Chapter 9

Rights and Regulation

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9.1 Introduction

The debate around an international bill of rights took place in the aftermath of World War II at a time when there was widespread acceptance (and practice) within the dominant European political paradigm that a job of the state was the provision of services essential to the functioning of society, such as health, education, prisons, water and power utilities. Subsequently, states have privatised or contracted out of some of those functions.[1] After an initial phase of enthusiasm for privatisation, some states have started to bring some of these privatised activities back into the government's fold. Both phases, privatisation and nationalisation, hold particular challenges for the state so far as safeguarding human rights is concerned.

A 21st century description of the issues alluded to above and discussed in this chapter is to talk about "regulatory reform" and human rights. "Regulation" for the purposes of this chapter is understood as primary and secondary legislation[2] and the lack thereof.[3] Derek Gill in his chapter "Regulatory Management in New Zealand: What, Why and How?" describes

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1 For the purpose of this paper, "privatisation" is taken to mean a process whereby a previously state-run service is transferred to private operation, and "contracted-out" means that the ownership of the facility or service enterprise remains with the state, but the provision of the service is transferred to non-state entities on a contractual basis.

2 Regulatory Standards Bill 2011, cl 5 refers to what is known as "tertiary legislation" – where the lawmaking power is delegated to other government actors such as Ministers, officials or agencies. Such regulation is beyond what is able to be addressed in this chapter.

3 This is a slightly narrower sense than in the chapters Dean Knight and Rayner Thwaites "Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance" (ch 8) or in Mark Bennett and Joel Colón-Ríos "Public Participation and Regulation" (ch 2) in this volume.

the policy objectives of regulatory reform as including:[4] Both "better quality" regulation through more effective alignment of "regulatory means" to achieve policy goals, as well a "regulatory relief" through administrative simplification and deregulation to reduce the perceived burden of regulation.

The OECD has made several recommendations about regulatory reform which are intended to provide governments with steps they can take to improve regulatory processes and outcomes within public administrations.[5] The New Zealand Treasury has developed "Best practice regulation principles and indicators" which list six principles to be taken into account when regulating[6] and the purpose of the Regulatory Standards Bill 2011 is to improve the quality of regulation in New Zealand. Both sets of guidelines focus on stimulating economic growth and competiveness of the state domestically. However, both commentaries to the guidelines acknowledge that other objectives have to be balanced against the goals of economic growth and competitiveness.[7] The Regulatory Standards Bill also acknowledges that rights play an important part in regulatory reform.[8]

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4 See Derek Gill "Regulatory Management in New Zealand: What, Why and How?" in this volume (ch 7).

5 Organisation for Economic Cooperation and Development *The OECD Report on Regulatory Reform: Synthesis* (OECD, Paris, 1997) at 27–39. The recommendations are:

- to adopt at the political level broad programmes of regulatory reform that establish clear objectives and frameworks for implementation;
- to review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively;
- to ensure that regulations and regulatory processes are transparent, non-discriminatory and efficiently applied;
- to review and strengthen where necessary the scope, effectiveness and enforcement of competition policy;
- to reform economic regulations in all sectors to stimulate competition, and eliminate them except where clear evidence demonstrates that they are the best way to serve broad public interests;
- to eliminate unnecessary regulatory barriers to trade and investment by enhancing implementation of international agreements and strengthening international principles; and
- to identify important linkages with other policy objectives and develop policies to achieve those objectives in ways that support reform.

6 Peter Mumford "Best Practice Regulation – Setting Targets and Detecting Vulnerabilities" (2011) 7 *Policy Quarterly* 3 at 37. The best practice regulation principles and indicators involve: growth, proportionality, flexibility and durability, certainty and predictability, transparency and accountability, and capable regulators.

7 Peter Mumford "Best Practice Regulation – Setting Targets and Detecting Vulnerabilities" (2011) 7 *Policy Quarterly* 3 at 37: "Identifying and justifying trade-offs between economic and other objectives is an explicit part of decision making." Organisation for Economic Cooperation and Development *The OECD Report on Regulatory Reform: Synthesis* (OECD, Paris, 1997) at 37: "Governments should assess the potential for higher risks in more competitive markets, and should intervene as appropriate, using the substantive principles of good regulation to ensure both that social objectives are not jeopardised and that new regulations are efficient within competitive markets."

8 See Regulatory Standards Bill 2011 (277-1), cl 7(1)(a)(ii) "the law should not adversely affect rights and liberties" and cl 7(1)(b): "legislation should not diminish a person's liberty,

The starting point of this chapter is that one of those "other objectives" is human rights compliance of the "end-product" regulation or any decision not to regulate. This chapter focuses on the mechanisms in place in New Zealand that facilitate adherence to human rights in regulatory reform. It does not discuss whether or to what extent New Zealand courts take into account human rights in their supervisory role.[9] Furthermore, the chapter focuses on the New Zealand constitutional reality and, therefore, it uses comparative analysis sparingly. The constitutional framework is of utmost importance to the question of regulatory reform and human rights compliance. Whether or not the constitutional framework includes a constitutional court with the power to strike down legislation has an impact on how a framework is designed to ensure that regulatory reform takes human rights into account. Since Germany has a strong system of judicial review, German jurisprudence and regulatory reform models are used as a comparator when useful.[10]

This chapter canvasses two issues:

(a) what role human rights play currently in regulatory reform so as to achieve better quality regulation; and

(b) whether human rights might limit the regulator's choice in regard to whether regulation might require an Act of Parliament.

In order to explore these two issues, the chapter will first explain why any regulatory reform in New Zealand has to take human rights into account. Secondly, the chapter will analyse the state's obligations of safeguarding human rights in two situations: first, in a state that privatises assets and at the same time de-regulates — promoting a "liberal business model" to provide essential services — and secondly, in a state that nationalises assets and re-regulates – a "paternalistic model". This chapter will not address the economic merits of either approach, nor will it discuss the potential benefits other than human rights protection. Lastly, the chapter will examine some examples of human rights concerns that might surface in particular scenarios.

9.2 Human rights in the regulatory reform process

For the purpose of this chapter "human rights" refers to the human rights standards explicitly embodied in New Zealand legislation, namely the New Zealand Bill of Rights Act 1990 ("BORA") and the Human Rights Act 1993

personal security, freedom of choice or action, or rights to own, use, and dispose of property …".

9 See Dean Knight and Raynor Thwaites "Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance" in this volume (ch 8).

10 Mark Tushnet "Judicial Supremacy or Inter-institutional Dialogue? Political Responses to Judicial Review" (paper presented to conference at Sydney Law School, Sydney, May 2010).

("HRA"). New Zealand is also bound to adhere to the international human rights treaties it has ratified. The extent to which those rights are binding will be explored below.

It seems opportune to discuss cl 7 of the Regulatory Standards Bill 2011 which articulates principles of responsible regulation. The clause makes three important points in regard to regulation and rights. First, legislators should not infringe rights present in New Zealand law unless it is reasonable and demonstrably justified in a free and democratic society to do so.[11] Secondly, it states that good lawmaking takes into account whether the public interest requires an issue to be dealt with by legislation.[12] The third point deals with the issues surrounding the right to property.[13]

This next part will first explore New Zealand's commitment to human rights, and secondly the situations in which an Act of Parliament is required to regulate an issue and the situations in which regulation by the Executive is sufficient.

9.2.1 *New Zealand's commitment to human rights*

New Zealand is a signatory to all major international human rights treaties.[14] Parliament has consistently acknowledged the international antecedents in the context of the development of domestic human rights legislation[15] and in many provisions in other areas of New Zealand statute law. In addition, Parliament has set a standard for itself for the observance of human rights by enacting BORA, which requires the Attorney-General to report any inconsistencies of a Bill with the BORA to Parliament.[16]

In the Government's *Guide to Cabinet and Cabinet Committee Processes* its duty is to develop human rights consistent policy as follows:[17]

11 See Regulatory Standards Bill 2011, cl 7(1)(a)(ii), cl 7(1)(b), cl 7(2), cl 7(3).

12 Regulatory Standards Bill 2011, cl 7(1)(h)(iii).

13 Regulatory Standards Bill 2011, cl 7(1)(c). See also Richard Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand" in this volume (ch 5).

14 "Treaties and International Law: International Treaties List" (2011) Ministry of Foreign Affairs and Trade www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/1-International-Treaties-List/index.php (last accessed 10 August 2011).

15 See, for example, the long titles of the following Acts: Race Relations Act 1971, Human Rights Commission Act 1977, Human Rights Act 1993, and New Zealand Bill of Rights Act 1990.

16 New Zealand Bill of Rights Act 1990, s 7.

17 Cabinet Office Wellington "Sections in papers: Human Rights Implications" (2011) Department of the Prime Minister and Cabinet cabguide.cabinetoffice.govt.nz/procedures/papers/sections-in-papers#human-rights-implications (last accessed 10 August 2011).

> When developing policy proposals, consideration must be given to their consistency with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, and comment included in the Cabinet paper. […]
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> An important aim of this requirement is to provide Ministers with relevant information on the implications of any inconsistency with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 arising in policy proposals before proposals reach the legislative or implementation stage. The requirement is also intended to prompt departments to consider human rights issues in terms broader than the avoidance of discrimination.

As well as a statement on the consistency of the proposals with the BORA and the HRA, Cabinet papers must also confirm compliance with the principles in the Privacy Act 1993 and international obligations.[18] Furthermore, all Cabinet papers submitted to the Cabinet Social Development Committee are required to include a statement as to whether a gender analysis of the policy proposal has been undertaken[19] and, where appropriate, a disability perspective.[20]

Re-evaluation of the Human Rights Protections in New Zealand, the 2000 report commissioned by the then Associate Minister of Justice Margaret Wilson stated:[21]

> If taken into account early in the policy making process, human rights tend to generate policies that ensure reasonable social objectives are realised by fair means. They contribute to social cohesion and, as the Treasury's *Briefing to the Incoming Government* (1999) observes: "Achieving and maintaining a sense of social cohesion and inclusion is an important aspect of welfare in the broadest sense ... Fairness to all parties involved extends both to the processes by which things are done and to the outcomes themselves. Social cohesion is low when individuals or groups feel marginalised."
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> Policies which respect and reflect human rights are more likely to be inclusive, equitable, robust, durable and of good quality. Critically, such policies will also be less vulnerable to domestic and international legal challenge.

In 2003, Claudia Geiringer and Matthew Palmer built on this report in their paper *Human Rights and Social Policy in New Zealand*[22] where they identified

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18 Cabinet Manual 2008 at [7.60].

19 Cabinet Office 2001a at [3.61]–[3.62].

20 Cabinet Office 2001b at [3.63].

21 Hon Margaret Wilson *Re-evaluation of the Human Rights Protections in New Zealand* (prepared for the Ministry of Justice in 2000) at 206–207.

22 Claudia Geiringer and Matthew Palmer "Human Rights and Social Policy in New Zealand" (2007) 30 *Social Policy Journal of New Zealand* at 12. The publication is also available online at www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj30/30-human-rights-and-social-policy-in-new-zealand-pages12-41.html#ESCrightsthestatesprotectiveobligationsinterrogated7 (last accessed 10 August 2011).

a range of constraints on social policy-making deriving from obligations under the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), and suggested that explicit and systematic attention to these constraints constitute the essence of a rights-based approach to making social policy.

(a) The development of Bills

The courts can review legislation for compliance with the BORA and the HRA.[23] Any regulatory process, therefore, should ensure that rights enshrined in the BORA are only infringed by new legislation if justified in a free and democratic society and that the HRA is adhered to.

The *Cabinet Manual 2008* sets out a detailed structure of how departments should develop Bills and who should be consulted.[24] Regulatory reform should involve the Legislation Advisory Committee, the Legislation Design Committee and officials of the Ministry of Justice's Bill of Rights/Human Rights team, early in the policy process in order ensure human rights compliance.[25] An early involvement of the officials should also clarify what the policy-maker needs to establish if it is necessary to prove that any BORA infringement is justified in a free and democratic society.[26] This should avoid the Attorney-General having to report any inconsistency with the BORA to Parliament.

In the absence of specific statutory reference there is nothing to compel the New Zealand Government to give effect to international law. It is a fundamental principle of international law, however, that the obligations contained in an international treaty bind the parties to that treaty, and those

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23 See Dean Knight and Rayner Thwaites "Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance" in this volume (ch 8).

24 Cabinet Office *Cabinet Manual 2008* at [7.19]–[7.76].

25 See also Cabinet Office "Sections in papers: Human Rights Implications" (2011) Department of the Prime Minister and Cabinet cabguide.cabinetoffice.govt.nz/procedures/papers/sections-in-papers#human-rights-implications (last accessed 10 August 2011). "It is the responsibility of each government department to make its own assessment and sign-off on human rights implications in the department's area of responsibility. In carrying out this assessment, departments should, where appropriate, consult agencies with an interest or experience in human rights issues, such as the Ministry of Justice (human rights policy and legal assistance), and the Crown Law Office (legal advice)."

26 See Ministry of Justice *The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (Ministry of Justice, Wellington, 2004): "they are a practical resource to assist you in the process of integrating human rights considerations into the development of your policy or practice". Also see the Guidelines published by the Legislative Advisory Committee in regard to the human rights compliance of legislation: Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 Edition and Amendments* (Ministry of Justice, Wellington, 2001).

parties are accordingly obliged to give effect to such obligations.[27] Failure to do so will render New Zealand in breach of its binding international obligations. In New Zealand the judicial approach to the interpretation of domestic statutes takes account of New Zealand's international human rights commitments.[28] In *Tavita v Minister of Immigration* Cooke P said:[29]

> A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them.

The Supreme Court has confirmed this approach.[30]

(b) Development of regulations

The Cabinet Manual 2008's section on "Regulations" provides that the guidance for "Development and Approval of Bills" applies equally to the development of regulations.[31] Regulations once drafted require authorisation from the Cabinet Legislation Committee before they are submitted to the Executive Council. The *Guide to Cabinet and Cabinet Committee Processes* recommends that cabinet papers seeking such approval should include a statement about any inconsistencies with the rights and freedoms contained in the BORA and the HRA, and should also indicate whether there may be grounds upon which the Regulations Review Committee might draw the regulations to the attention of Parliament.[32]

The Regulations Review Committee is the Parliamentary Select Committee tasked with examining regulations to determine whether they are an appropriate use of delegated lawmaking power. The Standing Orders empower the committee to draw the special attention of the House to regulations which trespass unduly on personal rights and liberties, or unduly

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27 Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980), art 26.

28 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [3.6.6]; Andrew Butler and Petra Butler "The Judicial Use of International Human Rights Law in New Zealand" [1999] 29 VUWLR at 15.

29 *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266 (CA).

30 See *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104, but also the *Immigration Services Manual* which sets out a procedure for considering humanitarian issues and includes a humanitarian questionnaire first adopted in response to the Court of Appeal determination in *Tavita v Ministry of Immigration* [1994] 2 NZLR 257 (CA); Immigration New Zealand *Operational Manual* (2011) www.immigration.govt.nz /opsmanual/ (last accessed 10 August 2011).

31 Cabinet Office *Cabinet Manual 2008* at [7.85].

32 Cabinet Office "Legislation" page on CabGuide: Guide to Cabinet and Cabinet Committee Processes see www.cabguide.cabinetoffice.govt.nz (last accessed 25 September 2011).

make the rights and liberties of persons dependent upon administrative decisions which are not subject to judicial review.[33] This is an important check on delegated lawmaking power, as regulations are not subject to the Attorney-General's vetting process under the BORA.

(c) Summary

In summary, it is the contention of this chapter that New Zealand already has a comprehensive system of checks and balances, at the policy making stage, that ensures that Acts of Parliament adhere to New Zealand's human rights standards. At introduction of a Bill the Attorney-General's report under BORA s 7 alerts Members of Parliament of any infringement of the rights in the BORA. In a democracy based on parliamentary sovereignty it is Parliament's prerogative to make the decision to "consciously" infringe human rights for the good of the people. The Regulations Review Committee fulfils an important function in safeguarding human rights. In practical terms, this human rights safeguarding process might not always work satisfactorily.[34] The evaluation (and rectification) of human error and lack of awareness of human rights issues and/or the willingness to engage with them within Government and among Members of Parliament is outside the scope of this chapter.[35]

9.2.2 *When to legislate*

The preceding paragraphs explain the extent to which human rights must be adhered to in the regulatory reform process in New Zealand. The more interesting and less explored issue is whether adherence to human rights might "dictate" a certain form of regulation.

Under s 15(1) of the Constitution Act 1986, Parliament has full power to make laws. Parliament usually exercises this power to pass statutes, but it also has the ability to delegate its law-making power to other persons or bodies. It is widely acknowledged that in a modern state Parliament cannot meet the

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33 Standing Orders of the House of Representatives 2008, SO 310.

34 More recently commentators have questioned how effective those checks and balances are: see Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) 23 NZULR 46; Tessa Bromwich "Parliamentary rights-vetting under the NZBORA" [2009] NZLJ 189; Janet McLean "Bill of Rights and Constitutional Conventions" public lecture to celebrate the 21st birthday of the New Zealand Bill of Rights Act 1990 (Wellington, 30 August 2011).

35 A constitutional framework depends on its actors fulfilling their constitutional functions. No legal system can withstand its actors not fulfilling their functions. It could be argued that a Constitutional Court with powers to control the legislature would add a further important check and safeguard for human rights. It would be futile, however, to explore this question further since at this point New Zealand will not forgo its parliamentary sovereignty democracy model.

regulatory demands alone by enacting statutes and that, therefore, delegated legislation is necessary.[36]

The Regulatory Standards Bill 2011 goes one step further and states that non-legislative options are available to deal with issues of public interest.[37] This raises the question of whether Parliament and the Executive are free to choose how to regulate an issue. Must all regulatory reform that impacts on human rights be dealt with by an Act of Parliament? Or, under certain circumstances, can such reform be dealt with as secondary or even tertiary regulation? The Legislative Advisory Committee in its *Guidelines* proposes a high threshold, stating that "provisions which affect fundamental human rights and freedoms should always be included in primary legislation".[38] That suggests that measures which have an impact on BORA human rights must be regulated by statute.

Of interest here is the extensive jurisprudence of the German Constitutional Court. The Court has taken a more nuanced approach stating that "only" measures which materially or significantly affect rights have to be regulated by statute.[39]

The following questions arise:

1 To what extent has practice followed the Legislation Advisory Committee Guidelines?

2 Is there a need for further guidelines in order to ensure an Act of Parliament as opposed to leaving the matter with the Executive?

3 Have the existing processes resulted in the regulation of significant human rights infringements by Acts of Parliament?

In order to progress these questions it is useful to look at some case studies.

9.3 Case studies

Having established that regulatory reform in New Zealand does have to take account of human rights, this part will examine two different scenarios using as examples of essential services (water, gas, electricity, and communications). First, privatisation and deregulation, and, secondly, nationalisation and regulation, of these essential services. The underlying

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36 See generally Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at [25.2] and [25.3.3]; Bruno-Otto Bryde in von Muench/Kunig (eds) Grundgesetz-Kommentar (4th ed, Beck, Muenchen, 2003) art 80, para 1.

37 Regulatory Standards Bill 2011, cl 7(1)(h)(iii) and (iv).

38 Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation: 2001 edition and amendments* (Ministry of Justice, Wellington, first edition 2001 and updated regularly since) at 10.1.3.

39 BVerfGE 47, 46, 79, 80; BVerfGE 57, 295, 321. That principle is called "Parlamentsvorbehalt".

questions are whether human rights have placed some limits around administrative simplification and deregulation of essential services and also put limits around nationalisation. These case studies focus *not* on the regulatory process, that is, the checks and balances of human rights compliance, but rather on substantive human rights concerns which arise when the state regulates.

9.3.1 *Privatisation and de-regulation*

(a) Introduction

States are not required to own the production or delivery systems of essential services. This means that the state does not have to be the sole provider of essential services.[40] By privatising or contracting out, however, the state does not forgo its obligations under the international human rights covenants. So, for example, privatising the provision of correctional services does not alleviate the state's responsibility to ensure observance of prisoners' rights as stipulated by the United Nations Standard Minimum Rules for the Treatment of Prisoners[41] or as developed by jurisprudence under the relevant human rights instruments.

The issues in regard to the privatisation of prisons concern who is competent to deprive a person of his or her liberty in order to enforce the criminal law, and whether it is permitted and desirable to depart from the rule that the exercise of power in this regard lies with the state in its capacity as the representative of the public. This debate has been conducted in academic and public circles, especially in the United States.[42]

The Israeli Supreme Court ruled in 2009 that a purported transfer of authority for managing a prison from the state to a private contractor whose sole aim was monetary profit would severely violate the prisoners' basic human right to dignity and freedom. The Court referred approvingly, inter alia, to the argument of American commentator J J Dilulio:[43]

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40 See United Nations High Commissioner on Human Rights "Economic, Social and Cultural Rights: Liberalization of Trade in Services and Human Rights" 54th sess, 4th agenda item, UN Doc E/CN.4/Sub.2/2002/9 (2002).

41 *Standard Minimum Rules for the Treatment of Prisoners* (1955) at www2.ohchr.org/english/law/treatmentprisoners.htm (last accessed 25 September 2011).

42 See, for example, Ira P Robbins "The Impact of the Delegation Doctrine on Prison Privatization" (1988) 35 UCLA L Rev 911; Joseph E Field "Making Prisons Private: An Improper Delegation of a Governmental Power" (1987) 15 Hofstra L Rev 649; Ahmed A White "Rule of Law and Limits of Sovereignty: The Private Prison in Jurisprudential Perspective" (2001) 38 Am Crim L Rev at 134–145.

43 John J Dilulio Jr "The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails" in Douglas C McDonald (ed) *Private Prisons and the Public Interest* (Rutgers University Press, New Brunswick, 1990) at 175–176.

> At a minimum, it can be said that, both in theory and in practice, the formulation and administration of criminal laws by recognised public authorities is one of the liberal state's most central and historic functions; indeed, in some formulations it is the liberal state's reason for being … It is not unreasonable to suggest that — employing the force of the Community via private penal management undermines the moral writ of the community itself.

The Court held that the proposed plan to privatise prisons granted a private corporation an inappropriate invasive authority over prisoners. For example, the manager of the private prison would have been authorised to sentence a prisoner to solitary confinement for as long as 48 hours, to order invasive inspections of a prisoner's naked body, and to authorise the use of reasonable force in order to search the prisoners. "When the power to incarcerate is transferred to a private corporation whose purpose is making money," the Court held, "the act of depriving a person of his liberty loses much of its legitimacy. Because of this loss of legitimacy, the violation of the prisoner's right to liberty goes beyond the violation entailed in the incarceration itself".[44]

While the Court acknowledged the economic benefits of the privatisation plan, it ruled that the material aspect was not a key factor that the Court must consider when exercising its judicial review powers. As important as efficiency may be, Beinisch CJ wrote, it is not an absolute value when the most basic and important human rights for which the state is responsible are at stake. In a prison run by a private company, prisoners' rights are undermined because they are transformed into a means of extracting profit.[45]

Beinisch CJ's conclusion is important in regard to the privatisation of essential services, such as communications, water and power utilities.[46] The

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44 *Academic Centre of Law and Business v Minister of Finance* [2009] HCJ 2605/05 (Israel, High Court of Justice) at [33].

45 *Academic Centre of Law and Business v Minister of Finance* [2009] HCJ 2605/05 (Israel, High Court of Justice) at [14]. In 2009, New Zealand's National Party-led Parliament passed the Corrections (Contract Management of Prisons) Act, which re-empowered the Crown to enter into contracts for the management of prisons by private persons in New Zealand. On 1 May 2011 the Department of Corrections handed over management of Auckland Central Remand Prison to Serco – an international service company headquartered in the United Kingdom. In his report on the consistency of the Bill with the BORA the Attorney-General, in finding that the Bill was consistent, noted the concerns that had been expressed by the United Nations Human Rights Committee regarding whether privately managed prisons could effectively meet New Zealand's responsibility under the International Covenant on Civil and Political Rights to protect persons deprived of their liberty. The Attorney-General's view was that "[t]his concern is alleviated in part by new section 199(2) which imposes a duty on the contractor to comply with the Bill of Rights Act and all relevant international conventions and other obligations ratified by the New Zealand government that relate to the management and treatment of prisoners". "Consistency with the New Zealand Bill of Rights Act 1990: Corrections (Contract Management of Prisons) Amendment Bill" (2009) at 4-5.

46 The author is aware that some would argue that prisons are part of the "essential services" that a state traditionally supplies.

ICESCR requires states to progressively realise economic, social and cultural rights. Two inquiries follow from the privatisation of essential Government services that are essential "to deliver human rights": the first is whether and to what extent privatised operations have to adhere to or implement human rights, and the second is whether and to what extent (depending also on the answer to the first question) the state's traditional duties in regard to human rights protection and implementation stay with the state. It seems that in tandem with the privatisation and corporation of state services the state de-regulated certain areas. As Taggart observed in the case of New Zealand, "[t]he response [to the movement from state ownership towards private ownership] of New Zealand Governments since the mid-1980s has generally been that of so-called 'light-handed' regulation".[47]

This part first provides an overview of the state's human rights obligations in the delivering of services, and secondly examines two areas of service provision with significant human rights implications: utilities supply (water, gas, electricity) and (tele)communication. These areas have been selected because they represent essential services that have been privatised for some time and where there is some experience with taking human rights into account. This part will examine the extent to which private corporations must adhere to or implement human rights, and what role the state has in safeguarding human rights in a "privatised" environment.

(b) The state's duties

The character of the state's human rights obligations is often described as threefold: an obligation to respect human rights, an obligation to protect human rights, and an obligation to promote human rights.[48] As McBeth observes, the obligation to respect human rights means that the state should not violate human rights. Privatising the delivery of essential services cannot mean that the state is no longer responsible for the realisation of rights or that the responsibility has been sub-contracted to the private sector provider. The obligation to protect human rights obliges the state to use its power, through the Legislature, Executive (for example police), and Judiciary, to prevent violation of the human rights of its citizens, by either itself or by private entities. The obligation to promote human rights requires that the state constantly strive to improve the level of realisation of human rights.[49]

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47 Michael Taggart "Public Utilities and Public Law" in Philip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) at 215.

48 Compare the Convention on the Rights of Persons with Disabilities (opened for signature 13 December 2006, entered into force 3 May 2008), art 33(2); Adam McBeth "Privatising Human Rights: What Happens to the State's Human Rights Duties when Services are Privatised?" (2004) 5 MelbJ Int Law at 135.

49 Adam McBeth "Privatising Human Rights: What Happens to the State's Human Rights Duties when Services are Privatised?" (2004) 5 MelbJ Int Law at 135.

Further, Taggart argued that alongside the state's human rights obligations stand common law duties to provide services to all, without discrimination and at a reasonable price.[50] Taggart based his theory on Sir Matthew Hale's principle of a business affected with a public interest, the law of common callings, and the doctrine of prime necessity.[51] If consumers of gas, water, electricity and (tele)communications services have no choice of service provider because there is a monopoly provider, then Taggart argued common law regulation is justified.[52]

Taggart's thesis is attractive because it sits well with a human rights analysis of the state's provision of essential services. The Court of Appeal confirmed in *Vector Ltd v Transpower New Zealand Ltd*, and in *Sky City Auckland Ltd v Wu*, that monopoly suppliers of services in which there is a public interest must supply those services on reasonable terms.[53] Both Courts referred to the principle as the doctrine of prime necessity.[54] The Court in *Sky City*, in which Taggart acted for the respondent – a patron of the Sky City casino who claimed that the casino had banned him from the premises solely because he was a "successful gambler", agreed with Taggart's submission that the doctrine was "a strand of the broader principle which … is adaptable to meet new legal and social situations".[55] The doctrine was ultimately found to be precluded by statute in both *Vector* and *Sky City*.[56] Both cases, however, are

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50 Taggart's thesis draws heavily on US jurisprudence and theory of "public utilities" (see *Munn v Illinois* 94 US 113 (1876)): Michael Taggart "Public Utilities and Public Law" in Phillip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) at 214.

51 Michael Taggart "Public Utilities and Public Law" in Phillip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) at 215.

52 Michael Taggart "Public Utilities and Public Law" in Phillip Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) at 215.

53 *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 (CA) at [51]; *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621 (CA) at [25]. The Court of Appeal in *Vector Ltd* cited the nineteenth century cases of *Bolt v Stennett* (1800) 8 TR 606 and *Allnutt v Inglis* (1810) 12 East 527 as authority for this principle.

54 The terminology dates back to the early 20th century Canadian case of *Minister of Justice for the Dominion of Canada v City of Lévis* (1917) 51 *Rapports Judiciaires de Quebec* 267. The Court of Appeal in Sky City took the view that the terminology was particularly appropriate to describe the supply of electricity or water by a utility company: *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621 (CA) at [25].

55 *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621 (CA) at [25]. The Court found Taggart's argument that New Zealand common law would recognise a casino as a business affected by the public interest in circumstances where the operator enjoys a monopoly persuasive, but was not required to reach a conclusion on the applicability of the doctrine of prime necessity because the governing statute entitled casinos to exclude persons without giving a reason.

56 In *Vector*, the Court found that price control for the transmission of bulk electricity was governed by Part 4 of the Commerce Act 1986, and thus there was no room for the application of the doctrine in this context. In *Sky City* the Court found that the Casino Control Act 1990 entitled casinos to exclude persons without having to provide a reason,

authority for the existence and potential applicability of the doctrine of prime necessity.

The following sections explore which human rights are associated with the provision of utilities and (tele)communications.

(c) The duty to provide essential services

Utilities which have been privatised around the world include electricity, gas, and water (access to drinking water as well as a sewerage system).[57] Those utilities are important to lead a life in dignity and health. The relevant rights the state is required to promote and to protect in respect of these utilities are found principally in the ICESCR and include, for example, the right to health,[58] the right to food and drinking water,[59] and the right to an adequate standard of living.[60] In some situations the right to life might also be relevant.[61] When delivering essential services, the duty to respect human rights means that the state is responsible for ensuring the enjoyment of human rights relevant to the particular service.[62] If a state privatises a service, then any agreement with the private service providers must be structured so that it is consistent with relevant human rights norms. The state must stipulate accountability measures for the private service providers and benchmarks for measuring their performance with the contracts. If the private sector provider fails to deliver its contractual obligations, then the state must take immediate steps to maintain access to the service. In order to meet its obligation to protect its citizens from human rights violations the state is required to ensure that vulnerable groups are given special protection. One of the means to achieve this is by regulating the particular industry and thereby setting standards which help to protect citizens from human rights violations. The state's duty to promote requires the state to adopt positive measures that enable and

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and thus the doctrine could not be invoked to argue that the respondent's exclusion from the premises was unreasonable.

57 For an account of privatisation and regulatory intervention in the electricity and telecommunications industries in New Zealand, see Alec Mladenovic "Network Industries Case Study: Electricity and Telecommunications" in this volume (ch 13).

58 International Covenant on Economic Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976), art 12.

59 International Covenant on Economic Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976), art 11.

60 International Covenant on Economic Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976), art 11.

61 International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976), art 6.

62 Compare against the Committee on Economic, Social and Cultural Rights "General Comment No. 14: The right to the highest attainable standard of health (art 12 of the International Covenant on Economic, Social and Cultural Rights)" 22nd sess, 3rd agenda item, at 50, UN Doc E/C.12/2000/4 (2000).

assist individuals and communities to enjoy their rights.[63] In addition, the state has an obligation to assist when individuals or groups are unable to realise their rights by their own means.[64]

In summary, privatisation does not allow the state to abdicate its responsibility to respect, protect, and promote human rights. The state has the duty to ensure that ownership of the delivery system – public or private – does not compromise accessibility, availability, quality and acceptability of essential services. Most importantly, as Amnesty International points out, privatisation must not result in denial of access to socio-economic rights for vulnerable and poor people.[65] Regulatory mechanisms of private actors and assistance measures must be put in place for the state to discharge these obligations.

The following examines a number of socio-economic rights in more detail. ICESCR rights are relevant in New Zealand since New Zealand has signed the ICESCR. The BORA does not contain any socio-economic rights, but New Zealand can be held to account in regard to the implementation of ICESCR rights through the United Nations reporting process[66] under the ICESCR and in line with the jurisprudence developed in regard to Executive decisions, as stated above.[67]

(i) The right to water

The human right to water (arts 11 and 12, ICESCR) is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights.[68] The human right to water entitles everyone to sufficient, safe,

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63 Compare against the Committee on Economic, Social and Cultural Rights "General Comment No. 14: The right to the highest attainable standard of health (art 12 of the International Covenant on Economic, Social and Cultural Rights)" 22nd sess, 3rd agenda item, at 50, UN Doc E/C.12/2000/4 (2000).

64 Compare Committee on Social, Economic and Cultural Rights, General Comment No 15. In some situations the non-provisions of those services can infringe the right to life, which is part of the civil and political rights catalogue. The distinction between socio-economic rights and civil and political rights is important mainly in regard to their justifiability.

65 Amnesty International "Human Rights and Privatisation" (2005) www.amnesty.org/en/library/asset/POL34/003/2005/en/fe6b668d-d50f-11dd-8a23-d58a49c0d652/pol340032005en.pdf (last accessed 10 August 2011) at 5.

66 International Covenant on Economic Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976), arts 16-25: All States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of accepting the Covenant and thereafter every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations".

67 See in regard to socio-economic rights and judicial review Dean Knight and Rayner Thwaites "Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance" in this volume (ch 8).

68 United Nations Committee on Social, Economic and Cultural Rights "General Comment No 15: The right to water (arts 11 and 12 of the International Covenant on Economic, Social

acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, and personal and domestic hygiene requirements. Article 11(1) ICESCR specifies a number of rights emanating from, and indispensable for, the realisation of the right to an adequate standard of living "including adequate food, clothing and housing". The use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. The right to water is also inextricably related to the right to the highest attainable standard of health (art 12(1)) and the right to adequate housing and adequate food (art 11(1)). For example, it is important to guarantee a sustainable right to water for agriculture in order to realise the right to adequate food. The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.[69]

The right to water has been recognised not only by the ICESCR but also in a wide range of international documents, including treaties, declarations and other standards.[70]

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and Cultural Rights)" 29th sess, 3rd agenda item, at [1], UN Doc E/C.12/2002/11 (2002). Helen Greatrex "The Human Right to Water" (2004) 2 Human Rights Research 5 at 85.

69 United Nations Committee on Social, Economic and Cultural Rights "General Comment No 15: The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)" 29th sess, 3rd agenda item, at [2-3], UN Doc E/C.12/2002/11 (2002). Moreover, the Committee recognised that water is a human right contained in art 11(1) of the International Covenant on Economic, Social and Cultural Rights, see: Committee on Economic, Social and Cultural Rights "General Comment 6: The economic, social and cultural rights of older persons" 13th sess, at [5] and [32], UN Doc E/1996/22 (1995).

70 See Convention on the Elimination of All Forms of Discrimination Against Women (opened for signature 18 December 1979, entered into force 3 September 1981), art 14(2)(h); Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990), art 24(2)(c); Geneva Convention relative to the Treatment of Prisoners of War (opened for signature 12 August 1949, entered into force 21 October 1950), arts 20, 26, 29 and 46; Geneva Convention relative to the Treatment of Civilian Persons in Time of War (opened for signature 12 August 1949, entered into force 21 October 1950), arts 85, 89 and 127; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (opened for signature 8 June 1977, entered into force 7 December 1978), arts 5 and 14; *Report of the United Nations Water Conference* 16th sess, E/Conf.70/29 (1977); *Report of the United Nations Conference on Environment and Development: Agenda 21* vol I, resolution 1, annex II at [18.47], A/Conf.151/26/Rev1 (1992); The Dublin Statement on Water and Sustainable Development A/CONF.151/PC/112 (1992); *Report of the United Nations International Conference on Population and Development: Programme of Action* at principle 2, A/CONF.171/13 (1994); *Council of Europe: Recommendation (2001)14 of the Committee of Ministers to member states on the European Charter on Water Resources* 769th meeting, at [5] and [19] (2001); See also: *Relationship between the enjoyment of*

The Committee on Economic, Social and Cultural Rights points out that the right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, for example from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.[71] Benchmarks are the availability, quality and accessibility of water, and information in regard to the accessibility of water.[72] The Local Government Act 2002 includes provisions on water delivery. The Act acknowledges both the social and economic impacts of funding policies.[73] This is in line with the ICESCR Committee's statement that "water should be treated as a social and cultural good, and not primarily as an economic commodity".[74]

From the freedoms and entitlements flow state obligations, principally the obligation to provide non-discriminatory and equal access to water but also, for example, the duty to maintain access for rural and deprived urban areas to properly maintained water facilities. This includes the requirement to ensure that informal human settlements and homeless persons should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status.[75]

While privatisation might improve water supply and make water distribution more efficient, privately owned water systems can result in a change of priorities from *need* to *profit*.[76] The commercialisation of this subsistence resource may mean high water tariffs or the removal of subsidies which impact on people with low incomes.[77] "Water poverty" has entered day

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economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation E/CN.4/Sub.2/2002/10 (2002). The report was submitted by the Special Rapporteur of the Sub-Commission, El Hadji Guissé.

71 United Nations Committee on Social, Economic and Cultural Rights "General Comment No 15: The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)" 29th sess, 3rd agenda item, at [10], UN Doc E/C.12/2002/11 (2002).

72 United Nations Committee on Social, Economic and Cultural Rights "General Comment No 15: The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)" 29th sess, 3rd agenda item, at [12], UN Doc E/C.12/2002/11 (2002).

73 Local Government Act 2002, ss 13, 14, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 192, 193, 194.

74 United Nations Committee on Social, Economic and Cultural Rights "General Comment No 15: The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)" 29th sess, 3rd agenda item, at [11], UN Doc E/C.12/2002/11 (2002).

75 United Nations Committee on Social, Economic and Cultural Rights "General Comment No 15: The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)" 29th sess, 3rd agenda item, at [16], UN Doc E/C.12/2002/11 (2002).

76 Helen Greatrex "The Human Right to Water" 2004 Human Rights Research 5 at 91.

77 United Nations "Economic and Social Commission Assessment of the Role of the Private Sector in the Development and Management of Water Supply in Selected ESCWA Member Countries" (United Nations, New York, 2003) at 11. The report is available at:

to day language even in developed countries such as France, where water can be turned off for non-payment.[78] Public-private partnerships have emerged in many countries to ensure the economic and social aspects of water delivery are carefully managed.[79]

(ii) The right to electricity/gas

The Committee on Social, Economic, and Cultural Rights has so far not published a General Comment in regard to the right to the provision of electricity or gas. However electricity and gas, like water, are essential services and can be seen as inherent in the rights to an adequate standard of living (art 11(1)),[80] food (art 11), health (art 12(1)) and adequate housing (art 11(1)).[81] Therefore, the state's duties in regard to providing electricity and gas are generally the same as in regard to water.

(d) The duties of private entities in safeguarding human rights

In order to protect against non-state violations of human rights, the obligations under international human rights law must extend to the private sphere. Human rights are by their very nature inherent to all human beings by virtue of their humanity and do not depend on the grace of the state for their existence. This principle is confirmed in art 1 of the Universal Declaration of Human Rights ("UDHR"), which states: "All human beings are born free and equal in dignity and rights." A person or group's human rights are therefore not diminished according to the identity of the prospective violator or according to the ability of the prevailing legal system to prevent or punish violations and promote the positive realisation of those rights. This has also been recognised in the international arena by the United Nations Sub-Commission for the Protection and Promotion of Human Rights in *Norms on*

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http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan044874.pdf (last accessed 18 August 2011).

78 Helen Greatrex "The Human Right to Water" 2004 Human Rights Research 5 at 91.

79 Economic and Social Commission Assessment of the Role of the Private Sector in the Development and Management of Water Supply in Selected ESCWA Member Countries (United Nations, New York 2003) at 1.

80 Compare "NGO Information Submitted by the Association for Civil Rights in Israel (ACRI) to the Committee on Economic, Social and Cultural Rights" (2010) The Association for Civil Rights in Israel www.acri.org.il/en/wp-content/uploads/2011/03/CESCR2010.pdf (last accessed 10 August) at [11].

81 United Nations Committee on Social, Economic and Cultural Rights " General Comment No 4" (1991) at [7]; Amnesty International "Human Rights and Privatisation" (2005) www.amnesty.org/en/library/asset/POL34/003/2005/en/fe6b668d-d50f-11dd-8a23-d58a49c0d652/pol340032005en.pdf (last accessed 10 August 2011) at 2; in regard to the right to adequate housing under the South African Constitution: *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19 (Constitutional Court of South Africa) at [37] per Yacoob J.

Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[82]

Above it is noted that the state cannot delegate its responsibility to ensure and promote human rights. In addition, it is arguable that private service providers also have a duty to refrain from interfering in the enjoyment of ICESCR rights, and an obligation to ensure that they do not jeopardise the quality, accessibility, and availability of the services when they assume control.[83] With respect to the provision of drinking water this duty means not only that the payment for water services must be based on the principle of equity, ensuring that these services are affordable to all, but also that the drinking water is of an acceptable standard and not contaminated. The same is true for the provision of power utilities. In regard to communication the state must ensure that its citizens have the means to communicate and obtain information, notwithstanding who the provider of those services is.

(e) Summary

Essential services like electricity, gas and water are vital to the promotion and protection of some of the most fundamental social, economic and cultural rights. Privatisation of any of these services will not operate to absolve a state of its obligations to observe and implement these rights. It remains incumbent upon the state to ensure that in cases where a private actor has been allowed to assume responsibility for providing these services, the provision of those services continues to meet human rights requirements.

9.4.2 *Nationalisation and regulation*

Following on from the general observations made in regard to privatisation and de-regulation, the question arises whether the state is in a different position when (re)nationalising essential services and/or starting to (re)regulate. This more paternalistic model is closer to the state model that the drafters of the international human rights treaties had in mind. More often than not (but not necessarily), the paternalistic model seems to offer better protection for consumers of the essential services.[84] In this model it is the rights of the private service providers that merit attention. In particular, the right to property and the right to natural justice are relevant.

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82 United Nations Sub-Commission for the Protection and Promotion of Human Rights *Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (2003) E/CN.4/Sub.2/2002/13.

83 This has been acknowledged, inter alia, by the development of the doctrine of horizontality. See also: *X and Y v Netherlands* (1985) 8 EHRR 235 (ECHR); *A v United Kingdom* (1999) 27 EHRR 611 (ECHR).

84 For a discussion of paternalism in consumer law see Kate Tokeley "Consumer Law and Paternalism: a Framework for Policy Decision-Making" in this volume (ch 10).

(a) Property[85]

A right to property is not enshrined in the BORA, and the question of whether such a right should be added is controversial and current. Right now it is unclear what a BORA-style right to property might look like. A right to property can be found in the international human rights conventions and in many constitutional documents, and the importance of property (including labour) to human well-being and freedom has been emphasised in many writings on human rights, including those of John Locke, William Blackstone, Georg Hegel and Henry Maine. Unsurprisingly, a right to property is provided for in the Universal Declaration of Human Rights,[86] the European Convention on Human Rights,[87] the American Convention on Human Rights,[88] the African Charter on Human and Peoples' Rights[89] and many other national human rights charters and constitutions. The recently enacted Bill of Rights in Victoria, Australia also contains a right to property.[90] Furthermore, the law of New Zealand already protects property in many ways.[91] Clause 7(1)(c) of the Regulatory Standards Bill proposes regulating the taking of property and emphasises the importance of property.

(b) Natural justice

Section 27(1) of the BORA guarantees the right to the observance of the principle of natural justice. Section 27(1) is not modelled closely on any overseas provision, and nor, unfortunately, has it attracted a lot of jurisprudential attention. Consequently, it is difficult to know if reasoning in support of the meaning discussed in cases so far will withstand scrutiny in later cases. Two judicial pronouncements are of particular relevance. First, Elias J held in *Ali v Deportation Review Tribunal* that a fundamental aspect of natural justice is the requirement that where the circumstances of the decision-making require a person affected by the decision to be given an opportunity to be heard, that person must be given a reasonable opportunity to present his or her case and reasonable notice of the case he or she will be required to answer.[92] Therefore, where re-regulation occurs the state must ensure that a process is in place to give the affected service providers sufficient notice to provide the appropriate opportunity to be heard.

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85 See also Richard Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand" in this volume (ch 5).

86 Universal Declaration of Human Rights, art 17. We note that the ICCPR does not guarantee a right to property.

87 European Convention on Human Rights, Protocol 1, art 1.

88 American Convention on Human Rights, art 21.

89 African Charter on Human and Peoples' Rights, art 14.

90 Charter of Human Rights and Responsibilities Act 2006 (Vic), s 20.

91 See Richard Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand" in this volume (ch 5).

92 *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC) at 220.

An example where the state's role as protector of its citizens' human rights was at issue was the case of Folole Muliaga. Ms Muliaga was terminally ill with obesity-related heart and lung disease, and depended on an electric oxygen pump to assist her breathing. She died after the local power supplier, citing arrears in payment, cut off the power to her home, and consequently to the oxygen pump. The power supplier in this case was state-owned, but this example nevertheless highlights the question of whether the state can, in cases such as those involving the provision of essential services, act like a business owner. The case resulted in the Electricity Commission issuing *Guidelines on Arrangements to assist Low Income and Vulnerable Consumers*.[93] The guidelines mandate that the electricity retailer must clearly communicate with its customer and should, prior to disconnection for non-payment, ascertain whether the consumer is vulnerable.[94] It also states that retailers should refer vulnerable consumers to WINZ[95] before disconnection.

If, for example, the Government had decided to re-regulate the provision of electricity in the aftermath of Folole Muliaga's death in order to ensure that power suppliers did not cut off vulnerable customers, it is arguable that power suppliers could have challenged such a regulation if they were not given the appropriate notice of the regulation and an opportunity to be heard on the matter. Such regulation may require power companies to make changes to their operations that have significant repercussions for their business models, and there would be obvious concerns around how power suppliers would be compensated for supplying electricity to vulnerable customers who are not in a position to pay. Power suppliers would therefore be anxious to see these concerns addressed in regulation, and could insist on a right to express them under s 27.

In *Lumber Specialities Ltd v Hodgson*, Hammond J recorded, as a "possible argument" under s 27(1) of the BORA, that the subsection may operate to prevent the taking of private property without just compensation being paid for it.[96] McGechan J declined to follow Hammond J's approach in *Westco Lagan v Attorney-General*,[97] even though that approach is in line with property provisions in some Constitutions.[98] As long as BORA does not contain a right to property s 27(1) is a potential avenue to afford some protection for services providers.

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93 Electricity Commission "Guideline on arrangements to assist low income and vulnerable consumers" (2007). These have been subsequently reviewed and updated. The latest version is available at www.ea.govt.nz/consumer/mdvc/ (last accessed 25 September 2011).

94 Vulnerable consumers are people who struggle to pay their power bill, and people whose health, age or disability makes disconnection a threat to their health.

95 Work and Income New Zealand: provides financial assistance and employment services throughout New Zealand.

96 *Lumber Specialities v Hodgson* [2000] 2 NZLR 347 (HC) at [170]-[177].

97 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [61].

98 Basic Law, Art 14; South African Constitution, Art 25(2)(b).

(c) Conclusion

When the state regulates and nationalises essential services the two rights which it can potentially infringe are the right to property and the right to natural justice. Both rights have played virtually no role in New Zealand's human rights jurisprudence or scholarship. This might change should the Government decide to add a property right to the BORA rights.[99] As discussed above, the Regulatory Standards Bill 2011, if enacted, will provide additional property protection.

9.4.3 *The duty to provide means of communication: the new kid on the block*

Twenty years ago, in *Federated Farmers v New Zealand Post*, the High Court was required to decide whether a substantial increase in the rural delivery service fee as a condition of delivery of mail "to the gate" in rural areas was legitimate.[100] The Court observed that:[101]Beneath the triviality of the sums involved, there are deeper concerns. There is concern on the part of the rural community at erosion of traditional rural services, whether mail, telephone, roading, schooling, or otherwise. The case has social and political overtones.

The Court held that the rural community's right under s 14 of the BORA to freedom to send and receive mail was hindered (infringed) by New Zealand Post's refusal to deliver to the post boxes at farm gates. The Court observed that for many the receipt of information by mail will be slower and more difficult.[102] After finding a prima facie infringement the Court held that the "user pays" principle which New Zealand Post operated was a reasonable limit under s 5 of the BORA.[103]

Unlike utilities, which are required in order to satisfy economic, social and cultural rights, the provision of means of communication finds its source in

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99 See, for an extensive discussion on the right of property, Richard Boast and Neil Quigley "Regulatory Reform and Property Rights in New Zealand" in this volume (ch 5).

100 *Federated Farmers of NZ v New Zealand Post Ltd* [1992] 3 NZBORR 339.

101 *Federated Farmers of NZ v New Zealand Post Ltd* [1992] 3 NZBORR 339.

102 *Federated Farmers of NZ v New Zealand Post Ltd* [1992] 3 NZBORR 339.

103 More recent criticism in New Zealand has been directed at the Government's approach to the supply of high speed internet access to rural New Zealand. As recently as 2007 approximately 50 per cent of rural telephone lines were incapable of supporting high speed broadband services, despite the fact that business enterprises operating in rural areas accounted for approximately 25 per cent of New Zealand's Gross Domestic Product: Ministry of Economic Development *Telecommunications Service Obligations Regulatory Framework: Discussion Document* (2007) www.med.govt.nz (last accessed 25 September 2011). On 20 April 2011, the Government announced that it had concluded a deal with national telecommunications providers that would provide access to high speed internet to 86 per cent of rural households and businesses, but pricing plans are yet to be disclosed: Tracy Watkins "Rural broadband at 'lightning speeds'" *The Dominion Post* (Wellington, 21 April 2011).

freedom of expression – a civil and political right. Article 19(2) of the International Covenant on Civil and Political Rights ("ICCPR"), as well as section 14 BORA, guarantees the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. The right to freedom of expression does not encompass the right to be heard, that is, the right that the information or opinion imparted should reach the intended addressee. However, a minimum guarantee in regard to the ability to communicate with the outside world is embedded in the right to freedom of expression. That means the exercise of the right to free speech in many forms is greatly dependent upon the infrastructure available to facilitate communication.[104]

Today the discussion focuses on the availability and accessibility of the internet more than mail delivery, cable television and telephone lines. The internet is simultaneously a communication, publishing and distribution tool, allowing over two billion people around the world to communicate instantaneously generally for cheaper than a local call.[105] It makes communication to an audience of millions within the reach of everyone with access to a computer and at the least a telephone line; it serves as a huge multi-media library of information on topics ranging from human rights to deep-sea exploration and it is being used as an important educational tool – some universities, for example, now offer courses over the internet. Governments use the internet to make information available and even public health services have gone online to provide self-help information. Increasingly, traditional media such as newspapers and radio stations are also available online, thus enriching internet content by providing a bridge between the 'paper-world' and cyberspace and ensuring worldwide access to local papers. In addition, the internet has developed an important entertainment function, providing, for example, online movies, games and music events. It has developed a crucial commercial function, with more and more businesses trading over the internet, selling everything from computers to holidays to flowers.[106] The core ability to communicate aids also the fulfilment of other rights like the right to vote and freedom of assembly. At the same time the internet poses a risk to the vulnerable members of society, especially children,

104 See, for example, *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation* 1995 (9) BCLR 1262 (ZimSC) in regard to an efficiently operating telephone network. A discussion of the decision: Andrew Butler "Freedom of Expression in Zimbabwe and the Telecommunications Monopoly" (1997) 46 ICLQR at 125; *Turner Broadcasting System Inc v Federal Communications Commission* 512 US 622 (1994) in regard to the carriage of local broadcast stations on cable systems. Discussion by Daniel Brenner "Cable Television and the Freedom of Expression" 1988 *Duke Law Journal* 329.

105 International Telecommunication Union, StatShot No.5, January 2011 available at: www.itu.int/net/pressoffice/stats/2011/01/index.aspx (last accessed 8 Aug 2011).

106 *ACLU v Reno* 929 F Supp 824 (ED Pa 1996) at 842; also New Zealand Human Rights Commission workshop on Internet and Human Rights (2010).

and content control is, therefore, discussed and exercised in most countries.[107] However, the special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, emphasised that due to the unique characteristics of the internet, regulations or restrictions which may be deemed legitimate and proportionate for traditional media are often not so with regard to the internet. While, for example, the protection of children from inappropriate content may constitute a legitimate aim, the availability of software filters that parents and school authorities can use to control access to certain content renders action by the Government such as blocking less necessary, and difficult to justify.[108]

The importance of an "internet right" in its two forms: *access* (to online content and the availability of the necessary infrastructure and information communication technologies) and (content) *control* was also evidenced in La Rue's report.[109] In New Zealand, the Human Rights Commission has made the right to access to the internet one of its priority areas.[110]

Whether, and if so how, the internet should be regulated is controversial. On the one hand, the ease with which material can be published and disseminated online raises serious questions regarding the ease of access to objectionable material, that is, the protection of the vulnerable, and the security of personal information. On the other hand, regulating to restrict or restrain internet use or availability threatens to undermine fundamental rights to freedom of expression and information. These rights which have taken on additional currency in light of recent political uprisings in Tunisia and Egypt which utilised online social networks such as Twitter and Facebook to mobilise protesters.[111]

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107 Dissemination of child pornography is prohibited under International Human Rights Law; see, for example, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art 3, para 1(c).

108 Center for Democracy and Technology "Regardless of Frontiers: The International Right to Freedom of Expression in the Digital Age" version 0.5 – Discussion draft (April 2011) at 5; United Nations General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (Human Rights Council, 17th session, 16 May 2011, A/HRC/17/27) at para 27.

109 United Nations General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (Human Rights Council, 17th session, 16 May 2011, A/HRC/17/27). The report highlights human rights issues of grave concern including: a) criminalisation of online expression, b) blocking, controlling and manipulating internet content, c) interference with privacy and data protection, d) unlawful surveillance, and restrictions and e) limitations on internet access.

110 Human Rights Commission *Summary of Human Rights in New Zealand 2010* (Human Rights Commission, Wellington, 2010) at 53.

111 See Alex Comninos *Twitter revolutions and cyber crackdowns: User-generated content and social networking in the Arab spring and beyond* (Association for Progressive Communications, 2011).

The degree of regulation of the internet varies widely between jurisdictions. New Zealand's approach to regulation has so far been light-handed, but there is some pressure to take a harder line.[112]

The regulation of the internet therefore lends itself to a case study of human rights considerations that ought to be taken into account and whether and/or for which aspects an Act of Parliament is needed to regulate. As there are many private actors involved in access to and content control of the internet the issues of private actors rights is also important.

9.5 Summary and further research

Human rights have to be taken into account in the policy making process in New Zealand. Even when a Bill is introduced, human rights play an important role. The Attorney-General's report under s 7 of the BORA alerts Members of Parliament to any infringement of BORA rights when a Bill enters Parliament. In a democracy based on parliamentary sovereignty it is Parliament's prerogative to make the decision to knowingly infringe human rights – generally for the good of the people. In regard to regulations, the Regulations Review Committee fulfils an important function in safeguarding human rights; although in practical terms, this process might not always work satisfactorily.

The interesting question that arises, and which will be further explored in the next stage of this project, is whether policy makers are free to choose the form of regulation or whether an Act of Parliament is the appropriate tool where human rights are impacted. This requires a careful analysis of when the extent of human rights infringement requires that regulation is by an Act of Parliament rather than through other means. These issues will be analysed using the regulation of access to and content control on the internet as a case study. In regard to content control, a rights analysis sits within the classical civil and political rights as protection against the state ("negative right"), and in regard to access issues the analysis sits within the positive rights paradigm. An analysis of how human rights should affect regulation of some aspects of the internet will need to address, inter alia, the questions whether some or all services should be nationalised to guarantee access for all and whether and/or how much content control the state should exercise or whether the state should rely on the industry to bind itself through code of conducts or similar mechanisms.

[112] InternetNZ "Briefing material for the TVNZ 7 internet debate" (2011) see www.internetnz.net.nz (last accessed 25 September 2011).