PART 4:

THE INSTITUTIONS OF THE REGULATORY REGIME

Chapter 13

When is an Act of Parliament Appropriate Form of Regulation? – Regulating the Internet as an Example

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> What do legislation and sausages have in common? One sleeps better if one does not know how they are made.[1]

13.1 Introduction

As outlined in "Rights and Regulation" – Chapter 9 of *Learning from the Past, Adapting for the Future* – human rights have to be taken into account in the policy making process in New Zealand.[2] Human rights are safeguarded in that process by various means, starting with the policy development process by involving the Ministry of Justice's experts and ultimately ending with an evaluation by a court as to whether a policy complies with New Zealand's human rights guarantees. The realisation of a policy can take different forms: legislation can be enacted by Parliament, but Parliament can also delegate the power to decide an issue to the relevant minister. Following on from "Rights and Regulation"[3] this chapter answers the question which has remained unanswered: 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 upon. The discussion of this abstract question will be followed by an application of the findings to Internet regulation.

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1 Otto von Bismarck cited in Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 AöR 155 at 156.

2 Petra Butler "Rights and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 241.

3 Petra Butler "Rights and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 241.

Internet regulation was chosen as a case study because it affects society in many different ways. Often the interests in regard to the Internet are opposing. It is a widely held view that access to the Internet is essential to participate in today's society and, therefore, a right the state has to provide for. However, the participation of society via the Internet poses some risks the state has a duty to mitigate. Undoubtedly this poses particular challenges to any regulatory regime.

13.2 Act of Parliament or regulation?

It is nearly trite to state that in today's world of a dynamic and ever-changing society the State is no longer able to fulfil the ideal to use Acts of Parliament, as the (only) central way to govern – "government of the people, by the people, for the people".[4] Acts of Parliament, as the legitimate transmission belt between people's sovereignty and the State exercising its power, often take too long and lack elasticity for the State to react quickly to the demands of a pluralistic society with ever more demanding situations and circumstances. In a democracy, which is based on a separation of powers, where Parliament does not have the law making monopoly but *merely* regulation primacy, it is legitimate to distribute some tasks or functions to the executive, especially when the executive has the expertise to react quickly, flexibly, and appropriately.[5] A shift of Parliament's social control mechanism function to the executive, however, holds the danger that the central function of Parliament as the legitimised social control mechanism will be eroded. The safeguarding of human rights within society is one of the social control mechanisms. The question arises whether, or to what extent, Parliament is able to shift that function to the executive. Taking into account the general principles just set out, any shift in responsibility from Parliament to the executive consequently has to be able to be retraced to the sovereignty of the people. Parliament cannot dispose of its law making role in favour of an "expertocracy".[6]

German jurisprudence and academia have dedicated extensive scholarship to

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4 Abraham Lincoln (speech at Gettysburg, 19 November 1863) cited in Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 Archiv des öffentlichen Rechts 157 at 159. Compare s 15(1) of the New Zealand Constitution Act 1986: Parliament has full law making power. Parliament usually exercises this power to pass primary legislation. However, Parliament also has the power to confer its law making power on another person or body, thus enabling that person or body to make laws; see also Legislative Advisory Committee *Guidelines on Process and Content of Legislation* (May 2001) at [10.1.2].

5 George Tanner and Mai Chen "Delegated Legislation" (NZLS Seminar, May 2002) at 95; Fritz Ossenbühl "Vorrang und Vorbehalt des Gesetzes" in Josef Isensee and Paul Kirchhof (eds) *Handbuch des Staatsrechts* Vol III (2nd ed, Müller, Heidelberg, 1996) §62 at [18]. Compare also BVerfGE 8, 274, 324 and 325; BVerfGE 49, 89, 145 and 146; see also Wolfgang Hoffmann-Riem "Gesetz und Gesetzesvorbehalt im Umbruch" in (2005) 130 Archiv des öffentlichen Rechts 5 at 7, who draws attention to the fact that over regulation, as understood in a multitude of Acts of Parliament, has been made responsible for bureaucratisation, the lack of innovation and growth.

6 Compare Fritz Ossenbühl "Vorrang und Vorbehalt des Gesetzes" in Josef Isensee and Paul Kirchhof (eds) *Handbuch des Staatsrechts Vol III* (2nd ed, Müller, Heidelberg, 1996) §62 at [1].

defining the threshold when an issue has to be regulated by an Act of Parliament and when and what can be regulated by (mere) regulation and, therefore, makes a useful comparative study. After giving an overview of where the line is drawn under German constitutional arrangements, this chapter will explore when and where the New Zealand Parliament can, and where it cannot, relinquish its mandate to safeguard human rights by an Act of Parliament.

13.2.1 *German law*

Any comparative analysis needs to start with an explanation why the particular comparative legislation was chosen. As already indicated, German jurisprudence and academia have dedicated extensive scholarship on defining the threshold for when an Act of Parliament is necessary. Therefore, there is extensive case law and material available which could be accessed in its original form. What makes a comparison with German law interesting is that the drafters of the German Grundgesetz (Basic Law) had thought about the allocation of responsibilities between Parliament and the executive in regard to ensuring a functioning and responsive state and set out, in articles 20 and 80, the principles for when an Act of Parliament is required to safeguard the citizens' human rights. Further, the value in the comparison with the German treatment of the issue lies in the fact that it is a civil jurisdiction with an entrenched written constitution. Even though there is undoubtedly enormous value in a comparison with a legal system from the same jurisprudential family, to compare it with a legal system nearly opposite provides, in the author's view, a more challenging and insightful comparison.

Three principles are at the heart of the way German constitutional law has dealt with the threshold issue: the core principle is the rule of law (Rechtsstaatsprinzip) embodied in the German Basic Law (Grundgesetz, GG).[7] This principle includes the principle of legality which, in turn, contains the primacy of law (Vorrang des Gesetzes) and the reservation of law (Vorbehalt des Gesetzes).[8]

The reservation of law is embodied in article 20(3)GG[9] which states: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice." Courts and academic commentators have concluded

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7 Oliver Lespsius "Verfassungsrechtlicher Rahmen der Regulierung" in Michael Fehling and Matthias Ruffert *Regulierungsrecht* (Mohr Siebeck, Tübingen, 2010) 143 at 199; Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2000].

8 Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2001].

9 Basic Law for the Federal Republic of Germany 1949 (Germany), art 20 (Constitutional principles – Right of resistance) reads in full:

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is possible.

that the guarantee of article 20(3)GG means that a legal authorisation is needed for all decisions of the executive that potentially violate the citizens' freedoms, property and the principle of equality.[10] The reservation of law, therefore, anchors the constitutionally guaranteed freedoms and equality of the citizenry again in the constitution and links it directly to Parliament's mandate.[11] Germany's approach is in line with other (modern) Constitutions, like Spain and Belgium,[12] but different from the (traditional) constitutional arrangements, for example, those of France and Britain where the executive has some inherent powers to carry out its activities. "Most of the powers relate to the functions of the 'night-watchman state': to provide for security and public order and to run a bureaucracy."[13] As John Bell explains, the reason for the different approaches lies in the countries' historical circumstances. The latter states are still influenced by the law predating the pre-democratic constitutional system, whereas the former states have embodied modern constitutional thinking developed in the beginning of the 20th century.[14]

Article 80 GG sets out the principle of reservation of law and Parliament's obligation to act, and not leave measures that have the potential to significantly infringe the people's human rights to the "expertocracy".[15] If a matter impacts on rights significantly, Parliament has to at least specify the subject, content, purpose and scope of the infringement.[16] However, this is not limited to rights infringements. As (positive) governmental measures such as granting of benefits and other interventions can have a similar impact on freedoms as the infringement of rights by the government,[17] the subject, content, purpose and scope of any

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10 BVerfGE 6, 32 and onwards; BVerfGE 80, 137, 154 and 155; Fritz Ossenbühl "Vorrang und Vorbehalt des Gesetzes" in Josef Isensee and Paul Kirchhof (eds) *Handbuch des Staatsrechts Vol III* (2nd ed, Müller, Heidelberg, 1996) §62 at [16]; Gerhard Robbers, *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2001] and [2003]; Herman von Mangoldt, Christian Starck, Friedrich Klein and others (eds) *Kommentar zum Grundgesetz* Vol II (Franz Vahlen, Munich, 2005) art 20(3) at [276].

11 Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2001].

12 Belgian Constitution 1994, arts 35 and 105; Spanish Constitution 1978, arts 9(1) and 103(1).

13 John Bell "Memorandum by John Bell to Parliament" (7 December 2005), available at <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/5120706.htm>.

14 See John Bell "Memorandum by John Bell to Parliament" (7 December 2005), available at <www.publications.parliament.uk/pa/ld200506/ldselect/ldconst/236/5120706.htm>. A more sustained comparative discussion in regard to the countries mentioned is not possible in the constraints of this chapter.

15 See Petra Butler "Rights and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 241 at 249; Herman von Mangoldt, Christian Starck, Friedrich Klein and others (eds) *Kommentar zum Grundgesetz Vol II* (Franz Vahlen, Munich, 2005) art 20(3) at [273]; Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2005] and [2016].

16 Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2006].

17 Resolution of the German Constitutional Court from 28/10/1975, reference: 2 BvR 883/73, 2 BvR 379/74, 2 BvR 497/74, 2 BvR 526/74, [34].

significant measure (positive or negative) will have to be regulated by Parliament.[18]

Separation of powers, embodied in the Basic Law in article 20(2) restrains Parliament's mandate to be the guardian of polity: the executive cannot only be a hollow shell that merely executes Parliament's wishes but must have an independent function (Verwaltungsvorbehalt).[19] Self-government falls within the realm of the executive,[20] the execution of the law (that is, the execution of Parliament's, the polity's, will), the self-organisation, even to make law (curtailed as discussed below), and the sphere where the executive complements Parliament, because Parliament has deliberately or unintentionally not legislated (Komplementärverwaltung).

Article 80(1) GG states that the German Federal Government, a Federal Minister or a state government can be authorised to adopt a regulation (instead of Parliament passing an Act). However that authorisation has to be enshrined in an Act of Parliament that prescribes the content, the purpose and the scope of the future regulation (GG, article 80(1)). The aim of this is that Parliament cannot ignore its responsibility as law maker it therefore, it can only transfer authority by specifying in advance what is tolerable and acceptable.[21] This does not mean that the empowering provision(s) needs to regulate every aspect in detail, but that it must be possible to determine the parameters Parliament has set by using the usual legal interpretation techniques.[22] However, the empowering provision has to be so clear that the citizen is able to determine the content of the regulation based on the empowering provision.[23]

In order to specify the requirements of reservation of law the German Constitutional Court (Bundesverfassungsgericht) developed a theory (Wesentlichkeitstheorie) after which the question of whether an aspect is significant and has to be regulated by the Parliament or not, has to be determined by the intensity of its infringement of constitutional rights as a starting point.[24] What is significant for the specific constitutional right and triggers the threshold of

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18 Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2012].

19 Compare Fritz Ossenbühl "Vorrang und Vorbehalt des Gesetzes" in Josef Isensee and Paul Kirchhof (eds) in *Handbuch des Staatsrecht Vol III* (CF Müller, Heidelberg, 1996) §62 at [18], [55] and following; Herman von Mangoldt, Christian Starck, Friedrich Klein and others (eds) *Kommentar zum Grundgesetz Vol II* (Franz Vahlen, Munich, 2005) art 20 (3) at [274].

20 See Fritz Ossenbühl "Vorrang und Vorbehalt des Gesetzes" in Josef Isensee and Paul Kirchhof (eds) in *Handbuch des Staatsrecht* Vol III (CF Müller, Heidelberg, 1996) §62 at [55] and following.

21 Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2047].

22 BVerfGE 8, 274 and 312; BVerfGE 24, 155 and 167; BVerfGE 26, 16 and 27; BVerfGE 26, 228 and 241; BVerfGE 58, 257 and 277; Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2047].

23 BVerfGE 2, 304 and 334; BVerfGE 23, 62 and 73; BVerfGE 42, 191 and 200.

24 BVerfGE 34, 165, 192 and following; BVerfGE 58, 257 and 278; BVerfGE 85, 386, 403 and following; BVerfGE 95, 267, 307 and 308; BVerfGE 101, 1 and 34; Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2025] and [2026].

an Act of Parliament depends on what is significant in regard to the particular right in question.[25] The more intense the infringement and the more serious a violation of a citizen's constitutionally protected sphere, the higher the requirements in regard to certainty of any authorising Act of Parliament.[26] Other considerations which will be taken into account are the importance for the public good and the intensity of the political conflict.[27] Thus, the yardstick for certainty and *definiteness* of the Act of Parliament changes in intensity from regulating measures supporting the citizenry to criminal law provisions.[28] Regarding the latter, a delegation is possible but the authorisation has to prescribe the limits of the punishable offence and the type of punishment in advance.[29] This approach safeguards the idea that only the democratically legitimised Parliament, as the guardian of the polity, decides upon those important issues by debating the pro and contra. This also achieves a high level of transparency for the citizenry.[30]

Three different scenarios can be distinguished: first there is the standard scenario where the government must decide whether a policy poses a significant infringement of a right and, therefore, should be regulated by an Act of Parliament. Second, there is the situation where a government body is given significant autonomy by statute and the question arises as to how the conduct of that body should be regulated. The third scenario pertains to the situation that the government wants to distribute a benefit.

(a) Standard scenario

The 19th century principle that any interference in liberty and property had to be regulated by an Act of Parliament is still valid, but is today too simplistic.[31] In regard

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25 Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2028].

26 Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 Archiv des öffentlichen Rechts 157 at 164. In regard to criminal law this is uncontroversial: already Cesare Beccaria in *Dei delitti e delle pene* (1764) stated the danger of uncertain/imprecise criminal law provisions.

27 Whether political disagreement alone makes an issue "significant" is not uncontroversial, against it see BVerfGE 98, 218 and 251; Herman von Mangoldt, Christian Starck, Friedrich Klein and others (eds) *Kommentar zum Grundgesetz Vol II* (Franz Vahlen, Munich, 2005) art 20(3) at [275].

28 Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 Archiv des öffentlichen Rechts 157 at 164.

29 Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislativer Effizienz – auf dem Weg zu einer dritten Form der Gesetzgebung" (2008) 133 Archiv des öffentlichen Rechts 157 at 164; Hoffmann-Riem holds the Wesentlichkeitstheorie responsible for the über-regulation in Germany: Wolfgang Hoffmann-Riem "Gesetz und Gesetzesvorbehalt im Umbruch" in (2005) 130 Archiv des öffentlichen Rechts 5 at 8.

30 Compare BVerfGE 85, 386, 403 and 404.

31 Herman von Mangoldt, Christian Starck, Friedrich Klein and others (eds) *Kommentar zum Grundgesetz Vol II* (Franz Vahlen, Munich, 2005) art 20(3) at [276]; see also Fritz Ossenbühl "Vorrang und Vorbehalt des Gesetzes" in Josef Isensee and Paul Kirchhof (eds) in *Handbuch des Staatsrecht Vol III* (CF Müller, Heidelberg, 1996) §62 at [14] who traces the history back to the 17th and 18th centuries.

to the problem of how to differentiate between significant issues which need to be regulated by statute and less significant issues where the executive can regulate without a narrow mandate, the jurisprudence in regard to the German school system is a good example.

In 1981 the German Constitutional Court had to decide when there could be an exclusion from school or the conditions under which a student had to repeat a year due to inadequate performance.[32] The Court held that the compulsory exclusion from school or, more explicitly, from a specific school type had a strong impact on the students' constitutional right of occupational freedom.[33] Because the exclusion from a specific school type cuts off the route to specific occupations, the Court found that it constituted an infringement of the constitutional right to choose and practice a profession. In contrast, it was found that repeating a school year due to inadequate performance was not an invasive infringement of the right to freely choose one's occupation or profession.[34] Although the student's time at school is extended for one year the student has still the possibility to visit the chosen school type and enter into a career which requires the completion of this specific school type.[35] As a result, the significant issues regarding the exclusion from school are necessarily regulated by an Act of Parliament, which specifically states the competence, proceedings and requirements of the exclusion.[36] Regarding the repeating of a school year, it is sufficient that the statute states the possibility of a student repeating a year, but the requirements that is the circumstances under which this has to take place, are described in a regulation.[37]

In another famous decision, the Constitutional Court was asked to decide whether the Ministry of Education of Baden-Württemberg was allowed to decline to hire a Muslim teacher who wore a headscarf. Instead of basing its reasoning on a violation of freedom of religion, as one might have expected, the Court held that the Ministry had acted unlawfully by declining to hire the teacher because the issue of religious freedom and employment should have been regulated by an Act of Parliament instead of an administrative regulation.[38] The Court found that the statutory scheme in place in Baden-Württemberg's existing laws did not provide a

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32 Resolution of the German Constitutional Court 20 Oct 1981 (1 BvR 640/80).

33 Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 Archiv des öffentlichen Rechts 157 at 156. Basic Law for the Federal Republic of Germany 1949 (Germany), art 12(1) states: "All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law."

34 Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 Archiv des öffentlichen Rechts 157 at 158.

35 See Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 Archiv des öffentlichen Rechts 157 at 158.

36 Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 Archiv des öffentlichen Rechts 157 at 158.

37 Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 Archiv des öffentlichen Rechts 157 at 167.

38 Headscarf Decision, BVerfGE 108, 282 (338), NJW 56 (2003), 3111 (3121), 2 BvR 1436/02 (Jentsch, Di Fabio and Mellinghoff dissenting). A discussion of the case: Axel Freiherr von Campbenhausen "The German Headscarf Debate" (2004) 29 BYU L Rev 665.

"sufficiently clear legal basis"[39] upon which to use an administrative decision to prohibit wearing headscarves while teaching. In holding the administrative regulation insufficient, the Court nullified all related regulations immediately, with no transitional period.[40] Consequently, laws in each of Germany's 16 federal states had to be amended if a particular state's law did not declare directly that the state prefers not to legislate on whether a Muslim teacher may or may not wear a headscarf while teaching, as in the case of the Land North Rhine-Westphalia.[41] In response to the headscarf decision, the states of Baden-Württemberg, Bavaria and Lower Saxony more or less immediately drafted new laws to provide a legal basis for prohibiting teachers from wearing headscarves while teaching.[42]

Parliament can, of course, empower the executive with the help of a regulation to administer a certain rights infringing issue. However, the Act of Parliament has to specifically empower all infringing measures.[43]

(b) Autonomous government body

Independent government bodies or state-owned enterprises are established by statute. However, as mentioned earlier, the executive has the power (conferred by the constitutional order) to self-govern and to self-organise.[44] The question that arises is what the establishing statute needs to regulate. Depending on what the entity regulates (that is, how *essential* it is), the statute will have to set out the competence of the entity including most importantly the limits of its competence and the nature and purpose of its task.[45] A decision of the Bundesverfassungsgericht concerned the decision of the German Government, in particular the military, to allow the United States military to position missiles on United States' army bases in Germany.[46] The positioning of the missiles was part of

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39 Headscarf Decision, BVerfGE 108, 282 (294), NJW 56 (2003), 3111 (3111), 2 BvR 1436/02, at [30].

40 Headscarf Decision, BVerfGE 108, 282 (338), NJW 56 (2003), 3111 (3121), 2 BvR 1436/02, at [133] (Jentsch, Di Fabio and Mellinghoff dissenting).

41 The Land North Rhine-Westphalia has expressly opted for a tolerant stance towards Muslim teachers wearing a headscarf while teaching. Mal Hü, mal Hott [First One Thing, Then Another], Spiegel online (3 October 2003), available at <www.spiegel.de/unispiegel/stadium/0,1518,268138,00.htm>: "That is, the Land has declined to legislate even though there are currently at least fifteen teachers in the Land who wear a headscarf while teaching. … The Land Minister of Education [Schulministerin], Ute Schäfer, a Social Democrat, has explained that wearing a headscarf while teaching has never led to a conflict within the school, stating that 'this is a sign of the high degree of toleration of people in our Bundesland'." ("Ich glaube, dass dies auch ein Zeichen der großen Toleranz der Menschen in unserem Bundesland ist.")

42 Axel Freiherr von Campenhausen "The German Headscarf Debate" (2004) 29 BYU L Rev 665 at 667.

43 Herman von Mangoldt, Christian Starck, Friedrich Klein and others (eds) *Kommentar zum Grundgesetz* Vol II (Franz Vahlen, Munich, 2005) art 20(3) at [277].

44 See above [13.2.1].

45 Mario Martini "Normsetzungsdelegation zwischen parlamentarischer Steuerung und legislative Effizienz" (2008) 133 Archiv des öffentlichen Rechts 157 at 160–164; compare BVerfGE 4 at 7 and following; BVerfGE 7, 282 and 301; BVerfGE 23, 62 and 72.

46 "Waffendoppelbeschluss" BVerfGE 68, 1.

a North Atlantic Treaty Organization (NATO) strategy. Germany was already a member of NATO at the time (that is, it had ratified the relevant treaties). The issue before the Court was whether the Federal Government had, by agreeing to the installation of nuclear-equipped United States intermediate-range missiles of the Pershing-2 and Cruise missile types in Germany, without specific statutory empowerment, indirectly prejudiced or infringed rights of the Bundestag. The Members of Parliament argued that the assent at issue involved rights of the Bundestag as legislator and constitutional legislator. This was because the decision of the German Government had been associated with a transfer – contrary to article 24 of the Basic Law – of sovereign powers to the head of another state. The government's decision made possible the use of nuclear weapons to an extent incompatible with the requirements of international law on the admissibility of war reprisals, binding also for the Federal Republic of Germany by virtue of article 25 of the Basic Law. The installation of the new weapons, because of the far-reaching and intensive effects for the citizens of the Federal Republic of Germany, constituted an essential decision within the meaning of article 20(3) of the Basic Law.[47] The Court held that the decision to allow the positioning of the missiles was within the realm of the German Government and did not need authorisation by an Act of the German Parliament since the administration of the treaty (that is, the NATO commitments) had been given to the executive to administer.[48]

(c) Distribution of benefits

As the state needs maximum flexibility in distributing benefits and subsidies prima facie no infringement of rights occurs. However, subsidies and benefits inherently disadvantage the citizens that do not meet the distribution criteria. The threshold in regard to subject, content, purpose and scope of the empowering provision for the subsidies and benefits is not as high as for the standard scenario. The Supreme Administrative Court (Bundesverwaltungsgericht) requires that benefits and subsidies must be tied in the budget to fulfil the requirements of subject, content and scope.[49] In regard to the requirement that the purpose needs to be clearly ascertainable, the Court held that the purpose of the subsidies and benefits has to be disclosed and the limits of the government's competence outlined.[50]

In light of the above described Wesentlichkeitstheorie, there are some areas of the benefits and subsidies administration which have to be regulated by an Act of Parliament. The most pertinent examples are press or media subsidies.[51] In emergency situations, however, the government must be able to distribute funds in

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47 BVerfGE 68, 1.

48 BVerfGE 68, 1, 108, 109, 110 (IV).

49 BVerwGE 6, 282, 287 and 288; BVerwG DVBl 1978, 212; see also going even further: Reinhard Mußgnug "Gesetzesgestaltung und Gesetzesanwendung im Leistungsrecht" (1989) 47 VVDStRL 113 at 122 and following.

50 BVerwGE 6, 282, BVerwG, NJW 1959, 1098.

51 Herman von Mangoldt, Christian Starck, Friedrich Klein and others (eds) *Kommentar zum Grundgesetz Vol II* (Franz Vahlen, Munich, 2005) art 20(3) at [281] and [282]; compare Gerhard Robbers *Kommentar zum Bonner Grundgesetz* (Bonner Kommentar) (CF Müller, Heidelberg, 142th supplement, October 2009) art 20 at [2031].

the short-term without a parliamentary basis to react flexibly to the emergency and the needs of the citizenry.[52]

In regard to benefits and subsidies, the intensity of regulation by Parliament depends on the multitude of circumstances and factual situations in which the benefits/subsidies are distributed. The Bundesverfassungsgericht, for example, had to decide on how intensely the granting of benefits for war victims (akin to a pension – a Kriegsopferversorgung) had to be regulated by statute. The government was faced with claimants from over 80 countries, with (obviously) varying life stories and circumstances, but also with vastly diverging legal systems and different degrees of diplomatic contact. The Court held that a law that sets out the granting of benefits that have an international dimension might need to confer a considerable amount of discretion to the executive to allow for the potentially great variation of circumstances that the executive will have to assess and react to.[53] However, since the benefit could be of existential importance to the aggrieved party, the requirement of when an exception to granting the benefit existed (that is, when a party is not eligible or only in part) had to be regulated by statute.[54]

(d) Summary

The German law has developed an elaborate but not narrow or stringent, doctrine to find the dividing line when a matter has to be regulated by statute and when it can be left to the executive to deal with it. The core of the doctrine is the *"Wesentlichkeitstheorie"*. According to the Wesentlichkeitstheorie, the starting point for determining whether an issue has to be regulated by an Act of Parliament is the intensity of the infringement of constitutional rights of the proposed measure. This is needed even though the drafters of the Basic Law allocated responsibilities between Parliament and the executive, in regard to ensuring a functioning and responsive state, which has not led to the German approach providing a hard and fast test. The Wesentlichkeitstheorie does give a framework that allows all branches of government to develop demarcation lines[55] and consequently has a signalling effect. It obliges and urges Parliament to consciously reflect on its role as the citizens' social control mechanism. Further, it also signals that considerations other than human rights can and should be advanced when deciding whether to regulate an issue as an Act of Parliament or as a regulation. Overall it can be concluded that the threshold when an issue has to be regulated by an Act of Parliament rather than regulation is not a hard and fast one, but rather a concept that is developed through jurisprudence with the help of academia.

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52 Compare Maurer, *Allegemeines Verwaltungsrecht* §6 at [15]; Herman von Mangoldt, Christian Starck, Friedrich Klein and others (eds) *Kommentar zum Grundgesetz Vol II* (Franz Vahlen, Munich, 2005) art 20(3) at [281].

53 BVerfGE 56, 1, 13 and following.

54 BVerfGE 56, 1, 1 (LS 1).

55 See in regard to the role of the courts Dean Knight and Rayner Thwaites "Review and Appeal of Regulatory Decisions: The Tension between Supervision and Performance" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 215 at 221 and following.

13.2.2 *New Zealand law*

One of the founding principles of New Zealand's constitution is the rule of law (the other being parliamentary sovereignty).[56] This means in regard to the executive[57] that all executive action must be in accordance with the law. According to Harris, the authority for executive action has three sources in New Zealand: it can either be found in statute; conferred by royal prerogative; or, in what Harris has termed the "third source",[58] the residuary freedom which the executive has to do which is not legally prohibited. Unlike in Germany's modern Basic Law, where Parliament's task as the legitimised social control mechanism defines the role of the executive, in New Zealand (and England) Parliament's role was originally determined by the monarch's overarching autocratic power. The prerogative power has its origin from that autocratic power and is what remains of that majestic power,[59] "so far as it has not been superseded by statute, eroded by judicial decision or atrophied by neglect or disuse."[60] As Harris points out:[61]

> [The executive] ha[s] valued the prerogative not only because it has been a ready-made source of authority for major aspects of executive action, but also because it can be exercised independently of parliamentary approval.

Unsurprisingly, more recently, the question has arisen whether the executive should still be able to derive any power through prerogative power or whether the executive should derive its power from statute (that is, by the will of the people).[62] The United Kingdom is moving towards the replacement of prerogative powers with statutory authorities, which has attracted attention and some criticism. Parliamentary oversight or control in relation to treaties, war powers, senior appointments and the management of the civil service is supposed to increase.[63] In New Zealand the executive's prerogative powers are still generally accepted.[64]

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56 See Supreme Court Act 2003, s 3(2); Bruce Harris "Replacement of the Royal Prerogative in New Zealand" (2009) 23 NZULR 285.

57 This chapter uses "executive" instead of "Crown", "government", or "State" to exemplify the role as opposed to Parliament and the Judiciary, and to use a term generically used across jurisdictions. For a discussion of the terms used in regard to the executive branch of government see Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 583.

58 Bruce Harris "The 'Third Source' of Authority for Government Action" (1992) 108 LQR 626; Bruce Harris "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 LQR 225.

59 Compare Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1959) at 424.

60 Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 617.

61 Bruce Harris "Replacement of the Royal Prerogative in New Zealand" (2009) 23 NZULR 285 at 286.

62 Ministry of Justice *The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report* (United Kingdom, London, 2009) at [1].

63 Ministry of Justice *The Governance of Britain – Review of the Executive Royal Prerogative Powers: Final Report* (United Kingdom, London, 2009) at [110], available at <http://ata.parliament.uk/DepositedPapers/Files/DEP2009-2493/DEP2009-2493.pdf>.

64 Compare Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 617.

Prerogative powers include: the prerogative of mercy;[65] the power to declare war and make peace;[66] the power to recognise foreign states;[67] the power to make certain appointments like the Governor-General,[68] ambassadors,[69] ministers,[70] and the Solicitor-General;[71] and the limited power to legislate, for example, in regard to the office of the Governor-General.[72] However, Harris in his seminal article in 2009 made a convincing case that the rationale of the prerogative powers (that is, the need for a Monarch to govern and to define Parliament's operating space) is now superseded by the constitutional principle of parliamentary sovereignty. Therefore, the executive should be authorised by Parliament, as the elected legislature, to fulfil all functions society wants and expects it to perform.[73] Parliament would give a democratic mandate to all executive action "in advance of it taking place, and impose such clear constraints and accountability mechanisms in respect of the action as considered appropriate at the time of enactment".[74]

The New Zealand Parliament can override any prerogative power by statute.[75] Parliament recognises that some matters are for it to decide by providing in SO 315(2)(f) that the Regulations Review Committee may draw a regulation to the special attention of the House, if the regulation "contains matter more appropriate for parliamentary enactment".

The Regulations Review Committee had its beginnings in 1929 when Lord Hewart perceived that the Parliament's law making powers had been delegated extensively to the executive which "place[d] government departments above the sovereignty of Parliament and beyond the jurisdiction of the courts".[76] In 1932 the Donoughmore Report on Ministers' powers acknowledged Lord Hewart's concerns, but disagreed with the notion that the devise of delegated legislation was objectionable.[77] The report acknowledged that there was the risk of abuse and that

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65 See Letters Patent Constituting the Office of Governor-General 1983, cl 11; *Burt v Governor-General* [1992] 3 NZLR 672 (CA).

66 Compare Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 657–680.

67 Compare Philip Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington 2007) at 657-680.

68 See Letters Patent Constituting the Office of Governor-General 1983, cl 1.

69 See Letters Patent Constituting the Office of Governor-General 1983, cl 10.

70 See Letters Patent Constituting the Office of Governor-General 1983, cl 10.

71 See Letters Patent Constituting the Office of Governor-General 1983, cl 10.

72 The Letter Patent constituting the Office of the Governor-General 1983 is a manifestation of this power. See generally Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 491–498.

73 Bruce Harris "Replacement of the Royal Prerogative in New Zealand" (2009) 23 NZULR 285 at 287.

74 Bruce Harris "Replacement of the Royal Prerogative in New Zealand" (2009) 23 NZULR 285 at 287.

75 See *Solicitor-General v Corp of the City of Dunedin* (1875) 1 NZ Jur (NS) SC 1 at 14 and 15 per Williams J; *Simpson v Attorney-General* [1955] NZLR 271 (CA) at 279–281 per Hutchinson J; Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 617–622; Bruce Harris "Replacement of the Royal Prerogative in New Zealand" (2009) 23 NZULR 285 at 299.

76 Lord Hewart of Bury *The New Despotism* (E Benn, London, 1929) at 14.

77 Report of the Committee on Ministers' Powers 1932, Cmnd 460 (Donoughmore Report) at 13–14.

safeguards had to be in place "if the country [was] to enjoy the advantages of the practice without suffering from its inherent dangers".[78] In New Zealand, the first step towards preserving Parliament's law making power over that of the executive was under the Regulations Act 1936, which stated that all regulations had to be made available to the public.[79] The next major step was the widening of the mandate of the Statutes Revision Committee in 1962 to draw the attention of the House to any regulation that: (a) trespassed unduly on personal rights and liberties; (b) appeared to make some unusual or unexpected use of the powers conferred by the statute under which it was made; and/or (c) required elucidation.[80] The Statutes Revision Committee scrutinising its own work in 1985, concluded that it did not have enough time to comprehensively scrutinise delegated legislation and recommended the establishment of a separate, specialised committee.[81] The Regulations Review Committee was constituted in July 1985.

The LAC Guidelines stipulate that principle and policy should be regulated by an Act of Parliament, whereas regulation is adequate for detail and implementation. However, the LAC also recognises that the distinction between principle and detail, and policy and implementation can be both confusing and circular, not least because there is a significant overlap between those general descriptions.[82]

The 2012 LAC Guidelines state:[83]

- provisions which affect fundamental human rights and freedoms should always be included in primary legislation. Examples of these rights and freedoms include—
  - freedom from search and seizure.
  - the right to demand and receive information.
  - rights under the New Zealand Bill of Rights Act 1990 generally.
  - provisions which expropriate property (namely, the taking of property for public use).
  - social and economic rights (which include welfare and ACC rights and the corresponding rates of entitlement).

On the face of it, the LAC Guidelines go further than the German reservation of law principle – stating that every matter that affects fundamental human rights and freedoms should always be included in primary legislation. However, that threshold would mean that every policy would have to be regulated by an Act of Parliament. It is hardly conceivable that a matter regulated will not (at least tangentially) impact on a fundamental human right, especially since the LAC Guidelines do not refer to

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78 Report of the Committee on Ministers' Powers 1932, Cmnd 460 (Donoughmore Report) at 14.

79 Regulations Act 1936, s 3; see also Ryan Malone and Tim Miller *Regulations Review Committee Digest* (4th ed, New Zealand Centre for Public Law, Wellington 2012) at 5.

80 Ryan Malone and Tim Miller *Regulations Review Committee Digest* (4th ed, New Zealand Centre for Public Law, Wellington 2012) at 6.

81 Ryan Malone and Tim Miller *Regulations Review Committee Digest* (4th ed, New Zealand Centre for Public Law, Wellington 2012) at 6.

82 Legislative Advisory Committee *Guidelines on Process and Content of Legislation* (2012) at [10.1.2], available at <www.justice.govt.nz/lac/>.

83 Legislative Advisory Committee *Guidelines on Process and Content of Legislation* (2012) at [10.1.3], available at <www.justice.govt.nz/lac/>.

civil and political rights but only to social and economic rights. Therefore, questions of threshold arise: At what point is an infringement of human rights so significant that the matter has to be regulated by statute? What is the sphere in which the executive can operate without Parliament's authorisation (that is, still has the royal prerogative)?[84]

This chapter is generally not concerned with the safeguarding of human rights by reactive means (once a human rights infringement has happened; for example, decisions by the Regulations Review Committee or the courts). However, it should be noted that Parliament's supervision regime of regulations is based on five prongs: (a) the laying of all regulations before the House of Representatives; (b) confirmation of regulations by an Act of Parliament; (c) approval of regulations by resolution of the House; (d) amendment or disallowance of regulations under the Regulations (Disallowance) Act 1989; and (e) scrutiny by the Regulations Review Committee.[85] The latter is the most important parliamentary scrutiny process. Doug Kidd, twice chairman of the Committee described the work of the Committee as follows:[86]

> … show the ongoing tendency of all Governments to stray from the paths of constitutional righteousness, seduced by the sirens of power, efficiency, and convenience. We are here to educate, guide, persuade, correct, chastise, and reform Government – a congenial sinner.
>
> Above all we are here to protect and promote the rule of law.

The Regulations Review Committee has two functions in regard to regulations: first, it examines all regulations after they are made;[87] and second, any person aggrieved in regard to the operation of a regulation can place a complaint before the Committee.[88] In accordance with Standing Orders,[89] the Committee can draw Parliament's attention to a regulation that "trespasses unduly on personal rights and liberties" and "unduly makes the rights and liberties of persons dependent upon administrative decisions which are not subject to review on their merits by a judicial or other independent tribunal". The Committee has established a three-step test for determining whether a regulation breaches the Standing Order:[90]

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84 See in regard to mechanism in the development of regulations Petra Butler "Rights and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 241 at 243–249; Ryan Malone and Tim Miller *Regulations Review Committee Digest* (4th ed, New Zealand Centre for Public Law, Wellington 2012) at 5 and following.

85 In 2007, the Regulations Review Committee scrutinised 405 regulations; in 2008, 312 regulations: Report of the Regulations Review Committee "Activities of the Regulations Review Committee During 2007" [2007] AJHR I16M; Report of the Regulations Review Committee "Activities of the Regulations Review Committee During 2008" [2008] AJHR I16R respectively.

86 Doug Kidd *Legislature v Executive: The Struggle Continues* (New Zealand Centre for Public Law, Victoria University of Wellington, Occasional Paper No 3, 2001) 1 at 2, available at <www.victoria.ac.nz/law>.

87 Standing Orders of the House of Representatives 2011, SO 314(1).

88 Standing Orders of the House of Representatives 2011, SO 316(1).

89 Standing Orders of the House of Representatives 2011, SO 315(2)(b) and (2)(d).

90 Ryan Malone and Tim Miller *Regulations Review Committee Digest* (4th ed, New Zealand Centre for Public Law, Wellington 2012) at 33.

(1) Is there a right or liberty to be trespassed against?

(2) Has the regulation trespassed against that right or liberty?

(3) If so, is that trespass undue or unreasonable in the circumstances?

It is important to note that the Committee has not limited its definition of rights to those protected by rights embodied in the New Zealand Bill of Rights Act 1990 or common law.[91] In 2012, in 33 out of the 80 Committee reports the issue was whether the regulation trespassed unduly on personal rights and liberties.[92] The Committee did not lightly find a breach of a right or liberty. Even in a case where a regulation was in contravention with an ILO Convention the Committee concluded that as a matter of New Zealand law it could not be said that the right enshrined in the ILO Convention existed in New Zealand.[93] Complaints concerned especially (perceived) property rights. Nine reports dealt with the question concerning the impact on rights and liberties.[94]

As already mentioned, SO 315(2)(f) requires the Committee to draw to the attention of Parliament any regulation that "contains matters more appropriate for parliamentary enactment". The 2012 Digest lists 17 reports where this was an issue. Examples listed in the Digest[95] where the Committee held that a policy should be regulated by an Act of Parliament include, inter alia, regulations that create or amend offence provisions,[96] regulations that prescribe the extent of financial obligations,[97] regulations that introduce a different, new kind of property, that is of strategically important infrastructure,[98] or regulations that set fees exceeding the level needed to cover costs in order to maintain a financial reserve.[99]

Therefore, the Regulations Review Committee is quite an effective parliamentary vehicle to safeguard parliamentary sovereignty in ensuring that Parliament, through statutes, sets out policy and the substance of law, and that the regulations made are limited to technicalities and detail. However, it seems from reviewing the Digest that the Committee takes a rather cautious approach in finding that a regulation unduly trespasses on personal rights and liberties.

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91 Ryan Malone and Tim Miller *Regulations Review Committee Digest* (4th ed, New Zealand Centre for Public Law, Wellington 2012) at 33.

92 See Appendix A of the *Regulations Review Committee Digest 2012*.

93 Report of the Regulations Review Committee "Complaints Relating to the Accident Insurance (Insurer's Liability to Pay Costs of Treatment) Regulations 1999" [1999] AJHR I16V.

94 Standing Order 315(2)(d); Ryan Malone and Tim Miller *Regulations Review Committee Digest* (4th ed, New Zealand Centre for Public Law, Wellington 2012) Appendix A.

95 Ryan Malone and Tim Miller *Regulations Review Committee Digest* (4th ed, New Zealand Centre for Public Law, Wellington 2012) at 50–52.

96 Report of the Regulations Review Committee "Investigation into the Biosecurity (Rabbit Calicivirus) Regulations 1997" [1998] AJHR I16E.

97 Report of the Regulations Review Committee "Complaints Relating to the Accident Rehabilitation and Compensation Insurance (Social Rehabilitation) Regulations 1992" [1993] AJHR I16H.

98 Report of the Regulations Review Committee "Report of the Inquiry into the Appropriateness of Establishing the Kiwifruit Marketing Board Through Regulations" [1988] AJHR I16; Report of the Regulations Review Committee "Complaint Regarding the Overseas Investment Amendment Regulations 2008" [2008] AJHR I16P.

99 Report of the Regulations Review Committee "Complaint regarding the Midwifery (Fees) Notice 2005" [2007] AJHR I16H.

In addition, it is informative to have regard to the courts' proceedings and rulings, since the judiciary is one of the arbiters of the separation of powers. It is also worthwhile to keep in mind that the New Zealand Bill of Rights Act 1990 (BORA) is just an *ordinary* statute and is not supreme or entrenched. The courts' role in New Zealand's parliamentary sovereignty, in regard to human rights, is one of interpretation rather than pronouncement. The uniqueness of New Zealand's democracy lies in the fact that it is the only surviving pure parliamentary sovereignty system. However, New Zealand's international human rights commitments and New Zealand's commitment to human rights is evidenced by legislation like the BORA; and it is recognised, for example, in the LAC Guidelines and in jurisprudence.[100] Therefore, the question of whether or not an issue needs to be enacted by an Act of Parliament because it infringes human rights has a comparable quality and poses a comparable threshold question as it does under German law.

Hamed v R[101] and *Idea Services Ltd v Attorney-General*[102] are both decisions which indicate that the vehicle the executive uses to regulate is an issue of importance, and that BORA might be infringed by not choosing the appropriate vehicle.

Elias CJ, for example, states in *Hamed v R* that the intrusion on personal freedom due to search and seizure by the police had to be regulated by an Act of Parliament. Otherwise "the scheme of rights and freedoms in the Bill of Rights and the security promised by s 21" would be subverted.[103] This is akin to the Wesentlichkeitstheorie of the German Constitutional Court.

In *Idea Services Ltd v Attorney-General*, a case concerning the funding for services for persons with an intellectual disability over the age of 65, the Ministry of Health argued its right to self-government in that:[104]

> … broad discretionary powers [were necessary] … in order to be able to carry out its responsibilities, including but not limited to the responsibility of managing funding that is allocated to the Ministry in a proper way.

The Human Rights Review Tribunal did not deny such a right, but held that, in the context of the Bill of Rights Act and the "prescribed by law" requirement of section 5 in particular, an ad hoc decision by the Ministry without underlying policy work does not meet the requirement.[105] Unfortunately, the courts have had hardly any opportunity to discuss the "prescribed by law" requirement in section 5 of BORA. The *Hamed* and *Ideas Services* decisions, however, indicate that similarly to the German

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100 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act 1990: A Commentary* (LexisNexis, Wellington, 2005) at 61 and following; Andrew Butler and Petra Butler "Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173.

101 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

102 *Idea Services Ltd v Attorney-General* [2011] NZHRRT 11.

103 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [46]; see also Blanchard J at [178], Tipping J at [227], McGrath J at [278], Gault J at [281] who agree that the search was unlawful.

104 *Idea Services Ltd v Attorney-General* [2011] NZHRRT 11 at [165].

105 *Idea Services Ltd v Attorney-General* [2011] NZHRRT 11 at [176].

Constitutional Court jurisprudence, the degree of infringement of a right might be a cornerstone for the assessment of whether an Act of Parliament is required.

It is noteworthy that it is uncontroversial that regulations have to be interpreted as BORA-compliant.[106] A (quite famous) case which illustrates the attention given to regulations discussed in light of section 6 of BORA is that of *Drew v Attorney-General*.[107] In this case, a challenge was mounted to a provision of the Penal Institutions Regulations 1999, which totally prohibited lawyers from representing inmates charged with a prison disciplinary offence under the Penal Institutions Act 1954. The challenge was twofold; the regulation was either:

(1) ultra vires because it was inconsistent with the right to present a case and cross-examine witnesses provided for in the 1954 Act itself (read together with the common law concept of natural justice); or

(2) ultra vires because the regulation-making power in the 1954 Act had to be read down so as not to authorise the making of regulations inconsistent with the right to legal representation in an appropriate case (a right said to flow from either section 24(c) of BORA – right of person charged with an offence to consult and instruct a lawyer; or section 27 of BORA – right to natural justice).

The Court of Appeal struck down the regulation on the first basis, but took the opportunity to address and reject the Crown's argument against the second basis. Blanchard J (for the Court on this point) held that regulation-making powers in statutes had to be read consistently with BORA, like all other provisions of a statute. As a result, such powers were to be read so as not to authorise the making of BORA-inconsistent regulations.[108]

In *Cropp v Judicial Committee*[109] the Court was faced with the question of whether the Rules of Racing relating to the taking of bodily samples for the purposes of drug-testing are ultra vires to the empowering provision in the Racing Act 2003 (section 29).[110] The Court held that the broad section 29 of the Racing Act[111] had to be read in light of section 6 of BORA, stating that "Parliament cannot be presumed to have intended New Zealand Thoroughbred Racing to have the power to make rules in conflict with fundamental human rights."[112] The Court set out the determination process by stating it was necessary to establish whether the delegated legislation did conflict with fundamental rights in a way not authorised by the empowering provision when given a rights-consistent interpretation.[113] The Court held that the taking of a urine sample was a justified breach of section 21 of BORA (to be free of unreasonable search and seizure) and therefore the Racing Rules were intra vires.

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106 See Andrew Butler and Petra Butler *Laws of New Zealand* Human Rights at [6.08].

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

108 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at 73.

109 *Cropp v Judicial Committee* [2007] NZAR 465 (HC) per Andrews J.

110 *Cropp v Judicial Committee* [2007] NZAR 465 (HC) at [35] per Andrews J.

111 Racing Act 2003, s 29(1) empowers the NZTR to make "rules regulating the conduct of racing" in particular "(d) the conduct and control of race meetings, including safety requirements …".

112 *Cropp v Judicial Committee* [2007] NZAR 465 (HC) at [43] per Andrews J.

113 *Cropp v Judicial Committee* [2007] NZAR 465 (HC) at [48] per Andrews J.

Similarly, in *Schubert v Wanganui District Council*[114] the issue was whether the bylaw authorised by the Wanganui District Council (Prohibition of Gang Insignia) Act 2009 was ultra vires since it made all public places in the district, places where persons may not display gang insignia. The Judge stated that:[115]

> … section 6 requires me to … prefer the most Bill of Rights consistent meaning that can be given to the Wanganui Act on the crucial question to the extent to which the Wanganui Act authorises bylaws that limit the right to freedom of expression.

In its analysis the Court came to the conclusion that the bylaw unjustifiably restricted the freedom of expression of those "who would otherwise communicate their membership of, and commitment to, a gang organisation … by wearing or otherwise displaying gang insignia".[116] Of particular interest are the Court's deliberations in regard to the question whether the bylaw was saved by the empowering provision, section 5 of the Wanganui District Council (Prohibition of Gang Insignia) Act 2009. The relevant sections read:

> **Section 5 Power to make bylaws designating specified places or gangs**
>
> …
>
> (5) The Council may make a bylaw under this section only if it is satisfied that the bylaw is reasonably necessary in order to prevent or reduce the likelihood of intimidation or harassment of members of the public in a specified place or to avoid or reduce the potential for confrontation by or between gangs.
>
> (6) A bylaw must not be made under subsection (1)(a) if the effect of the bylaw, either by itself or in conjunction with other bylaws made under subsection (1)(a), would be that all the public places in the district are specified places.

The Court found that the phrase "reasonably necessary" in section 5(5) of the 2009 Act had to be given a BORA-compliant interpretation in accordance with section 6 of BORA. The Court thereby not only referred to the Supreme Court decision in *R v Hansen* but also to the Act's legislative history,[117] quoting the Attorney-General's report to Parliament under section 7 of BORA where he stated:[118]

> The power to make bylaws in clause 5 does not exclude the requirement that it be exercised consistently with the Bill of Rights Act. For that reason, together with the requirement of reasonably necessity in clause 5(4), the scope of the power will be limited in practice.

Furthermore, the Select Committee acknowledged that the Council's bylaw powers risked infringing BORA. However, the Committee was satisfied that the empowering

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114 *Schubert v Wanganui District Council* [2011] NZAR 233 (HC).

115 *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [82] per Clifford J.

116 *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [97], [129], [130] and [131] per Clifford J.

117 *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [132] and following per Clifford J.

118 Wanganui District Council (Prohibition of Gang Insignia) Bill (171-2) (Attorney-General's report) at 2.

provision(s) were drafted safeguarding the rights encompassed in BORA.[119] The Court then found that the margin of appreciation given to the Council in section 5(5) of the 2009 Act, by allowing the Council to (subjectively) assess whether a bylaw was reasonably necessary in this case did not save the bylaw since the Council, as the record of the Council's decision making showed, had held the "erroneous view that NZBORA issues were no longer relevant to that decision".[120]

13.2.3 *Summary*

The question of when an issue must be regulated by an Act of Parliament has not been widely discussed in either the New Zealand jurisprudence or academia. However, some cornerstones can be surmised. First, in the author's view, Harris is correct to state that the executive's royal prerogative is an anachronism in the New Zealand constitutional landscape and that a parliamentary democracy requires that the legitimacy of executive power derives from Parliament. However, that said, and as touched on in the *Idea Services* decision and akin to the German constitutional framework, the executive has to have its own sphere of self-government, a power to regulate, to fill regulatory gaps left by Parliament, and to be able to flexibly respond to matters which any government might need to urgently respond to.

Another cornerstone is that regulations have to be Bill of Rights compliant.

The LAC Guidelines state that principle and policy should be laid down in an Act of Parliament, the implementation can be left to a regulation.

Elias J in *Hamed* described the threshold where a matter has to be regulated by an Act of Parliament as the point where otherwise a subversion of the scheme of BORA and right in question, would take place.[121] That threshold is higher than the one stipulated in the LAC Guidelines which *only* requires that a right is affected, and by the German Constitutional Court in its Wesentlichkeitstheorie that requires a significant infringement.

Taking the cornerstones into account, the following principles should be considered when deciding whether to regulate a matter in an Act of Parliament or by regulation:

(1) A matter that so significantly infringes a right in the Bill of Rights Act that it subverts the scheme of the Bill of Rights Act, has to be regulated by an Act of Parliament.

Commentary: Judicial authority has stipulated where a matter must be regulated by an Act of Parliament. To avoid an ambulance at the bottom of the cliff approach; that is, to leave it to chance whether the matter will be decided by a court, the regulator should adapt the threshold.

(2) A matter that significantly infringes a right should be regulated by an Act of

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119 *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [148] and following per Clifford J.

120 *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [160] per Clifford J.

121 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 304 at [46]; see also Blanchard J at [178], Tipping J at [227], McGrath J at [278], Gault J at [281] who agree that the search was unlawful.

Parliament. However, in the author's view there is some discretion for Parliament, in certain circumstances, to leave a wider discretion to the executive.

Commentary: In the author's view it has to be acknowledged that the demands placed on government by a pluralistic and pragmatic society like New Zealand often demand a very quick and flexible response. New Zealand's citizenry sees government as providing more individualised and pragmatic responses once a problem has been identified. To allow those quick and individualised and pragmatic responses the executive needs a wider self-administered sphere of operation. However, Parliament should not lightly relinquish its power to regulate. As the LAC Guidelines state, principle and policy need to be set out in an Act of Parliament. Importantly, if significant rights infringements can occur the empowering act should carefully circumscribe the limits of the executive power.

A recent example is the Canterbury Earthquake Recovery Act 2011. The Act gave the executive wide-ranging powers that have the potential to infringe freedom of movement (BORA, section 18), freedom from unreasonable search and seizure (BORA, section 21), and the right to natural justice (BORA, section 27(1)). The Explanatory Note to the Canterbury Earthquake Recovery Bill states that:[122]

> The Bill sets out appropriate measures to enable the Minister for Canterbury Earthquake Recovery and/or the Canterbury Earthquake Recovery Authority (CERA) to facilitate and direct, if necessary, greater Christchurch and its communities to respond to, and recover from, the impacts of the Canterbury earthquakes. The Bill is founded on the need for community participation in decision-making processes while balancing this against the need for a timely and coordinated recovery process.

Under the Wesentlichkeitstheorie of the German Constitutional Court it is questionable whether the Act would have been constitutional. The rights infringements are significant and should have been regulated extensively by the Act rather than leaving it to the discretion of the executive. To leave it to the executive to establish the limit of their acts and omissions in accordance with the *purpose* of the Act[123] does not set out where the limits to a rights infringement are. Given the fact that at the time of enactment the full extent of the catastrophe was not known, the Act with its wide-ranging powers and discretion conferred by the executive was a pragmatic response justified by the need for urgency, flexibility and New Zealand's pragmatism. The Minister recognised his wide-ranging powers and assured the public in the second reading of the Bill:[124]

> It does have significant checks and balances on the use of those powers, and the most clear check and balance is the requirement that all of those powers must be exercised in the recovery process and cannot step outside of that. What we have recognised with this bill is the need to restore social, economic, cultural, and environmental well-

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122 Canterbury Earthquake Recovery Bill (286-1), introduced 12 April 2011, at 1, available at <www.legislation.govt.nz>.

123 See Attorney-General, Legal Advice on the consistency of the Canterbury Earthquake Recovery Bill (12 April 2011), available at <www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/canterbury-earthquake-recovery-bill>.

124 (14 April 2011) 671 NZPD 18129.

being in Greater Christchurch. Further, it recognises a need to facilitate, coordinate, and direct the planning, rebuilding, and recovery of Greater Christchurch, and it places importance on community participation in the planning of the recovery while balancing that against the need for timely, focused, and coordinated recovery processes.

The Court in the judicial review proceedings *Independent Fisheries v Minister for Christchurch Earthquake Recovery* examined closely whether the Minister's decisions stepped outside the statutory purposes or compromised the policy of the 2011 Act and held it did.[125] The Court clearly as the third power of government fulfilled its function of providing an independent check.

Furthermore, the Act provides for an annual review of the Act and an overall time limit of five years.[126] This limits the executive's power and puts checks and balances in place. The 2011 Act can be seen as an example that Parliament and the executive are aware of their respective roles: Parliament as the ultimate arbiter of a multitude of different social demands and the executive responsible for the on the ground running of the state.[127]

(3) The subject, content, purpose, and scope of subsidies and benefits have to be at least tied to a budget.

Commentary: The Human Rights Review Tribunal in *Idea Services* stated that funding allocation has to be based on a policy decision to meet the requirement of "prescribed by law" under section 5 of BORA.[128] Given that decisions on subsidies and benefits always disadvantage parts of society it is important that Parliament, as the social control mechanism, has had the opportunity to debate any funding decision.

(4) The powers of any autonomous government body need to be carefully circumscribed by an Act of Parliament.

Commentary: Depending on what the entity regulates, that is, how *essential* the matter is, the establishing statute will have to set out the competence of the entity including, most importantly, the limits of its competence and the nature and purpose of its task.

13.3 The Internet

The following discussion applies the threshold test set out under [13.2], to the regulation of the Internet, outlining and examining some of the issues which Parliament will have to regulate by an Act of Parliament. The Internet was chosen not only because it is a very contemporary issue and certain aspects have been subject to high level human rights discussions, but also because "the Internet"

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125 *Independent Fisheries Ltd v Minister for Christchurch Earthquake Recovery* [2012] NZHC 1810 at [91] and following per Chisholm J.

126 Canterbury Earthquake Recovery Act 2011, ss 92 and 93 respectively.

127 Compare *Independent Fisheries Ltd v Minister for Christchurch Earthquake Recovery* [2012] NZHC 1810 at [75] and [87] per Chisholm J.

128 *Idea Services Ltd v Attorney-General* [2011] NZHRRT 11 at [176].

presents a dichotomy: on the one hand the need for the state to protect its citizens from the potential harm emanating from the Internet and, on the other hand (potentially) the duty of the government to provide Internet access to its citizen to enable them to realise their self-fulfilment.[129]

(1) A matter that so significantly infringes a right in the Bill of Rights Act that it subverts the scheme of the Bill of Rights Act has to be regulated by an Act of Parliament.

(a) Ambit of freedom of expression

The Internet is a relative new phenomenon, and society and its representatives are still coming to terms with it. It allows over two billion people around the world to communicate instantaneously, generally cheaper than a local phone call. It serves as: a huge multimedia library of information; it is used as an important education tool with some universities using it to offer courses; it is used by the government and public health services to make information available; it is an outlet for newspapers and radio stations; and it is unimaginable how the entertainment industry would do without it. Movies, games and music – everything is available online.

New Zealand had 3.6 million Internet connections in 2011[130] and, therefore, the Internet has to be taken seriously as a communication, publishing, and distribution medium in New Zealand. The development of the Internet has opened up new opportunities for achieving what amounts to uncensored free speech. The Internet enables the creation of data havens (such as Freenet), the use of pseudonyms, anonymity, and permanency (data often cannot be removed). This is especially true as the Internet has overcome the geographical remoteness and the physical problems of getting censored material into New Zealand. In addition, the Internet has opened up new ways of conducting protest action. Petitions can be more easily organised and demonstrations can seek to overload a targeted website so as to render e-business impossible.[131]

Section 14 of BORA states the human rights standard that provides the threshold. It reads:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

The scope of section 14 of BORA is informed by article 19 of the International Covenant of Civil and Political Rights (ICCPR) which acknowledges the importance of freedom of expression but also recognises its dangers and states:

> 1. Everyone shall have the right to hold opinions without interference.

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129 See *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 1996 (5) BCLR 609, (1996) 1 BHRC 541 (SACC); Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act 1990: A Commentary* (LexisNexis, Wellington, 2006) at 309 and 311.

130 InternetNZ "Internet Access Numbers" (16 October 2011), available at <www.internetnz.net.nz/news/blog/2011/Internet-access-numbers>.

131 Frankfurt District Court convicted an individual who had encouraged the public to sabotage Lufthansa AG's e-ticket sales by simultaneously clicking on Lufthansa's website: <www.libertad.de>.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Freedom of expression has given rise to one of the most highly developed fields of human rights jurisprudence in the world.[132] It is, therefore, only possible to highlight some of the most pertinent issues pertaining to the Internet in the space of this chapter and make some general observations.

13.3.1 *Content of expression*

In a leading comment on the extent of expression, as it relates to the breadth and content of freedom of expression, the Court held that section 14 of BORA was "as wide as human thought and imagination".[133] The Internet, in regard to the content of freedom of expression, faces the same challenges as any other means of communication. For example, whether expression extends to the copying of someone else's idea is not a question only pertinent to the Internet,[134] neither is the question of whether commercial expression falls under the ambit of freedom of expression.[135] One of the pertinent questions in regard to this chapter is what does *not* constitute expression. Notwithstanding the accepted very broad ambit of freedom of expression, a comparative analysis shows that in regard to violent[136]

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132 Eric Brandt *Freedom of Speech* (Oxford, Clarendon Press, 1985); Laurence H Tribe *American Constitutional Law* (2nd ed, New York, Foundation Press, 1988) at ch 12; Peter J Tettinger "Schutz der Kommunikationsfreiheiten im deutschen Verfassungsrecht" JZ 1990 at 846; Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act 1990: A Commentary* (LexisNexis, Wellington, 2006) at 303.

133 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA), (1999) 5 HRNZ 224; see also the Full Bench of the High Court in *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC) at 59: freedom of expression guarantees "everyone [the right] to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community."

134 See *TVNZ v Newsmonitor Services Ltd* [1994] 2 NZLR 91 (HC) at 95 where Blanchard J defined the ambit of s 14 of BORA in relation to the Copyright Act 1962 by stating that "[s]ection 14 does not provide a guarantee of a right to appropriate someone else's form of expression" – drawing an expression/idea distinction. A view not shared by the author who argues that the expression/idea distinction is a copyright law concept and does not answer the question whether something falls within the ambit of freedom of expression but rather plays a role in deciding whether the Copyright Act 1994 is a justified limitation to freedom of expression (Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act 1990: A Commentary* (LexisNexis, Wellington 2006) at 311).

135 See for an extensive discussion on the issue: Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act 1990: A Commentary* (LexisNexis, Wellington, 2006) at 316–317.

136 See, for example, *Irwin Toy Ltd v Attorney-General (Quebec)* [1989] 1 SCR 927 at 970 (SCC) (Dickson CJ); *Hess v Indiana* 414 US 105 (1973).

and obscene[137] expression and expression that threatens national security,[138] the question arises whether they fall within the scope of freedom of expression. However, limiting the scope of freedom of expression, taking a content-based approach, does not accommodate the concept that the ideas of self-fulfilment, truth, and democracy are underlying principles of freedom of expression, since certain information or opinions would never enter the arena of debate. Limiting the scope also would not be consistent with the scheme of BORA that gives section 5 (justification of a prima facie infringement) a prominent place and pivotal role in BORA methodology. Therefore, to achieve an easier and more consistent approach the ambit of freedom of expression is wide and encompasses any content, including violent and obscene content. Any limitations on section 14 of BORA should be addressed through the rubric of section 5 of BORA.[139]

13.3.2 *Means of expression*

To give freedom of expression full meaning, not only is the content of expression protected, but also the means of expression is protected as often a clear division between seek, receive, and impart is not possible.[140] The Internet is today's means to seek, receive, and impart information and opinions – it is a communication tool.

The "right to impart information" must include the ability to communicate information or opinion free from any form of state interference or obstruction. Therefore, any kind of administrative obstacle to imparting information or an opinion prima facie infringes section 14 of BORA.[141] The right to impart information does not embrace the right to have an audience. The German courts have consistently held that the right to freedom of expression does not impose a positive obligation on the state to provide for a suitable forum to impart information or the right to get financial assistance to be able to impart information or an opinion. According to the German courts, freedom of expression protects the intellectual discourse; but it does not protect the success of the information or opinion reaching the intended recipients or particular path to such a success.[142]

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137 *Miller v California* 413 US 15 (1973); *New York v Ferber* 458 US 747 (1982); *American Booksellers Foundation for Free Expression v Strickland* 560 F 3d 443 (6th Cir 2009); *Ashcroft v Free Speech Coalition* 535 US 234 (2002); *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (HC), (1999) 5 HRNZ 224 at [15].

138 See discussion in *New York Times Co v United States* 403 US 713 (1971) at 713–714.

139 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act 1990: A Commentary* (LexisNexis, Wellington 2006) at 316.

140 Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act 1990: A Commentary* (LexisNexis, Wellington 2006) at 319.

141 See, for example, *Groppera Radio AG v Switzerland* (1990) 12 EHRR 321 (ECtHRR), where the ECtHRR held that refusing the granting of a radio licence infringed the right to impart information under the ECHR.

142 See OLG Karlsruhe NJW 1970, 64, 65; BayOLG NJW 1969, 1127; BVerWGE 72, 113, 118; BVerwGE 87, 270, 274; for an overview see H Jarrass and B Pieroth *Grundgesetz fuer die Bundesrepublik Deutschland, Kommentar* (7th ed, Muenchen, Beck 2004) art 5 at [9] and [10]. See also Supreme Court of Zimbabwe which held that freedom of expression (art 20 of the Zimbabwean Constitution) did not expressly guarantee the right to exercise freedom of expression through being a journalist and, therefore, an accreditation system was justified:

The "right to receive information" and opinions is a logical component of the right to freedom of expression. Without it the right would be impoverished and, accordingly, the marketplace of ideas would be detrimentally affected. People would be unable to be informed by the opinions of others.[143] The right to receive information prevents the state from restricting a person from receiving information that others may wish or may be willing to impart to her or him. However, Butler and Butler state the right to receive information does not entail the right to insist on being given access to information and opinions.[144]

The "right to seek information" guarantees that a person can try to find or obtain information. This includes the choice of the means of gathering the information and the means of retaining it. However, it does not mean that the individual has a right to be given certain information. Butler and Butler also contend that the right to seek information does not include the individual's right that the state has to make a certain medium available.[145]

The ambit of freedom of expression gives rise to two pertinent issues about the Internet: the first is whether access to the Internet requires an Act of Parliament because of the significance of Internet-based communication in society; and second, whether Parliament needs to regulate content based infringements of freedom of expression because of the amplifying impact communication via the Internet might have.

(a) Access to the Internet as a right

In May 2011, the United Nations special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, stated that access to online content, access to an Internet connection, and the necessary infrastructure should be recognised as a human right.[146] He stated the Internet was a communication medium with the ability to mobilise "the population to call for justice, equality, accountability and better respect for human rights".[147] He pointed out that through the use of the Internet individuals changed from passive recipients to active publishers of information.[148] Therefore, the Internet has developed into a

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Association of Independent Journalists v The Minister of State for Information (2005) 5 CHRLD 62 at 64.

143 *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* 1996 (5) BCLR 609 (SACC) at [25] per Mokgoro J.

144 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act 1990: A Commentary* (LexisNexis, Wellington 2006) at 320.

145 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act 1990: A Commentary* (LexisNexis, Wellington 2006) at 319.

146 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 [20], available at <www.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>.

147 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 [2], available at <www.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>.

148 United Nations General Assembly *Report of the Special Rapporteur on the promotion and*

key means of exercising the right of freedom of opinion and expression as the means to seek, receive, and impart information and opinions.[149] As the right of freedom of opinion and expression catalyses other human rights, the Internet is also important for their realisation.[150] The Internet has become an indispensable tool for realising a range of human rights.[151] He further stressed:[152]

> Three-quarters of the world's population lacks access to the Internet. … Although Internet access *is not yet recognized as a right in international human rights law*, States have a positive obligation to create an enabling environment so that all individuals can exercise their right to freedom of opinion and expression. This includes putting in place a concrete and effective policy and the political will to ensure universal access to the Internet.

The prevailing opinion internationally is clear: 41 states, including New Zealand, immediately declared their support for La Rue's report.[153]

It is informative to note that the Internet has already found its way into New Zealand legislation. For example, the Climate Change Response Act 2002 states in section 33(2) that the Minister:

> … must make a copy of the direction accessible via the inventory agency's Internet site.

This phrase substituted the phrase: "publish a copy of the direction in the *Gazette*".

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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 [19], available at <www.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>.

149 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 [20], available at <www.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>.

150 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 [22], available at <www.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>.

151 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 [85], available at <www.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf>.

152 United Nations Commissioner for Human Rights, Press Release (4 November 2011) (emphasis added), available at <www.ohchr.org/EN/NewsEvents/ Pages/ Freedomofexpressioneverywhere.aspx>.

153 Speech of Carl Bildt, Swedish Minister for Foreign Affairs on behalf of 41 states at the 17th session of the Human Rights Council (10 June 2011), available at <www.sweden.gov.se/sb/d/14194/a/170566>; not included were France and the United Kingdom which have enacted a criticised regulation, see Timothy Lee *US, NZ, Sweden, others condemn "three strikes" Internet laws* ars technica, (14 June 2011), available at <http://arstechnica.com/tech-policy/news/2011/06/us-nz-sweden-others-condemn-three-strikes-internet-laws.ars>; see also s 122B(4(b))122P(2) of the Copyright (Infringing File Sharing) Amendment Act 2011, (2011 No 11), Date of assent 18 April 2011; for the legislative history see <www.legislation.govt.nz/act/public/2011/0011/latest/ DLM3331813.html>.

Since its amendment by the Customs and Excise Amendment Act 2007, section 56 of the Customs and Excise Act 1996 states in subsection (2G) that the:

> Secretary must maintain an up-to-date list of all goods, classes of goods, electronic publications, and classes of electronic publications that are prohibited under subsection (2)(a) and (b) because they have or may have a strategic use.

Another example is section 43EA(7) of the Gas Act 1992, as amended by the Electricity Industry Act 2010, which now states:

> The Ministry must include on its Internet site a list of all current class and individual exemptions.

One could consider that the government's own use of the Internet has moved beyond a simple means of communication. Rather than being a simply informative tool, there is an increasing desire to use the Internet as a functional way to carry out various duties of both citizen and government. The Inland Revenue Department (IRD) has introduced the myIR online system, an online tool that allows citizens not only to view information about their situation with the IRD (regarding tax, student loans, GST returns, and the like), but also allows them to calculate and submit various forms within the website.[154] The Ministry of Social Development (MSD) Annual Report for 2011/2012 states that 72 per cent of students received StudyLink (student loans and allowances) correspondence online, and had used the website to make over 2.3 million transactions using the MyStudyLink tools.[155] The recent Department of Internal Affairs iGovt login system is a wide-ranging attempt to homogenise the login process for the completion of numerous interactions with various parts of government including, inter alia: MSD, the New Zealand Transport Association, the various amalgamated Ministries under the Ministry of Business, Innovation and Employment (including the Ministry of Economic Development's Companies Office), and both the Wellington City and Auckland Councils.[156] Perhaps even more significantly, recent proposed changes to the operation of District Courts in Auckland include an Electronic Operating Model (EOM). The EOM proposes, inter alia, the electronic processing and receiving of documents for civil and family proceedings.[157]

The summary of government Internet activity shows that the New Zealand Government uses the Internet as a communication tool like everyone else to publish and impart information, as well as to receive it. This suggests that a lack of Internet access may become a material disadvantage (if it is not already), resulting in increasing difficulty fully participating in society. If the government requires or takes Internet access for granted, does this not impose a positive duty to ensure

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154 Inland Revenue Department "Why myIR?", available at <www.ird.govt.nz/online-services/campaign-myir.html>.

155 Ministry of Social Development *Annual Report 2011/2012* (Wellington 2012) at 19, available at <www.msd.govt.nz>.

156 Department of Internal Affairs "Where you can use igovt services" <www.i.govt.nz/cls/static/participatingagencies>.

157 Ministry of Justice *Discussion Document: Proposed New Operating Model For District Courts In Auckland* (Wellington, 2011), available at <www.justice.govt.nz>.

that all citizens have access to it? In time, the Internet may well be considered an essential utility in New Zealand, in a similar sense to electricity or gas. Regardless of ownership or provision, the state continues to be responsible for the provision of human rights, which extends to the provision of essential services.[158] The more essential the service becomes, the greater duty there is to provide it.[159] Such ideas are not far-fetched; for example, Finland has become the first country to make the access to broadband a legal right for every citizen.[160] In New Zealand, the government at least recognises the Internet as one of its major information tools, and has developed a range of web-standards for its sites (both technical and non-technical).[161]

Therefore, the prominence with which the Internet is used as a tool to seek, to receive, and to impart information suggests that any policy that limits the use of the Internet as a communication tool should be regulated. In contrast to the pronouncements in Butler and Butler in 2005, the importance of the Internet as a communication tool seven years later means that the position that the right to seek information does not encompass the right to be given access to a certain medium of communication is now untenable. Today's world relies, at least in developed countries like New Zealand, on the use of the Internet. Access to the Internet is encompassed in the right to seek, to receive, and to impart information. Such a right, however, does not as yet mean that every citizen has to have free access at home. At this point in time, although the Internet is becoming the most dominant form of communication, other means of communication do exist. Therefore, free access in libraries or other public places is sufficient. However, it does mean that any potential restriction on access to the Internet would need to be regulated by an Act of Parliament. This could include any decision of how to regulate the infrastructure, but also resource allocation in regard to free access through public spaces like libraries.

(b) Regulation and the threshold of "harmful" content when using the Internet

Any policy restricting the Internet content triggers the need for an Act of Parliament in the same way as any other communication would trigger that need. For example, the policy to censor film, videos and publications that contain either a certain level of violence or a certain type and level of sex have to be regulated by an Act of Parliament, since censorship is designed to result in a severe restriction on the right

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158 Petra Butler "Rights and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 241 at 254.

159 Petra Butler "Rights and Regulation" in Susy Frankel (ed) *Learning from the Past, Adapting for the Future: Regulatory Reform in New Zealand* (LexisNexis, Wellington, 2011) 241 at 255.

160 Jonathon Penney *Open connectivity, Open data: Two dimensions of the freedom to seek, receive and impart information* (Victoria University, Wellington, 2011) at 3, available at <www.victoria.ac.nz/law/pdf/internetnz-working-papers/Penney.pdf>.

161 Department of Internal Affairs "Web Standards Overview", available at <www.webtoolkit.govt.nz/standards/web-standards-overview/>.

to seek, to impart and to receive information.[162] This kind of content regulation is not unique to the Internet – harmful communication is harmful on any medium. However, the question arises whether an Act of Parliament is required to regulate content on the Internet, even in less harmful circumstances, due to the amplifying impact of the use of the Internet as a communication tool. The Law Commission has noted, for example, that both the wide-reaching nature and level of engagement young people have with digital communications make harmful behaviour damaging in ways that "find no real parallel in the pre-digital world".[163]

A recent Law Commission Ministerial Briefing regarding the regulation of cyber-bullying recommended the creation of a Communications Tribunal. Of central importance here is the recommendation that the Tribunal have some coercive powers, including the ability to issue "take down" orders to both individuals and content hosts (such as ISPs).[164] Such orders, that seek to remove offending materials from websites, would clearly constitute a prima facie breach of section 14 of BORA by suppressing speech. Suppressing such content is not a concern, as there are several examples where such content is appropriately regulated.[165] Rather, the main issue is the ability of the Tribunal to regulate the behaviour of third parties (like ISPs) for the offensive content created by users. This kind of rights-infringing regulation is more unique, and arises from the unique nature of Internet communication.[166] The role of ISPs and other content hosts (for example, Facebook and Google) in the process of cyber-bullying introduces another unique element. Content hosts could bear the brunt of regulatory moves, particularly where the actual offender cannot be located.[167] In such a scenario, this would infringe the free speech rights of hosts to publish (if not author) any data. This would have to be balanced against the rights of individuals to not receive harmful communication. As discussed, Parliament acts as the transmission belt between government and the sovereignty of the people. Where regulation significantly infringes or subverts the scheme of BORA, Parliament's democratic mandate should determine the outcome.

Non-governmental groups, including InternetNZ, have identified the need to

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162 The Films, Videos and Publications Classification Act 1993 is the result of the policy: Department of Justice *Report of the Ministerial Committee of Inquiry into Pornography* (Wellington, February 1989), available at <www.censorship.govt.nz/>.

163 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 38, available at <www.lawcom.govt.nz>.

164 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 120, available at <www.lawcom.govt.nz>.

165 For example, the Films, Videos and Publications Classification Act 1993 regulates most forms of content one could expect to find on the Internet.

166 The Law Commission notes five critical features of digital communication: the viral nature and worldwide audience of cyberspace; the ubiquity of technology; the persistent nature of electronic information; the ease of access; and the opportunity for anonymity: Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 10, available at <www.lawcom.govt.nz>.

167 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 17, available at <www.lawcom.govt.nz>.

ensure broad legislative change is based on consistent principles.[168] However, InternetNZ has critiqued the Tribunal in particular as being ill-conceived. The requirements for the making of order under clause 16 (including "take downs") are two-fold: that the complainant suffers, or was likely to suffer harm; and that the defendant breached one of the Communications Principles.[169] InternetNZ suggests that this threshold is too low, and could lead to decisions that establish an undue limit on freedom of speech.[170] Instead, it recommends that the threshold be similar to that of the new offence that the Bill creates in the Summary Offences Act 1981, requiring actions that are: (a) *grossly* offensive; or (b) indecent, obscene or menacing; or (c) knowingly false.[171]

This new frontier of regulation brings with it several challenges, and as a result, there is a need for a robust statutory basis. Despite corporations such as Google and Facebook touting the effectiveness of self-regulation,[172] the Law Commission has identified that it is not sufficient, as there are several gaps in the law that require statutory action.[173] The inherent power imbalances the large volume of data, the rigidity of existing law and the complexity of regulating (including the difficulty in identifying culprits) means that allowing the industry to self-regulate (in the Law Commission's view) is ineffective. Furthermore, regardless of the effectiveness of self-regulation, it would still be an inappropriate way to make regulations that attempt to balance interests in the face of rights breaches. This would more appropriately fall within the role of Parliament as articulated in the outset of this chapter – as the legitimate arbitrator of the different interests in society.

(2) A matter that significantly infringes a right should be regulated by an Act of Parliament. However, in the author's view there is some discretion for Parliament, in certain circumstances, to leave a wider discretion to the executive.

One argument for affording the executive more discretion is based on the technical nature of the industry it regulates. While objectionable content is nothing new, the current drive toward various kinds of regulation (be it to protect,[174] or to secure rights of access[175]) deals with a unique medium. By its nature, the Internet

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168 InternetNZ *Future: Digital (A discussion starter on priorities for a future Government)* (InternetNZ, Wellington, 2011), available at <www.internetnz.net.nz/net11>.

169 Communications (New Media) Bill, cl 7(1).

170 InternetNZ *Position Paper on the Law Commission's Ministerial Briefing Paper* (InternetNZ, Wellington, 2012) at [47], available at <www.internetnz.net.nz/news/the-browser/2012/November-2012/Cyber-bullying-education-and-narrow-focus-critical>.

171 Communications (New Media) Bill, cl 24.

172 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 55–57, available at <www.lawcom.govt.nz>.

173 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 13–14, available at <www.lawcom.govt.nz>.

174 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 2, available at <www.lawcom.govt.nz>.

175 Jonathon Penney *Open connectivity, Open data: Two dimensions of the freedom to seek,*

establishes near-instantaneous communications. An example is cyber-bullying. While bullying itself is an age-old phenomenon, the medium over which it is now occurring brings an unprecedented level of invasiveness.[176] The immediacy and pervasiveness of modern communication technology may not change the content of bullying, but it certainly increases the opportunities. Where bullying (and other harmful communications[177]) once required opportunities like physical presence, mobile digital communication allows it to occur instantaneously and at any time, and the offending articles are often preserved on the property (servers) of third parties.[178] Any regulation of Internet communication would require a level of technical insight to deal with these unique issues, and would potentially be operationally difficult.[179] Acts of Parliament can often be a blunt instrument.[180] The executive, having the ability to employ various experts, could perhaps provide more flexible, targeted regulation.

However, it would not be appropriate to afford this kind of regulatory power to the executive, regardless of any "expertocracy".[181] The potential erosion of Parliament's role as the sole arbiter of social control is, in the author's view, unacceptable given the importance of freedom of expression as a right vital for a functioning democracy. Further, the executive's traditional role includes the specific execution of Parliament's sovereign laws. There would still be a place for the executive to ensure operational efficacy and efficiency in the regulation of the Internet, on the basis of the regulatory power that Parliament legitimises.

As stated above, there are certain scenarios where more regulatory discretion could be given to the executive.[182] The executive could, for reasons of practicality, potentially be afforded a wider discretion to regulate Internet access where, for example, the variable quality and cost in rural areas would not be adequately

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receive and impart information (Victoria University, Wellington, 2011) at 4, available at <www.victoria.ac.nz/law/pdf/internetnz-working-papers/Penney.pdf>.

176 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 38 and 43, available at <www.lawcom.govt.nz>.

177 It is worth noting that InternetNZ has critiqued the government's response to the Law Commission report as being too narrowly focused on cyber-bullying alone. In this chapter cyber-bullying provides a pertinent example as one type of harmful communication – but the authors recognise that it is part of a larger dimension. See <www.internetnz.net.nz/news/media-releases/2012/Cyber-bullying-education-and-narrow-focus-critical>.

178 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 38, available at <www.lawcom.govt.nz>.

179 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 51, available at <www.lawcom.govt.nz>.

180 For example, the Copyright (Infringing File Sharing) Amendment Act 2011 applies to copyright infringement via peer-to-peer file sharing (s 6). However, it is accepted that this does not extend to copyright infringement on streaming websites, see <www.netsafe.org.nz/copyright-law-can-i-download-music-and-videos-from-youtube>. This raises some questions as to how effective the law really is at protecting copyrighted material.

181 See above at [13.2].

182 See above at [13.2.1(c)].

considered in a blanket Act of Parliament which granted full access rights.

The executive might also be suited to an educative role, to ensure citizens understand any regulation, and are able to access any potential remedies. Such a function would have critical importance. Citizens should not only understand their rights in a new regulatory framework, but the increasing necessity of Internet access may generate a responsibility to ensure they are equipped to use its function. The Law Commission emphasises that regulation should not simply include the proliferation of new offences, but should be considered a "package"that includes this educative function.[183]

These kinds of functions would all be appropriate for the executive, as they involve implementation and operation based on fundamental regulatory principles – but in this case, and generally, the fundamental principles and the loci of rights infringements require the authority of Parliament.

(3) The subject, content, purpose, and scope of subsidies and benefits have to be at least tied to a budget.

Should the government decide to further subsidise access, this should be regulated by an Act, that is, the annual Budget. Currently, limited access is provided for in various public places (such as public libraries). As discussed above, alternative means of communication mean that free access in select public places is probably sufficient. However, considering the aforementioned increasing amount of online government-citizen interactions, one may well consider a future where Internet access in the home would become more crucial. Where Internet access becomes so necessary that it is incumbent on the government to regulate the provision of Internet connections, the fiscal subsidies would have to be enshrined in Acts of Parliament. Such a future is certainly conceivable – indeed, as outlined above, Finland has already reached this point. Similarly, it may eventuate that specifically "broadband" access is required (perhaps if television is provided through broadband Internet and government-funded news, for example, is only provided on that service), and there is impetus for the government to regulate for ensuring that broadband speeds are widely accessible, perhaps by way of subsidy. Either way, the end result is the same – at the point where services become so crucial that it requires a direct government subsidy then the subsidy becomes an essential component of the regulation of a right to access. If this happens, the subsidy should be shaped and protected by the robustness of Parliamentary action such as a Budget.

(4) The powers of any autonomous government body need to be carefully circumscribed by an Act of Parliament.

An Internet lobby group, like Internet NZ, relies on self-regulation. As set out earlier at [13.2.1(b)], German courts have held that self-governing autonomous bodies are a way for the government to regulate an issue. However, an Act establishing the body should clearly set out the competence of the entity including most

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183 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC, Ministerial Briefing Paper, 2012) at 6, available at <www.lawcom.govt.nz>.

importantly the limits of its competence and the nature and purpose of its task.[184] Because of the importance of the Internet, any voluntary self-regulating body, if that body fulfils any tasks in regard to the regulation of the Internet, should have its mandate conferred by an Act of Parliament. The Law Commission gives one example of how this might work in the Ministerial Briefing on harmful digital communications. One recommendation made in addition to the establishment of a Communications Tribunal was that NetSafe (an independent non-profit Internet advocacy group[185]) should be appointed as an "approved agency" that would examine and mediate complaints prior to the Tribunal's coercive powers being necessary.[186] The Bill drafted in response to these recommendations provides that the approved agency can be appointed by the responsible Minister.[187] While examining the full nature of the approved agency is beyond the scope of this chapter, it is important to note that if it was found to have any regulatory power it should be appointed by a more direct parliamentary mandate, rather than a member of the executive.

In 2009, the French Parliament enacted the HADOPI legislation which gave a government agency the power to cut Internet connectivity for repeated copyright infringement.[188] Shortly thereafter, the Conseil Constitutionnel (the Constitutional Council) found this particular power to be an unconstitutional hampering of the freedoms of expression and communication.[189] As Penney discusses, this resulted in legislation being amended for constitutionality.[190] This could be considered an example of where a failure to circumscribe powers devolved to a government agency (where Internet as a right is concerned), resulted in an unconstitutional rights breach.[191] While there was legislative action creating the agency, Parliament did not appropriately circumscribe regulatory powers that infringed protected human rights.

The HADOPI law was eventually amended to require judicial oversight of any

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184 See above at [13.2.1(b)]

185 NetSafe works with strategic partners in government (including Ministries) to promote and protect the Internet in New Zealand, see <www.netsafe.org.nz/about-netsafe>.

186 Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC Ministerial Briefing Paper, 2012) at 18, available at <www.lawcom.govt.nz>.

187 Communication (New Media) Bill, cl 8.

188 Jonathon Penney *Open connectivity, Open data: Two dimensions of the freedom to seek, receive and impart information* (Victoria University, Wellington, 2011) at 3, available at <www.victoria.ac.nz/law/pdf/internetnz-working-papers/Penney.pdf>.

189 Jonathon Penney *Open connectivity, Open data: Two dimensions of the freedom to seek, receive and impart information* (Victoria University, Wellington, 2011) at 3, available at <www.victoria.ac.nz/law/pdf/internetnz-working-papers/Penney.pdf>.

190 Jonathon Penney *Open connectivity, Open data: Two dimensions of the freedom to seek, receive and impart information* (Victoria University, Wellington, 2011) at 3, available at <www.victoria.ac.nz/law/pdf/internetnz-working-papers/Penney.pdf>.

191 It should be noted that the amended legislation vested the power to sanction users with a judicial authority, and was considered constitutionally appropriate. See Nicola Lucchi "Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression" (2011) 19 Cardozo J Int'l and Comp L 645 at 673. The comparable "three strikes" legislation in New Zealand also requires similar judicial oversight, see Copyright (Infringing File Sharing) Amendment Act 2011, s 122B(4).

disconnection orders.[192] One might examine the Law Commission's recommended Communications Tribunal in New Zealand in light of this. The proposed orders in the case of the Tribunal fall short of full disconnection, but do include various actions that constitute freedom of expression and other rights breaches (including, inter alia: "take down" orders, orders to cease further publishing, and identification orders.)[193] As discussed, the "take down" orders at least are direct infringements on section 14 of BORA. However, an important difference lies in clause 12(1) of the Communications (New Media) Bill, which establishes that the Tribunal will always consist of one District Court judge. This mandatory judicial oversight would indicate that the powers are, at the very least, better circumscribed than the maligned first HADOPI law.

(c) Conclusions on the application of the framework to the Internet

Applying the framework to the Internet highlights the need for parliamentary authority when regulating in ways that infringe rights, and presents unique challenges. While the fundamental kinds of content do not differ, the way in which they are communicated is unlike other communication tools. Communication is instant, increasingly pervasive and involves the use of third party property for storage (hosting). Regulation, whether it is to restrict harm or promote access, will inevitably come into contact with fundamental human rights, particularly the freedom of expression. In its infancy, and even today, the Internet presents a space for freedom of expression that, in principle and practice, should be liberated from established legal traditions and social pressures.[194] Freedom of expression, perhaps more so on the Internet than other communicative tools, is often considered sacrosanct. As the Law Commission observed:[195]

> The idea of restraining, or delaying free speech, in order to protect other human rights is an anathema to many internet users. Free speech values and an abhorrence of censorship have been hardwired into the architecture of the internet and are deeply embedded in its culture.

Any regulation is likely to have widespread effects as a result of an increasing prevalence of Internet connections, and an increasing reliance and promotion of the Internet as a communication tool (including from the government itself). While the executive has a role to play, and is better able to deal with specific technical functions, it should not (for the reasons outlined in the first half of this chapter) determine the scope of the impact of regulation on human rights. The loci of

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192 Nicola Lucchi "Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression" (2011) 19 Cardozo J Int'l and Comp L 645 at 673.

193 Communications (New Media) Bill, cl 16(1).

194 Jonathan Barrett and Luke Strongman "The Internet, the Law, and Privacy in New Zealand: Dignity with Liberty?" (2012) 6 IJoC 127.

195 See Law Commission *The news media meets "New Media": Rights, Responsibilities and Regulation in the Digital Age* (NZLC IP27, 2011) at [7.4], available at <www.lawcom.govt.nz>.

regulatory rights breaches should be the domain solely of Parliament, as it is Parliament that is mandated to arbitrate the balancing of different interests. The Internet is no different, and with the unique nature regulations must take on, Parliament must be the one to determine their extent.