strasbourg jurisprudence somewhat skirts this difficulty by regarding the State as having positive obligations under Article 8 to which the restrictions in Article

75. D. Feldman, "The Developing Scope of Article 8 of the European Convention on Human Rights" [1997] E.H.R.L.R. 265, 266–267.

76. Cf. Lord Wilberforce in *Blathwayt* v. *Baron Cawley* [1976] A.C. 397, 426 (testamentary freedom not to be curtailed by development of public policy using Art.9 ECHR) and Lord Woolf in *Spring* v. *Guardian Assurance plc* [1995] 2 A.C. 296, 352 (freedom of speech re reference to be balanced against common law freedom not to be deprived of opportunity of earning livelihood in chosen profession).

77. Art.8(2): "there shall be no interference by a public authority with the exercise of this right except ...". This contrasts with the wording of Arts.9–11, which do not restrict the limitations to the actions of the State.

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8(2) are also relevant.[78] A domestic court would confront it directly. In a different constitutional setting judicial ingenuity might then compensate by limiting the class of activities falling within private life. However, it is doubtful how far a UK court could go in this direction, in view of the very wide reading already given to respect for private life at Strasbourg, where of course the right is subject to a substantial list of permissible restrictions. A second approach would be to give Article 8 a narcissistic reading in conjunction with Section 6(3) so that the words "no interference by a public authority except..." are taken to refer to the Court itself. This would be consistent with the Strasbourg approach of treating the State as responsible for judicial acts[79] and with the definition of a "public authority" as including a court. A third possibility would be for a court to argue there is an implied balance in the Convention rights in view of the protection for freedom of speech in Article 10 (subject to permissible limitations for, *inter alia*, "the protection of the reputation of others" and "for preventing the disclosure of information received in confidence") and that this should qualify the scope of the protection of Article 8.[80] However, this could equally be taken as showing that Article 8 should take priority over Article 10. In truth, once embarked on an exercise of this kind the court would be using the articles selectively in a way that they were not drafted to be used, and the results would be unpredictable.

IV. HORIZONTALITY AND THE HUMAN RIGHTS ACT

THE Human Rights Act gives no power to judges to overrule or disapply statutes which contravene Convention rights (except in the case of Scotland, where Acts of the Scottish Parliament are to be vulnerable to challenge in this way). Instead, courts at all levels are under a duty to do everything possible to interpret legislation in conformity with Convention rights. Where this is not possible, superior courts will be able to give a declaration of incompatibility. This does not of itself change the law or give a remedy to the applicant. Instead it acts as the trigger for ministers to introduce an order to amend the law (a remedial order or "fast-track" order). Parliament, then, is given the last word on conformity. Orders may be retrospective but there is no guarantee that a litigant who persuades a court to grant a declaration of incompatibility will ultimately benefit from it. Public authorities (a term of definitional inexactitude under the Act, but specifically including courts) will act unlawfully if they contravene a

78. *Powell and Rayner* v. *UK* (1990) 12 E.H.R.R. 355, para.41; *Lopez Ostra* v. *Spain*, *supra* n.69, at para.51.

79. E.g. see *Markt Intern*, *infra* n.115. In *Derbyshire CC* v. *Times Newspapers* [1992] 3 All E.R. 65, 79 Balcombe LJ took this approach, arguing that both the court and the council were public authorities within Art.10(2).

80. For a similar argument see The Hon. Sir John Laws, "The Limitations of Human Rights" [1998] P.L. 254, 263–264.

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person's Convention rights unless clearly required to do so by statute. The Act's main devices for strengthening respect for the Convention are threefold: pre-legislative review by ministers and Parliament, the strong interpretative duty laid on courts and tribunals; and the new duty on public authorities. Changes to the common law are not explicitly mentioned, but it is debatable that they may be implied from the inclusion of courts as public authorities.

Within this framework, several potential forms of horizontal effect arise. First, statutes applying between private individuals are subject to the interpretative duty to give effect wherever possible to Convention rights ("direct statutory horizontality"). Second, an extended application of the Convention may arise if bodies or persons for which the State would not be liable under the Convention machinery were to be treated as public authorities for the purpose of the Act ("public liability horizontality"). Controversy in the parliamentary debates over the possible application of the Act to churches and religious charities centred around this issue.[81] Third, public authorities may have powers to protect one person against infringements of his or her Convention rights emanating from another private person: the effect of section 6 may be to compel the public authority to intervene where it has such powers ("intermediate horizontality"). Fourth, judges exercising discretionary powers in private litigation must do so in conformity with Convention rights, since courts are counted as public authorities under section 6(3)(a) ("remedial horizontality"). It is clear, irrespective of the Act that (fifth) the Convention should be influential in the general development of the common law as it applies between private parties ("indirect horizontality"). Finally, it is arguable that the inclusion of courts as public authorities requires (sixth) horizontal effect to be given to Convention rights in all private common law litigation, whether or not the pre-incorporation law was uncertain. I argue below against this "full" or "direct" type of horizontality, both as a matter of textual exposition and in principle, while accepting that the other five forms of horizontal effect exist. Each will be considered in turn and with reference to its possible application to privacy.

A. Direct Statutory Horizontality

Although section 1(2) provides that the Convention rights are to "have effect", this is "for the purpose of this Act", which rather begs the question

81. *HL Hansard*, Vol.585, cols.770 *et seq.* (5 Feb. 1998); *HC Hansard*, Vol.312, col.1014 (20 May 1998); for analysis: I. Leigh, "Towards a Christian Approach to Religious Liberty", in P. Beaumont, *Christian Perspectives on Human Rights and Legal Philosophy* (1998), pp.83–99.

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of whether the rights are vertical only or also horizontal. The subsequent purposes include the duties to read and give effect to *legislation* so as to achieve compatibility (section 3(1)) and, where this is not possible, (in the case of the High Court and above) to give a certificate of incompatibility (section 4). Nothing in the text limits these judicial duties to legislation applying only between public authorities and the individual. In this respect the effect is similar to New Zealand and (allowing for the difference between a power to strike down and an interpretative duty) to Canada and South Africa. It was accepted in Canada and South Africa that if the constitutional guarantee binding the legislature was to be given full effect it must apply to the same degree in legislation applying between private parties as to other legislation.[82] The same point applies to an interpretative duty. If this principle were not applied the perverse result would be that the same legislative provision would require different interpretations depending on whether the defendant was a governmental entity or a private individual. It does, however, create a further anomaly in systems which deny *full* or *direct horizontality*: whether horizontal rights apply depends on the accident of whether a particular area of law has been codified, rather than on a principled delineation of the public and private spheres.[83]

Where the civil relationship is a statutory one a court is, therefore, bound to use Convention rights in construing the statute. It might then be possible to qualify or extend a statutory duty by interpretation to import a newly fashioned right under section 3. Employment law is an obvious area where this approach might be used, for example to fill in gaps in anti-discrimination legislation or the law relating to industrial disputes. The wide reach of "private life" under Article 8, which includes matters of sexual autonomy, may give scope for an extended reading of sex discrimination legislation; for example, to combat pregnancy or sexual orientation discrimination or sexual harassment.[84] This approach will generally be of little assistance in the case of privacy where the legal defect is the absence of an existing legal remedy, not an inhospitable or inadequate statutory one. One statute which, however, does affect inter-personal privacy is the Data Protection Act 1998, which confers statutory rights on "data sub-

82. In *Re Blainey and Ontario Hockey Assn.* (1986) 54 O.R. (2d) 513 a statutory exemption in a non-discrimination statute was held to be incompatible with the Charter of Rights in a private claim.

83. The extent to which this is anomalous will in turn depend on whether there is in any given context much difference between direct horizontality and indirect horizontality (which will apply nevertheless).

84. However, a potential problem in the former case is that the Convention contains no right to employment as such.

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jects" against "data controllers", enforceable in the High Court.[85] Similarly, section 3 of the Protection from Harassment Act 1997 creates a civil remedy for a person claiming to be a victim of a course of conduct of harassment, since the concept of harassment involves consideration of reasonableness of belief and (by way of defence) of conduct,[86] there is considerable scope for interpretation by reference to Article 8.

B. Public Liability Horizontality

A further device for avoiding the restricted impact of the Convention has many parallels in the applicability of European Union law. The relationship between the individual and a public body may be at stake, although the law applicable to the legal relationship may correspond to a greater or lesser degree with that which would apply if another private individual stood in place of the public body. This is most likely to occur where the State acts as employer, contractor or tortfeasor. A good example is the recent case in which Alison Halford (a former senior police officer) succeeded in her claim of a violation of Article 8 as regards the interception of calls by her employer in her office.[87] In so holding the Court specifically referred to the fact that her employer was a public body. The outcome may be that employees may have an expectation of privacy at work under Article 8 if they work for a public body, but not if their employer is a private company—a position which is hard to justify in principle.

In the case of the Human Rights Act this position is further complicated by section 6(5), which excludes the duty of some public bodies (those which qualify only because some of their functions are public) to act compatibly with Convention rights, "if the nature of the act is private". The government's intention was that there should be two categories of "public authorities" under section 6: those to whom the Convention rights apply whatever function they are undertaking (such as government departments, local authorities and the police) and those which are hybrid, where the Convention will apply in respect of public functions, but not private functions.[88] The legislation fails to delineate either category more clearly or to specify the relevant criteria for drawing the divide between public and private functions. Indeed ministers seemed to contemplate with equa-

85. Pt. II confers rights of subject access and of compensation, rectification and erasure for inaccuracy. See also Defamation Act 1996, s.2 (scope of the defence of "an offer to make amends").

86. Protection from Harassment Act 1997, s.1(2) and (3)(c).

87. *Halford* v. *UK* (1997) 24 E.H.R.R. 523, para.48; however in *Young, James and Webster*, *supra* n.70, the Court argued that it was irrelevant to the question of violation of their rights under Art.11 that the applicants were State employees (of British Rail): para.49.

88. *HL Hansard*, Vol.582, col.1232 (3 Nov. 1997) (*per* Lord Irvine); *HC Hansard*, Vol.314, cols.406 *et seq.* (17 June 1998) (*per* Rt Hon. Jack Straw).

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nimity the possibility that bodies not traditionally regarded as State organs might fall within section 6.[89]

There is a credible argument that employment should be regarded as private in nature; comparable reasoning has prevailed in judicial review.[90] It might, therefore, be open to a UK court interpreting the Human Rights Act to take a different view from the European Court of Human Rights on the applicability of Article 8 to public employees in the workplace, but if it did so Strasbourg *might* nevertheless find a violation, following *Halford*. Or, on the other hand, if employees of "pure" public authorities are treated as entitled to Convention rights on the basis that by definition such authorities have no private functions, will it not appear anomalous if those of "hybrid" public authorities in similar situations are treated as falling into the private functions category, and so have none? There may, therefore, be domestic pressure to grant horizontal rights by blurring the public/private functions distinction in the quest for symmetry, irrespective of entitlement at Strasbourg.

C. Intermediate Horizontality

Although Labour's consultative document on incorporation was generally against horizontal rights, the following paragraph qualified this general approach:[91]

> Individuals would in certain circumstances be able to use the new Act to seek to secure effective action by public authorities to protect them against abuse of human rights by private bodies or individuals. Nevertheless, this new legislation is not intended to alter existing legal relationships between individuals.

The White Paper,[92] on the other hand, made no mention of the possible use of Convention rights against other private individuals, even via the indirect route of alleging failure on the part of a public authority to give protection against the actions of another person.

Comparable arguments to those in the consultative document might be developed following incorporation: where a public body is given powers which could be used to protect a person's privacy against interference by another private individual, the failure to do so might be an unlawful act under section 6. There is power, for example, to prosecute for unlawful interception of communications (section 1 of the Interception of Communications Act 1985), for malicious or obscene telephone calls, against

89. E.g. Rt Hon. Jack Straw, *idem*, col.406, "we wanted a realistic and modern definition of the state so as to provide correspondingly wide protection against abuse of human rights".
90. *R.* v. *East Berkshire, HA ex p. Walsh* [1985] Q.B. 152.
91. Labour Party, *Bringing Rights Home* (1996), p.7.
92. *Rights Brought Home*, Cm.3782 (1997).

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stalkers (under the Protection from Harassment Act 1997). Demands might be made that respect for privacy as a Convention right requires the police to take action[93] or the Crown Prosecution Service to prosecute for criminal trespass or watching and besetting, obstruction of the highway, or causing a breach of the peace against pickets or tabloid journalists. The Data Protection Commissioner might be claimed to violate Article 8 by failing to take effective enforcement action against data controllers whose actions threaten the privacy of data subjects. Likewise, the Broadcasting Complaints Commission, whose statutory functions include the consideration of and adjudication upon complaints of "unwarranted infringement of privacy in, or in connection with the obtaining of material included in" radio and television programmes,[94] might similarly be pressured to act in defence of privacy against broadcasters under Article 8. Equally, its non-statutory cousin, the Press Complaints Commission, might qualify as a public authority for these purposes since, in the wording of section 6(3), it exercises functions of a "public nature" by acting as a self-regulatory body over newspapers and could, therefore, be subject to judicial review for acting in a way which is incompatible with a complainant's Convention right of privacy.[95] In some of these instances, the public body would have to take account also, though, of the rights of free speech under Article 10

93. Cf. *Osman* v. *UK* (87/1997/871/1083) judgment of the European Court of Human Rights of 28 October 1998, in which the Court rejected, on the facts, the applicants' claims of violations of Arts.2 and 8 arising from police failure to protect the complainant from harassment and his father from being killed by a psychologically disturbed teacher. Domestic negligence proceedings had failed: *Osman* v. *Ferguson and Comm. of Police for the Metropolis* [1993] 4 All E.R. 344. However, the European Court of Human Rights found that the treatment by the Court of Appeal of the applicants' negligence action as effectively barred by the public policy exclusion amounted to a violation of Art.6(1).

94. Broadcasting Act 1990, s.143(1).

95. The government's view vacillated. The Lord Chancellor initially advised that the PCC would not be a public authority but later revised that opinion. In the Commons' Committee stage the Home Secretary expressed the considered view that the PCC would be a public authority, but that the press itself would not be (*HC Hansard*, vol.314, col.414 (17 June 1998)). It may still be argued, however, that the PCC is not a "public authority": Wade notes its lack of coercive powers and doubts that complaint to the PCC would be regarded as an effective remedy for the purpose of Art.13 (*supra*, n.11, 64–65). Colin Warbrick has pointed out to me that a newspaper is free both to disregard the Commission and to leave its jurisdiction. In *R.* v. *Press Complaints Commission, ex p. Stewart-Brady*, 18 Nov. 1996, CA it was held to be arguable that the PCC was subject to judicial review but that the court should not intervene for technical breaches of the Commission's Code. The Broadcasting Complaints Commission is subject to judicial review: *R.* v. *BCC, ex p. Granada Television, The Times*, 31 May 1993 (QBD) and *R.* v. *BCC, ex p. Barclay* [1997] C.O.D. 57.

Public liability horizontality might also arise in relation to the media: Lord Williams of Mostyn thought that the BBC and Channel 4 would be public authorities, but that some commercial television stations would not (*HL Hansard*, Vol.582, col.1309 (3 Nov. 1997)). The position of the BBC has not been formally resolved under the ECHR jurisprudence: compare *BBC* v. *UK* (1996) 21 E.H.R.R. C.D. 97 (complaint manifestly ill-founded, no need to determine whether BBC entitled to complain) and *Hilton* v. *UK*, Appl. No.12105/86 (rejection of complaint based on vetting by BBC and Security Service).

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and of association under Article 11, of the individual complained against. Reasoning along these lines under section 6 might conceivably have altered the course of some ill-fated privacy claims: Gordon Kaye, for example, might have had an action against the health authority for failure to shield him from tabloid journalists while in hospital;[96] the application for judicial review brought in respect of the Police Complaints Authority investigation into police bugging might have taken a different course.[97]

It is, however, perhaps an inevitable consequence of approaching what are in reality private disputes through the medium of intermediate liability of the public authority that the true nature of the issues will be partly obscured. As a consequence, the balancing of the respective interests of the private parties may often be subsumed under the discretionary powers of the public authority to pursue societal interests. For example, in assessing any liability of the Crown Prosecution Service for failure to protect rights under Article 8 in the examples above, much would turn on interpretation of discretion under the Code for Crown Prosecutors, governing when to institute proceedings, or not, in the public interest.

D. Remedial Horizontality

Like the New Zealand Bill of Rights Act, but unlike the Canadian Charter and the South African Constitution, the courts are specifically bound by Convention rights under the Human Rights Act. Moreover, like the New Zealand Act, but in contrast to the latter two, the Act contains no declaration of its effect on the common law. Instead, the possible effect of section 6, which makes it unlawful for a public authority to act incompatibly with a Convention right and which specifically applies to courts,[98] on judicial development of the law must be considered. What this provision fails to clarify is whether the duty of a court to act compatibly with the Convention rights concerns merely its own procedure or also extends to its application of the law.[99] Judicial responsibility to protect Convention rights can be understood as embracing various types of discretion: procedural, evidential, remedial and substantive.

96. See *Kaye* v. *Robertson* [1991] F.S.R. 62. However, such an action would not be effective to prevent publication by the third person.

97. *R.* v. *Chief Constable of West Yorkshire, ex p. Govell*, QBD unrep. decision of 24 May 1994 (LEXIS), discussed in N. Taylor and C. Walker, "Bugs in the System" (1996) 1(2) J. Civil Liberties, 105, 119.

98. S.6(3)(a). The remedies against judges found in contravention are restricted. The traditional guarantees of judicial independence are preserved: personal immunity from suit is guaranteed by s.9(3) and (4). Where the claim is against a court proceedings must be brought by the normal routes of appeal or judicial review respectively (s.9(1) and (2)).

99. It is noteworthy perhaps that Art.13 (guaranteeing an effective remedy) has been specifically omitted from the Convention rights incorporated under the Human Rights Act.

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So far as procedure is concerned, some judicial acts or omissions are obviously capable of prejudicing Convention rights, especially the rights to a speedy hearing under Article 5(4) and to a fair and public trial under Article 6. Equally, the discretion a court has to regulate its own procedure (for example, by imposing orders banning publication of a defendant's or witness's name) could be said to touch directly on the enjoyment of Convention rights to free speech and privacy of persons involved. Recently, for example, the European Court of Human Rights held that an order of a Finnish court opening transcripts of medical evidence concerning the applicant to the public would violate Article 8.[100] The application by a court of a discretionary remedy such as injunction might also prejudice Convention rights: it was on this basis that the European Court of Human Rights found that the continuation of the interim injunction by the UK courts in the *Spycatcher* case violated the newspapers' rights under Article 10[101] and that an award by a jury of excessive damages in a defamation action violated the same Article.[102] The grant of an *Anton Piller* order in copyright proceedings has been held to constitute an interference with the applicant's rights under Article 8, but one which was, on the facts and the terms of the order, within the permitted restrictions.[103] The failure of the Finnish courts to take effective steps to enforce a parent's rights of access to his child was held to violate Article 8, since the State had a positive obligation inherent in the duty of respect for family life, notwithstanding that the dispute was a private one between the applicant and his deceased wife's parents.[104]

The Convention has already been influential in several domestic decisions about injunctions, notably in cases where an order was sought to restrain publicity in the wardship jurisdiction,[105] prior to incorporation. After the Act such cases will be governed by section 12, requiring notice to the newspaper concerned and for the court to have "particular regard" to Article 10 (although on the analysis above Article 8 could not be

100. *Z* v. *Finland* (1998) 25 E.H.R.R. 371. Cf. *Hoffmann* v. *Austria* (1994) 17 E.H.R.R. 293 (violation of Art.8 in conjunction with Art.14 in child custody decision).

101. *Guardian and Observer* v. *UK* (1992) 14 E.H.R.R. 229, paras.66–71; cf. *Sunday Times* v. *UK* where the European Court of Human Rights found that an injunction issued by the House of Lords violated Art.10. On liability of member States for the actions of their courts under the Convention see generally Clapham, *op. cit. supra* n.65, at pp.240–244.

102. *Tolstoy Miloslavsky* v. *UK* (1995) 20 E.H.R.R. 442, paras.48–51.

103. *Chappell* v. *UK* (1990) 12 E.H.R.R. 38.

104. *Hokkanen* v. *Finland* (1995) 19 E.H.R.R. 139, paras.55, 60–62; see also *Airey* v. *Ireland*, *supra* n.67.

105. *In re H-S (Minors) (Protection of Identity)* [1994] 1 W.L.R. 1141; *R.* v. *Central Independent Television* [1994] 3 W.L.R. 20; *Re W (Wardship Discharge: Publicity)* [1995] 2 F.L.R. 466; and see *Middlebrook Mushrooms* v. *Transport and General Workers' Union* [1993] I.C.R. 612. For discussion: M. Hunt, *Using Human Rights Law in English Courts* (1997), pp.191–196.

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neglected either).[106] Equally, although Article 8 was not cited, it could have strengthened the juridical basis for recent developments in injunctive relief, restraining telephone harassment[107] and imposing an "exclusion zone" to protect the plaintiff from harassment.[108] In future a court would be bound to consider the Convention rights of both parties in such cases.

E. Indirect Horizontality

We saw earlier how the courts in Canada and South Africa have developed the concepts of respect for Charter values and of indirect horizontality, even in the common law between private individuals. The Human Rights Act fails to stipulate what the effect on inconsistent common law is, unlike section 52 of the Canadian Charter or section 33(5) of the Interim South African Constitution. However, there is a major difference from the Canadian and South African situations—the Convention already has a defined role under the common law prior to incorporation. In *Spycatcher* Lord Goff stated that the courts were bound to develop the common law, when free to do so, in accordance with the Crown's obligations under the Convention.[109] There is, however, some controversy over whether it requires ambiguity in the common law before the Convention can be invoked[110] and in some instances, especially where freedom of expression is concerned, the courts have developed the common law in parallel with, rather than directly influenced by, the Convention under the unconvincing justification that the two are identical.[111] Lord Goff's approach applies equally to the common law in purely private litigation, although there is as yet no clear-cut example of the Convention exerting a decisive effect in such a case.[112] The Human Rights Act does not formally change the

106. See *supra* n.7

107. *Khorasandjian* v. *Bush* [1993] Q.B. 727 (private nuisance, but overruled in so far as it purported to extend nuisance to non-property holders by *Hunter* v. *Canary Wharf* [1997] 2 W.L.R. 684, HL).

108. *Burris* v. *Adzani* [1995] 1 W.L.R. 1372 (made under general discretion to give interlocutory relief: Supreme Court Act 1981, s.37).

109. *AG* v. *Guardian Newspapers (No.2)* [1990] 1 A.C. 108, 283. Cf. Butler-Sloss LJ and Lord Keith in *Derbyshire CC* v. *Times Newspapers* [1993] 3 All E.R. 65, 93 and [1993] 1 All E.R. 1011, 1021 respectively.

110. The High Court satisfied itself that there was no breach of the Convention in *R.* v. *Bow Street Magistrates Court, ex p. Choudhury* [1990] 3 W.L.R. 986, 1001 although the common law offence of blasphemy was not uncertain.

111. *Guardian Newspapers (No.2)*, *supra* n.109, at p.283 (*per* Lord Goff); *Derbyshire CC*, *supra* n.109, at p.1021 (*per* Lord Keith). Likewise, Lord Oliver equating Art.8 and the best interests of the child test in wardship in *Re KD* [1988] 1 All E.R. 577, 588.

112. In *R.* v. *Mid Glamorgan HSA, ex p. Martin* [1995] 1 W.L.R. 110 the Court of Appeal used Art.8 and related jurisprudence to interpret the common law duty of a health authority to give a patient access to his medical records (Nourse LJ, p.116 and Evans LJ, p.118); Nourse LJ found that a private doctor in a contractual relationship with the patient would have been in the same position (pp.116–117). In *Watts v. Times Newspapers* [1996] 2 W.L.R. 427, 443

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approach to Convention questions in the common law, although there may be a change of atmosphere post-incorporation. The courts may feel more free to look explicitly to the Convention as the reason for developing the common law, rather than merely as a persuasive additional consideration. At the very least it can be said that nothing in the Human Rights Act will detract from these developments in the common law and that the general climate following incorporation is more likely to favour increasing judicial reference to the Convention.

There are some similarities between the position of UK courts in relation to the Convention in the common law and the approach of the Canadian courts to Charter *values* in common law litigation discussed earlier,[113] but in the United Kingdom no difference in approach has emerged according to whether the government or merely private litigants are involved, nor has the question of limitation of rights been tackled with any sophistication. If horizontal effect is given to the Convention in the United Kingdom it would seem anomalous that private litigants should bear the burden of justifying restrictions on rights (and certainly not the Strasbourg standard of "pressing social need"):[114] the approach taken by Cory J in *Hill* of requiring the party asserting inconsistency to bear the burden of proof has much to recommend it on grounds of stability and certainty.

F. Full or Direct Horizontality

Member States are liable under the Convention at Strasbourg for the failure of their domestic courts to protect Convention rights but the margin of appreciation doctrine will restrict the scope of review by the European Court of Human Rights.[115] Moreover, it is enough to satisfy the Convention that a litigant has an opportunity to raise before the domestic courts the *substance* of the argument—it is not a requirement that the Convention itself should have direct effect.[116] With the incorporation of the Convention via the Human Rights Act, neither of these limitations will apply

Hirst LJ rejected the argument that the burden of proof upon a defendant in a defamation action to establish a defence of qualified privilege violated Art.10. In *Spring* v. *Guardian Assurance plc* [1995] 2 A.C. 296, 326 Lord Lowry rejected the argument that Art.10 should act as a shield to a claim of negligence in giving an employment reference.

113. Text accompanying *supra* n.32.

114. At Strasbourg "broadly similar" approaches may be applicable to limitations of rights under Art.8 depending on whether the State's negative or positive obligations are involved: *Powell and Rayner* v. *UK* (1990) 12 E.H.R.R. 355, para.41.

115. In *Markt Intern* v. *Germany* (1990) 12 E.H.R.R. 161, para.27 the European Court of Human Rights found that an injunction issued by a German court in a private competition case was an interference by a public authority with freedom of expression, but held that it was prescribed by law and for a justified reason.

116. Art.13: *Soering* v. *UK*, Ser.A 161, para.121 (1989), holding that judicial review gave sufficient opportunity (criticised in Harris, O'Boyle and Warbrick, *op. cit. supra* n.66, at pp.451–456).

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domestically where appellate courts or the High Court (in judicial review cases) are asked to review the actions of lower courts or inferior tribunals. The margin of appreciation is inappropriate in the context of domestic enforcement of human rights (rather than international supervision), although in time some equivalent test (perhaps a domestic version of proportionality) may develop. The Act requires UK courts to apply the Convention directly (albeit as an interpretative tool) where statutes and the actions of public authorities are concerned (sections 3(1) and 6(1) respectively).

It might be argued that the effect of including courts within the definition of public authorities is to create a new and broad statutory right of appeal, namely that the lower court's decision violated one party's Convention rights. Such an approach would treat such a judicial decision as an "unlawful action" within the wording of section 6(1). This would require a judge to achieve compatibility with the Convention wherever the common law is applied (even where, in the court's eyes, it has no discretion). Some largely negative support for this reading of section 6 can be found in the wording excluding acts which are private in nature, which does not apply to courts or tribunals,[117] but this could equally be explained by arguing that none of the actions they perform is private in nature.

This approach could provide a peg for the development of domestic Convention rights with horizontal effect. It could then be argued that the parties *owe each other* Convention rights. This would be very different from *indirect* horizontal effect: it would envisage using Convention rights as a cause of action in their own right, or as a defence or exemption despite the existence of a clear common law rule to the contrary.[118] The implications would be profound: settled common law rules of private law would be open to reinterpretation in the light of the Human Rights Act. If a broad reading of section 6 of this kind was intended the drafting is undoubtedly clumsy: the more natural course would have been to follow the Canadian and South African approaches and to include a specific provision dealing with the common law, and specific amendment of the various statutory rights of appeal, rather than simply including courts within the definition of an all-encompassing duty on public authorities.

117. S.6(5).

118. Prior to incorporation the Court of Appeal held in *F* v. *Wirral MBC* [1991] Fam. 99 that recognition under Art.8 of parental rights of access to a child did not of itself establish a cause of action for damages in tort for interference with the right (Ralph Gibson LJ at 110). The line between establishing a new cause of action and expanding an existing one can, however, obviously be a fine one: see *Hunter* v. *Canary Wharf*, *supra* n.107, at p.698, where Lord Goff characterised the proposed extension of standing in private nuisance to licensees as the "back door" creation of a tort of personal harassment. Lord Cooke of Thorndon (dissenting, at pp.715–716), on the other hand, referred to Art.8 ECHR in support of giving nuisance an extended interpretation, beyond those holding a legal interest in land.

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During the committee stage of the Bill in the House of Lords, Lord Wilberforce raised the problem that horizontal effect might occur because of the inclusion of courts in the definition of public authorities. The Lord Chancellor's response was that it was right in principle that the courts should be bound as public authorities in the development of the common law, but that judges would not be obliged by the Bill to "legislate" to protect Convention rights where there was a gap in the common law or statutes.[119] This seems to support the view that indirect horizontality rather than direct or full horizontality was intended.

V. PRE-INCORPORATION USE OF ARTICLE 8 BY UK COURTS

THE record of the UK courts in using Article 8 to protect privacy prior to the Human Rights Act 1998 was uniformly unimpressive. In *Malone* Megarry J treated Article 8 as irrelevant to the question of the domestic legality of telephone tapping because of the failure to incorporate the Convention, although he also (correctly) regarded condemnation in Strasbourg as inevitable and expressed regret at the inability to offer a remedy.[120] *Malone* might be passed off as an early aberration, were it not for a series of recent decisions in which the courts have considered Article 8 and then given it little, if any, weight. In *Sultan Khan* Article 8 was raised in relation to whether unlawfully obtained evidence (through police bugging of private premises) should be excluded using the trial judge's discretion under section 78 of the Police and Criminal Evidence Act 1984: the House of Lords held not.[121] In *Ex parte Smith*, after apparently accepting that enquiry into a person's sexual orientation could violate Article 8, the Court of Appeal held that the human rights dimension merely called for extra vigilance (note, not absolute protection) in assessing the rationality of the army's policy of discharging homosexuals; the policy was held not to be irrational.[122] Finally, in a case decided while the parliamentary contro-

119. *HL Hansard*, Vol.583, cols.781–782 (Lord Wilberforce) and 785 (Lord Irvine of Lairg) (24 Nov. 1997).

120. *Malone* v. *Metropolitan Police Commissioner (No.2)* [1979] Ch. 344.

121. *R.* v. *Khan* [1996] 3 All E.R. 289. The trial judge when exercising the discretion under s.78 could (but was not bound to) have regard to Arts.6 and 8 of the Convention. Their Lordships cited *Schenk* v. *Switzerland* (1988) 13 E.H.R.R. 242 in which the European Court of Human Rights found no breach of Art.6 in admitting unlawfully obtained evidence on the facts (Lord Slynn of Hadley, p.292 and see Lord Nolan pp.300–301, Lord Nicholls, p.302); the speeches show little awareness that *Schenk* was decided under the margin of appreciation and that a trial judge applying the Convention would be in a different position. See also *R. v. Chalkley* [1998] 2 All E.R. 155.

122. *R.* v. *Secretary of State for Defence, ex p. Smith* [1996] 2 W.L.R. 305, 340 (*per* Lord Bingham MR); 345 (*per* Henry LJ—affirming the approach of Simon Brown LJ at first instance, who argued that the nature of the exercise would have been different (what he described as "primary review") if the Convention had been incorporated: *idem*, pp.322–328) and 346 (*per* Thorpe LJ). Contrast *Morris* v. *Beardmore* [1980] 2 All E.R. 753, 763 where Lord Scarman supported a restrictive interpretation of police breathalyser powers by reference to Art.8.

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versies over privacy were raging, the Court of Appeal rejected a claim by a paedophile couple that their privacy had been violated when the North Wales police supplied details of their whereabouts to a caravan site owner.[123]

In the light of the actual use of Article 8 by the courts in these cases it requires a quite unwarranted optimism to argue that the Human Rights Act will lead to the speedy judicial creation of a right of privacy. Furthermore, creation of a domestic right of privacy based on Article 8 would require UK judges to go considerably beyond the Strasbourg case law (which does not require a specific remedy between private individuals)[124] —something which seems inherently improbable in view of the deferential way in which the courts have approached *State* invasions of privacy (which clearly do fall within Article 8) in the cases cited. Significantly, a recent study of privacy and press freedom concentrates on the capacity of the common law to bring about reform and virtually ignores Article 8.[125]

VI. CONCLUSION

IN this article several types of argument for horizontal effect which can be constructed on the basis of the Human Rights Act have been reviewed:

(1) arising through interpretation of statutes applicable between private individuals (direct statutory horizontality);
(2) under the duties on public authorities in the case of those dealing with them in a civil capacity, through an enlarged definition of a public authority (public liability horizontality);
(3) where the right is claimed against the public authority for its failure to take action against a third party whose actions harm the plaintiff (intermediate horizontality);
(4) by informing the development of the common law (indirect horizontality);
(5) through the effect of section 6 on discretionary/procedural actions of the courts (remedial horizontality);
(6) full or direct horizontal effect—through a broad reading of section 6(5) so as to require the courts to create appropriate rights and remedies by revising the common law to protect Convention rights subject only to the limitation that a clear statute must prevail.

123. *R.* v. *Chief Constable of N Wales Police, ex p. A B* [1998] 3 W.L.R. 57 (CA) affirming *R.* v. *Chief Constable of North Wales, ex p. AB* [1997] 3 W.L.R. 724, 736 (*per* Lord Bingham MR) and 738 (*per* Buxton J) (on which see N. Barber [1998] P.L. 19, 23–24 and R. Mullender [1998] P.L. 384).
124. *Winer* v. *UK*, *supra* n.72.
125. R. Wacks, *Privacy and Press Freedom* (1995).

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Of these, public liability and remedial horizontality can be seen to be well established under the Convention jurisprudence and there is little reason for a UK court to depart from this in applying the Human Rights Act (indeed, if it did the United Kingdom would be liable for the breach at Strasbourg). Direct statutory, intermediate and indirect horizontality seem readily supportable through either a clear reading of the legislation or pre-existing authority. The most contentious argument concerns full or direct horizontality: it has been argued here that neither the drafting of the Act, the scheme of the Convention nor constitutional principle elucidated by courts in other jurisdictions which have faced identical problems supports the acceptance of full direct horizontal effect.[126]

The implications for privacy are that the most obvious ways in which legal protection may be strengthened following incorporation are via direct statutory horizontality and in protection by public bodies in their civil capacity—public liability horizontality (subject to the private functions argument). Section 6 will impact directly on the courts' grant of discretionary remedies in private litigation and public authorities such as the police and broadcasting regulators may be required to protect one private individual against another, for example by having regard to respect for a person's private life under Article 8, or free speech under Article 10, and so to give higher priority to protection of privacy (intermediate and remedial horizontality). However, if the Human Rights Act proves to be the catalyst for the creation of a general right of privacy in English law due to indirect or full direct horizontality it will be the pretext rather than the cause, since this is not required by the Act or by the Convention itself.

It is noteworthy that in Canada, New Zealand and South Africa the borderlands of freedom of expression and privacy have been one of the initial testing grounds for arguments about horizontality. It would be no surprise if the same were to occur in Britain. For a general development of third-party effect to occur involving full or direct horizontality, however, it would first of all be necessary for UK courts to adopt an idiosyncratic interpretation of the scope of the Convention rights, different from that of the European Commission and of the Court of Human Rights. Any such development would also depend on a tortuous but not wholly improbable reading of the Human Rights Act. Overall, the climate does not favour a development of this kind, but it cannot be ruled out entirely.

126. A similar conclusion has been reached, albeit by a different route, by Murray Hunt in a recently published article. He argues that the Human Rights Act 1998 does not require the creation of new causes of civil action but that it is consistent with a form of horizontality which (following Kriegler J in *Du Plessis*, n.36 *supra*) he terms an "application to all law" model: M. Hunt, "'The Horizontal Effect' of the Human Rights Act" [1998] P.L. 423.

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