

A Public/Private Power Play: How to
Approach the Question of the New Zealand Bill of Rights Act
1990's Direct Application Under Section 3(b)?

Alex Latu

A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws
(with Honours)

University of Otago

Dunedin

2009

Acknowledgements

To Andrew Geddis for your supervision throughout the year

To my wonderful Mother Judith and sister 'Ema for putting up with me in the end-run

To Emma Peart and Anthony Wicks for helpful discussions in the tutor's office

And finally, to the coastline of Dunedin for providing rare moments of sanity

This paper uses a slightly modified version of the New Zealand Universities Law Review style guide. In particular, frequently referenced statutes and sections are abbreviated in the main text.

Introduction	1
Chapter I. The public/private distinction – theory	3
A. The liberal conception of the public/private distinction	3
1. Public/private, State/non-State	4
B. The emergence of a functional public/private distinction	5
1. What is a public function?	6
C. Assessing the distinction as applied by the courts	8
1. Masking indeterminacy?	8
2. Overly reductive?	9
2. Overly formal?	10
D. Where to from here? Methodology	10
Chapter II. s3 - an overview	12
A. Background	12
B. Section 3(a)	14
1. Identifying the branches of government	15
2. The relationship between s3(a) and s3(b)	16
C. Section 3(b)	18
1. “By any person or body”	18
2. “Acts done ... in the performance of”	18
3. “Conferred or imposed ... by or pursuant to law”	19
4. Public function, power, or duty	21
C. s3 in the wider context of NZBORA	22
1. s6 in the wider context of the HRA(UK)	23
D. Summary	23
Chapter III: The courts and s3(b) NZBORA	25
A. Ransfield v The Radio Network Ltd	25
1. Contextual functionality	26
B. The Utility of Judicial Review Cases	28
1. The review approach – a brief overview	28
2. Relevance to NZBORA?	29
C. Entity focussed considerations	31
1. Motive	32
2. Institutional/relational considerations	33
3. Overall	35
D. Function, power, or duty focussed considerations	36
1. Characterising the function	36
E. Deciding what is ‘governmental’	
1. Governmental in a narrow sense	38
2. Governmental in a broader sense.	40
F. Initial Analysis	45
G. The relevance of considering the risk to rights	47
1. The risk to rights	47
2. How this analysis has been conducted in the courts	48

Chapter IV: Assessments	50
A. The story so far...	50
1. When is direct application necessary?	51
B. Existing rights-protections	51
1. Legislative protection	51
C. Direct application - alternatives to the current approach	55
1. A legislated list	55
2. Rishworth and McLean's approach – ignoring s3(b)?	55
3. Setting the s3(b) threshold	57
4. Applying s5	59
5. Possible objections to a greater role for s5	61
6. Summary	63
Conclusion	64
Table of cases	67
Select Bibliography	70
Appendices	76

Introduction

“conduct which is wholly private is left to be controlled by the
general law of the land”
R v N [1999] 1 NZLR 713 718

“Power over the public is public power.”
RH Tawney, *Equality* (1931) 190

Traditionally, rights-instruments only directly constrain the exercise of power by the State. Under s3(b) of the New Zealand Bill of Rights Act 1990 (NZBORA) however, direct application may extend to any person or body acting “in the performance of any public function, power, or duty”.¹ This functional public/private distinction is thus a central issue when determining NZBORA’s direct application to an entity that is not part of the legislature, executive, or judiciary.² In an era where the boundaries between public and private have grown more faint and less valuable,³ the distinction is far from self-revealing.

The problem this presents is how best to ensure that the distinction operates in a manner that catches appropriate powers, functions, or duties without imposing onerous obligations on private actors and civil society. After all, there is often already legislative and common law provision for rights protection against private actors.⁴ This paper explores the rationale behind s3(b), assesses how the courts have approached, and might in future approach the issue, and considers the desirability of alternative approaches. The real difficulties arise in relation to situations where entities voluntarily perform functions that may impact on rights and how far, if at all, the autonomy of these entities should be restricted.

¹ New Zealand Bill of Rights Act 1990, s3(b)

² New Zealand Bill of Rights Act 1990, s3(a)

³ Catherine Donnelly *Delegation of Governmental Power to Private Parties* (2007) 6-8

⁴ For example, the Human Rights Act 1993. See chap 4 for a fuller discussion of existing rights-protecting mechanisms.

In considering these issues, this paper is divided into four chapters. The first and second consider the general theoretical underpinnings of the public/private distinction, and then look to the specific functional public/private distinction enacted in NZBORA, considered comparatively with the Human Rights Act (UK) 1998 (HRA(UK)). It is argued that there is no objective public/private distinction. Instead, the functional public/private distinction, in this context, invokes a set of values to make a normative claim that the function should or should not render its performer subject to the accountability mechanisms under the relevant rights-instrument. Potential problems with the way this operates in practice include a fixation on the State, lack of clarity, and the reductive, binary nature of the distinction.

The second chapter outlines and discusses the approach taken by the courts to s3(b), focussing mainly on the High Court's judgment in *Ransfield v The Radio Network*,⁵ and the analogous English experience under the HRA(UK). As there is relatively little New Zealand case law, how our approach to this issue will develop is something of a moot point. Nevertheless, there appear to be sufficient similarities with the troubled English experience to consider that difficulties may develop in future, although there are certainly some positive aspects to the current approach.

The final chapter considers alternative approaches to the direct application of NZBORA, and whether these are necessary or desirable. I conclude that the current approach can draw a useful threshold, and avoid the issues that have caused considerable angst under the HRA(UK), so long as the role that s5 of NZBORA can play is recognised. Under s5, rights may be limited so long as the limitations are reasonable, prescribed by law, and justified in a free and democratic society. This approach is able to relieve the burden from the jurisdictional public/private distinction, and make the reasoning clearer and easier, without imposing overly onerous burdens on private actors.

⁵ [2005] 1 NZLR 233

Chapter I. The public/private distinction – theory

A. The liberal conception

There is no single, monolithic public/private distinction. Rather, ‘the public/private distinction’ refers to a complex set of distinctions, drawn not only in areas of law, but in everyday life. They have in common, and are rooted in, the political philosophy of (classical) liberalism.⁶ This posits a private sphere, where individuals are free to pursue their own ends, clearly distinct from the public sphere where autonomy may be restricted for the liberty and welfare of the collective.⁷

As public/private distinctions have been drawn in varied areas, and are relevant to multiple areas of the law, they are context dependent.⁸ The fact that an entity or function may be considered ‘public’ in an application for judicial review will not be determinative of ‘publicness’ under the New Zealand Bill of Rights Act 1990 (NZBORA).⁹ Nor should either of these be thought to tally directly with what we consider ‘public’ in everyday speech. This paper deals with the public/private distinction as drawn in relation to the direct application of NZBORA under s3(b), via the concept of “acts done in performance of a public function, power or duty”.

⁶ Peter Cane, “Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept” in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence: Third Series* (1987) 57-78; Michael Taggart, “The Province of Administrative Law Determined?” in Michael Taggart (ed), *The Province of Administrative Law* (1997) 4

⁷ Cane, “Public Law and Private Law” (1987) 57

⁸ As Peter Cane puts it; “functions are ‘public’ or ‘private’ only because we make them so for particular and varied purposes” “Church, State and Human Rights: Are Parish Councils Public Authorities?” (2004) 120 LQR 41, 45; Peter Cane, “Accountability and the Public/Private Distinction” in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution*, (2003) 254; Stephanie Palmer, “Public Functions and Private Services: A Gap in Human Rights Protection” (2008) 6 IJCON 585, 599; Elizabeth Palmer, “Should Public Health be a Private Concern? Developing a Public Service Paradigm in English Law” (2002) 22(4) OJLS 663, 685

⁹ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233, paras 64, 69

See also *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, 10-11 which held that in the context of review and the principles of natural justice, a function which might otherwise have been characterised as private and contractual could be considered ‘public’. Issue not discussed on appeal; *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513

1. *Public/private, State/non-State, an institutional understanding*

The public/private distinction appears to have emerged in the eighteenth and nineteenth centuries, a period marked by increasingly centralised and expansive State power on one hand, and Enlightenment-era philosophy prioritising the individual on the other. In this historical context, the general public/private boundary was easily conceptualised along institutional lines. The State comprised the public sphere, and non-State, individual citizens the private.¹⁰ This ‘institutional’ State/non-State understanding of the public/private distinction is one of the most common.¹¹

In the rights-context, there appear to be two main reasons behind the institutional approach. Firstly, the State was seen as having a monopoly on governance,¹² and removed from economic and social life, the unrestricted domain of private entities.¹³ There were thus differing normative perceptions of the relative social roles of the State on one hand, and private citizens on the other.¹⁴ Secondly, it was considered that the State was the only entity in society sufficiently capable of violating individuals’ rights.¹⁵

The public/private distinction in this context is effectively part of a normative theory of accountability.¹⁶ Finding an entity to be part of the State reflects the end result of normative reasoning that actions of the State should be subject to a rights-instrument, as opposed to the general law.¹⁷

¹⁰ Cane, “Accountability and the Public/Private Distinction” (2003) 253

¹¹ Law Commission of Canada, *New Perspectives on the Public-Private Divide* (2003) vii-viii.

¹² Cane, *Administrative Law*, 4th ed, (2004) 5, 10

¹³ Cane, “Accountability and the Public/Private Distinction” (2003) 253-254, 265

¹⁴ Catherine Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (2007) 229; N Bamforth, “The Public Law-Private Law Distinction: A Comparative and Philosophical Approach” in P Leyland and T Woods (eds), *Administrative Law Facing the Future*, (1997), 136-159, 139-140, 143

¹⁵ Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 229

¹⁶ Cane, “Accountability and the Public/Private Distinction” (2003) 271

¹⁷ Cane, “Accountability and the Public/Private Distinction” (2003) 271

B. The emergence of a functional public/private distinction

A clear-cut institutional approach to the public/private distinction is problematic. Difficulties with liberal theory have become increasingly apparent with the State's increased involvement in economic activities¹⁸ and the relatively recent phenomenon of 'rolling back the State'.¹⁹

These have challenged the two normative assumptions underpinning the institutional approach. In particular, privatisation, public/private partnerships and 'contracting out' have seen private (non-State) actors exercising the exact powers previously wielded by the State.²⁰ Private actors exercising what could be considered 'governmental' power²¹ challenges the idea of the State as a discrete governing entity, different in kind from citizens and commercial entities. The capacity of private actors to infringe rights has also become more evident, particularly so in extreme examples such as private prison management.²²

On an institutional approach rights-protection is not based on the nature, or effects of the function, but the form that the State happens to take at a particular time.²³ Cane observes that these issues did not simply emerge as a result of the late twentieth-century reforms, although they exacerbated them. Liberal theory did not map perfectly to the nineteenth century either.²⁴

Linked with the institutional approach is the geometric vocabulary which describes rights as applying horizontally between citizen-citizen, and vertically between citizen-State. This metaphor assumes precisely what is in issue, the sharp delineation of

¹⁸ Janet Mclean, "Public Function Tests: Bringing Back the State?", in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009) 194

¹⁹ Carol Harlow, "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43 *Modern Law Review* 241, 256-258; Cane, "Church, State and Human Rights" (2003) 42-43; McLean, "Public Function Tests" (2009) 185-187, 200-201

²⁰ Harlow, "'Public' and 'Private' Law" (1980) 256-258; this type of mixing has been described as 'hybridisation' by Cane, "Accountability and the Public/Private Distinction" (2003) 269-271

²¹ Cane, "Accountability and the Public/Private Distinction" (2003) 265; J Freeman, "The Private Role in Public Governance" (2000) 75 *NYULR* 543, 552-553

²² Murray Hunt, "Human Rights Review and the Public-Private Distinction" in Huscroft and Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (2002) 73

²³ Cane makes a similar point in "Accountability and the Public/Private Distinction" (2003) 253-254, 266

²⁴ Cane, "Accountability and the Public/Private Distinction" (2003) 265

public and private spheres along institutional lines.²⁵ The focus here is on the direct application of NZBORA via s3(b), however this might be characterised in geometric terms.²⁶

In response to these difficulties, more flexible, ‘functional’ approaches to the distinction have emerged,²⁷ seeking to identify functions which are sufficiently ‘public’, or ‘governmental’²⁸ for rights protection to apply. This conceptually separates these functions from the actual functions that the State assumes responsibility for at any given time. However, reconceptualising the public sphere in this manner is difficult.

1. *What is a public function?*

An easily workable functional approach presupposes that there was a clear conception of ‘public’ or ‘governmental’ functions before changes like privatisation.²⁹ Unfortunately, this is not the case. Harlow puts it strongly, claiming that “no activity is typically governmental in character, nor wholly without parallels in private law”.³⁰ At the least, few powers or functions may only be exercised by the State.³¹ Activities that seem obviously ‘public’ such as tax collection, welfare provision, fire protection, education, and policing have all been performed privately at some time.³²

As Justice Friendly famously remarked, the issue is a ‘conceptual disaster area’.³³ There is no general consensus as to what a public function is.³⁴ It is a “radically

²⁵ The Rt, Hon Lord Justice Sedley, “LAW: Public Power and Private Power” in *The Hamlyn Lectures: Fiftieth Series; Freedom, Law and Justice* (1999) 22-23

²⁶ Horizontality under s3(a) is discussed further in chapter 4.

²⁷ For example consider: New Zealand Bill of Rights Act 1990, s3(b); Human Rights Act (UK) 1998, s6(3)(b). In the judicial review context: *R v Panel of Take-Overs and Mergers, ex parte Datafin Plc* [1987] QB 815; *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1; *Electoral Commission v Cameron* [1997] 2 NZLR 421

²⁸ Conceived of in a wide sense as in; Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 6

²⁹ Mclean, “Public Function Tests” (2009), 185-208, 186-187

³⁰ Harlow, “‘Public’ and ‘Private’ Law” (1980) 257

³¹ Joint Committee on Human Rights, Seventh Report, “The Meaning of Public Authority Under the Human Rights Act” (2003 HL 39, HC 32), 46

³² J Freeman, “The Private Role in Public Governance” (2000) 75 NYULR 543, 552-553

³³ Considering the issue of direct rights-application to private actors under the U.S ‘state-action doctrine’, which also utilises the concept of ‘public functions’ in: *US v Kozminski* 487 US 931, 942 (1988)

evaluative”³⁵ political question that prompts deep ideological disputes, is handled differently in different jurisdictions,³⁶ and to which answers change over time.³⁷ For example, the idea of private prisons in England, now a reality, was once considered “fantastical”.³⁸

Comparing the two approaches makes the reasons for these difficulties clear. The institutional approach only asks one to identify what is State and non-State. The normative heavy lifting has already been done. In contrast, the functional approach asks one to distinguish between functions that should be subject to a rights-instrument, as opposed to the general law.³⁹ In making this decision, the actual consequences of finding a function to be ‘public’ or ‘private’ under s3(b) should be carefully considered. It would also be expected that normative criteria concerning the desirable reach of human rights would be assessed.⁴⁰ After all, judging what is ‘public’ and ‘private’ depends on the specific purposes for which the distinction is being drawn.⁴¹

In brief, the functional public/private distinction invokes a set of values to make a normative claim that the function should or should not render its performer subject to a certain accountability regime.

³⁴ Colin Campbell, “The Nature of Power as Public in English Judicial Review” (2009) 68(1) CLJ 90, 92

³⁵ Cane, “Accountability and the Public/Private Distinction” (2003) 266

³⁶ Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 254-255, pointing out that in the U.S.A, commitment of patients to psychiatric hospitals by private actors is not considered to be a public function; Dawn Oliver, writing in the English context, argues that this function is obviously ‘public’ in nature in “Functions of a Public Nature Under the Human Rights Act” [2004] PL 329

³⁷ McLean, “Public Function Tests” (2009) 187

Joint Committee on Human Rights, Seventh Report, “The Meaning of Public Authority Under the Human Rights Act” (2003 HL 39, HC 32), 47

³⁸ Andrew Clapham, “The Privatisation of Human Rights” (1995) 1 EHRLR 20, 21

³⁹ Cane, “Accountability and the Public/Private Distinction” (2003) 249

⁴⁰ Cane, “Church, State and Human Rights” (2004) 120 LQR 41, 46-47

McLean, “Public Function Tests” (2009) 199, 207

Paul Rishworth and Janet McLean, *Direct Application of Human Rights Obligations: Antipodean Reflections on the YL Case and the Idea of “Public Function* (2009) a conference paper initially delivered in “Effective Judicial Review: A Cornerstone of Good Governance” (Hong Kong 8-10 December 2008)

⁴¹ See n.7 above

C. Assessing the distinction in practice

1. Masking indeterminacy?

In line with the above discussion, public/private distinctions have long been criticised as descriptively inaccurate, conceptually indeterminate, and arbitrarily applied.⁴² Despite this, the distinction has displayed remarkable resilience, and is still deeply embedded in the law, including NZBORA.

As Freeman and Cane point out, this can be explained if the terms ‘public’ and ‘private’ are not seen as descriptive,⁴³ but as (imprecise) ‘meaningful signifiers’.⁴⁴ They provide a shorthand reference to activities we see as more or less ‘public’, for varying reasons. This explains the continuing use of the distinction, such as categorising insurance markets, although underpinned by State regulation, as ‘private’, in contrast to a ‘public’ social security system funded by taxes.⁴⁵ Unless it is considered that ‘everything is public’, or ‘everything is private’, there still seems to be a reason to draw some public/private distinction, although it may be difficult.⁴⁶

This leaves the problem that the public/private distinction in practice might mask this normative basis, reifying ‘public’ and ‘private’ as objective and inflexible. In the jurisdictions considered, certain indicia are considered to signify ‘publicness’. There is a risk that these proxies for normative reasoning might displace it. In order to clearly understand the distinction and allow it to operate flexibly, it is important that its normative, evaluative nature be fore-grounded, and not “hidden behind a formalistic screen”.⁴⁷ Controversial reasoning may be exposed, but, as the

⁴² Cane, “Public Law and Private Law” (1980) 64-66; Cane, “Accountability and the Public/Private Distinction” (2003) 254, 261-262; Morton J Horwitz, “The History of the Public Private Distinction” (1982) 130(6) UPLR 1423, 1426-1427

⁴³ Cane, “Public Law and Private Law” (1987) 64-66.

⁴⁴ Freeman’s term, “The Private Role in Public Governance” (2000) 550-551; Donnelly also takes this approach in *Delegation of Governmental Power to Private Parties* (2007) 7

⁴⁵ Cane, “Accountability and the Public/Private Distinction” (2003) 262

⁴⁶ Cane, “Accountability and the Public/Private Distinction” (2003) 264

⁴⁷ Cane, “Accountability and the Public/Private Distinction” (2003) 266

reasonableness requirement in tort shows, this does not prevent a distinction operating adequately within the law.⁴⁸

Another issue related to clarity is whether the distinction sends the courts on a fruitless search for the *a priori* public function. Rishworth and McLean suggest that an abstract public function enquiry merely serves to unnecessarily complicate the cases. The courts are contended to rely partially on more certain, fact-specific factors in order to reach decisions, although this is obfuscated and confused by the public function question.⁴⁹ This argument is considered in more detail below.

2. *Overly reductive?*

The distinction deals with complex value judgments about the proper scope of autonomy within society, and with ‘hybridised’ functions and institutions that could be perceived as partly public and private.⁵⁰ However, both institutional and functional public/private distinctions only operate in a binary fashion. This may not matter when using the distinction in everyday conversation, but if the function is considered ‘private’, no direct rights obligations apply. Entities, functions, or powers are either public or private, subject to a rights instrument, or not at all.⁵¹

This outcome does not reflect the nature of the public/private distinction as a context-dependent, imprecise, ‘meaningful signifier’. Teubner⁵² and Cane argue that the law needs to recognise the distinction in a more flexible, ‘values-based’ contextual manner. A potentially fruitful way of achieving this is in deciding the spectrum-like question of what consequences should attach, rather than focussing unduly on the binary jurisdictional question.⁵³ For example, if a function is ‘public’ under s3(b), the degree of rights-obligations remains to be assessed. These may be no more than those

⁴⁸ Cane, “Accountability and the Public/Private Distinction” (2003) 266

⁴⁹ McLean, “Public Function Tests” (2009) 199; Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009) 16-17; see also Ian Leigh and Roger Masterman *Making Rights Real: The Human Rights Act in its First Decade* (2008) 146-147

⁵⁰ Cane, “Accountability and the Public/Private Distinction” (2003) 269-273

⁵¹ Cane, *Administrative Law* (2004) 6-7.

⁵² Gunther Teubner, “After Privatization? The Many Autonomies of Private Law” (1998) 51 CLP 393

⁵³ Cane considers *R v Panel of Take-Overs and Mergers, ex parte Datafin Plc* [1987] QB 815 an example of this. The jurisdictional question was decided on a binary public/private distinction, but whether the application would succeed was a more flexible matter, taking into account the ‘hybrid’ nature of the Panel. “Accountability and the Public/Private Distinction” (2003) 273-274

imposed by the general law. In this manner, the relative publicness of a function, along with other considerations⁵⁴ could be more easily recognised than if the predominant focus is on shoe-horning it into one of the binary categories.⁵⁵ As Cane puts it, we need to “unravel the strands which make up the public/private distinction” creating a set of concepts or distinctions which help to decide cases.⁵⁶

3. *Overly formal?*

The distinction can also be seen as an overly formal and hierarchical analysis of society. So far, ‘public’ and ‘governmental’ have been used fairly interchangeably. This is contingent on a wide understanding of the term ‘governmental’ that is not restricted to the institutions of the State, or the tasks that the State undertakes responsibility for at a particular time.⁵⁷ ‘Public’ and ‘governmental’ significantly overlap, but are not always coextensive.⁵⁸

D. Methodology

The idea that the public/private distinction simply describes social reality, and is synonymous with State/non-State is rejected. As a result, the vocabulary of horizontality and verticality is considered unhelpful.

The approaches taken by the English and New Zealand courts will be assessed based on whether the normative basis of the reasoning is being made clear, whether the distinction can be considered too blunt or inflexible in operation, and whether the distinction in practice encourages a problematically narrow approach to imposing rights-obligations in light of the applicable statute.

⁵⁴ Gunther Teubner, “After Privatization? The Many Autonomies of Private Law” (1998) 51 CLP 393, 396 “The simple dualism private law v. public law, which reflects the dualism of political v. economic rationality cannot grasp the peculiarities of social fragmentation”

⁵⁵ McLean, “Public Function Tests” (2009) 199, “[The distinction] leads to ‘all or nothing’ determinations of whether a function is public or private – the kind of determination that, in my view, is uncongenial to the common law way of thinking”

⁵⁶ Cane, “Public Law and Private Law” (1987) 70

⁵⁷ See the conception of ‘governmental power’ in Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 6, 252. See also the idea of ‘governance’ in; Cane, *Accountability and the Public/Private Distinction* (2003) 270-271; Cane, “*Administrative Law* (2004) 5, 10 and: Law Commission of Canada, *New Perspectives on the Public-Private Divide* (2003) xvi.

⁵⁸ Andrew Butler, “Is this a Public Law Case?”, (2000) 31 VUWLR 747, 770

Finally, this distinction is important. In England at least, it has proved not to be just a dry academic enquiry.⁵⁹ Over-inclusiveness risks intolerable uncertainty in the law, and violating the idea that NZBORA is not generally applicable against private parties. Under-inclusiveness may fail to keep up with the changing nature of governance, depriving vulnerable people of rights-protection. Entities with the power to seriously impinge on people's rights may also receive "the penny and the bun",⁶⁰ being able to invoke rights against the State, but evade rights-obligations in their own actions.

It is not only against the leviathan of the State that rights protection may be needed, but also against 'jaws', private entities which possess significant capacity to threaten rights.⁶¹ Where private actors threaten the protection of human rights, it makes sense to at least consider directly extending human rights obligations to them. This relates the 'publicness' inquiry back to the values rights instruments seek to protect, rather than on a fancied analogy with the State as is or was. Admittedly, examples where this might be necessary in New Zealand are currently difficult to come up with. This does not render s3(b) irrelevant. It is still worthwhile considering what approach to s3(b) is most useful to deal with difficult situations if and when they do arise.

⁵⁹ Joint Committee on Human Rights, Seventh Report, "The Meaning of Public Authority Under the Human Rights Act" (2003 HL 39, HC 32), 46

⁶⁰ Sedley, "LAW: Public Power and Private Power" (1999) 31

⁶¹ Sedley, "LAW: Public Power and Private Power" (1999) 38

Chapter II. Section 3 of the New Zealand Bill of Rights Act 1990 – an overview

This chapter outlines how s3(b)'s concept of public functions, powers, or duties fits into the statutory framework.⁶² The HRA(UK)'s application section⁶³ is also discussed as English cases are used comparatively in Chapter Three.

A. Background

Both NZBORA and the HRA(UK) adopt a view of rights as fundamental, inherent and inalienable.⁶⁴ NZBORA seeks to affirm, protect, and promote the listed rights and freedoms,⁶⁵ and the HRA(UK) is similarly intended to give effect to the European Convention rights it incorporates domestically.⁶⁶

Although New Zealand's White Paper sees Bills of Rights as generally restraining the State,⁶⁷ it gives examples of rights being invoked against non-State entities, where the action is sufficiently public "in some substantive sense".⁶⁸ The legislative background

⁶² New Zealand Bill of Rights Act 1990

3 Application

This Bill of Rights applies only to acts done—

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

⁶³ Human Rights Act (UK) 1998

6 Acts of public authorities.

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

...

- (3) In this section "public authority" includes—

...

- (b) any person certain of whose functions are functions of a public nature,

...

- (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

See appendix 1

⁶⁴ New Zealand Bill of Rights Act 1990, long title; Human Rights Act (UK) 1998, s1

⁶⁵ New Zealand Bill of Rights Act 1990, long title

⁶⁶ Human Rights Act (UK) 1998, long title; European Convention on Human Rights and Fundamental Freedoms 1950

⁶⁷ *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR A.6, para 10.20; a similar position is taken in: Justice and Law Reform Select Committee *Inquiry into the White Paper – A Bill of Rights for New Zealand* (1986) AJHR I.8A 25

⁶⁸ *White Paper* (1985) AJHR A.6, paras 10.20(f), 10.21

Referring to U.S cases under the State-action doctrine: *Marsh v Alabama* (1946) 326 U.S. 501; *Jackson v Metro Edison* (1974) 419 U.S. 345; *Adickes v Kress and Co.* (1970) 398 U.S. 144

to the HRA(UK) goes further, emphasising that s6(3)(b) was at least intended to apply to private actors responsible for activity previously within the public sector.⁶⁹

NZBORA only applies directly, imposing a rights-observing duty on a particular entity, if the relevant entity falls under s3.⁷⁰ This contains both an institutional and a functional approach to the public/private distinction. The HRA(UK)'s application section has a similar split. 'Core' public authorities under s6(1) are 'governmental',⁷¹ entities, and s6(3)(b) public authorities include 'any person' who exercises "functions of a public nature".⁷²

⁶⁹ Janet Mclean, "Public Function Tests: Bringing Back the State?", in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009) 187

⁷⁰ 'Only' did not appear in the *White Paper* draft. See: Paul Rishworth et. al, *The New Zealand Bill of Rights*, (2003) 71; *White Paper* (1985) AJHR A.6 10.19 – 10.23

⁷¹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, 554 per Lord Nicholls

⁷² Also known as 'hybrid' public authorities. Human Rights Act (UK) 1998, s6(3)(b)

B. Section 3(a)

All acts done by the relevant branches of government are caught by subsection 3(a).⁷³ “[I]n the performance of any public function, power, or duty” attaches only to “any person or body” under s3(b). This is not an unusual position. The State is bound in all its actions under the Canadian Charter of Rights and Freedoms,⁷⁴ as are s6(1) ‘core’ public authorities under the HRA(UK).⁷⁵

The position that these entities have no private life as far as human rights are concerned⁷⁶ seems counter-intuitive. Craig suggests that it is a symbolic gesture, reflecting a perception that governmental bodies are so ‘public’ that relatively few of their actions might be classified as private, and that these bodies should be setting a good example regarding human rights anyway.⁷⁷ Human rights norms do have a more universal flavour that might justify this.⁷⁸ This general position is subject to statutory exceptions, such as the Human Rights Act 1993 which treats s3(a) entities as ‘private’ in certain situations.⁷⁹

Practically, NZBORA’s application to all acts of s3(a) entities may be quite underwhelming. A department buying office furniture is notionally subject to NZBORA, but unlikely to ever infringe rights in doing so. More ‘private’ aspects of core government conduct may simply be subject to less rigorous rights-obligations, if any, under s5.

⁷³ Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act*, (2005) 88

⁷⁴ *Eldridge v Attorney General of British Columbia* (1997) 3 SCR 624, para 40 per La Forest J

⁷⁵ Canadian Charter of Rights and Freedoms (1982)

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another [2004] 1 AC 546, 563, per Lord Hope

⁷⁶ Janet McLean, “Public Function Tests” (2009) 192-197 discusses how this is a relatively new phenomenon, and represents a departure from the common law.

⁷⁷ Paul Craig, *Administrative Law*, (2008) 571

⁷⁸ J Maclean, “Public Function Tests: Bringing Back the State?” (2009) 197

⁷⁹ Human Rights Act (NZ) 1993, part 1A, s21A

1. Identifying the “legislative, executive or judicial branches of government”

It seems clear that “core governmental apparatus” such as Ministers and departments are caught by s3(a).⁸⁰ The more difficult question is how far s3(a) should extend past this. Currently, ‘the executive’ covers entities with a sufficiently close and direct agency relationship with the Crown/core executive.⁸¹

Canadian Charter jurisprudence in this area is more developed than in both England and New Zealand.⁸² The Canadian approach considers whether the entity in question is an “emanation of government”.⁸³ However, the Canadian Charter only has an institutional, ‘status-based’ section. At times, this appears to have been interpreted to effectively implement a functional test.⁸⁴ As a result, it has been considered that in relation to s3(a), the approach is forced, and should not be adopted.⁸⁵

This is not a necessary consequence of applying an institutional approach to difficult cases. Other Canadian authority has held universities to be statutory bodies performing a public function, but not part of government apparatus, and hence outside the Charter’s scope.⁸⁶ There appears to be no reason to completely abandon s3(a) every time a case looks difficult to categorise.

While generally un-theorised in relation to NZBORA, the *CIR* case,⁸⁷ which dealt with the meaning of “an instrument of the executive government” under taxation legislation, seems to be useful in determining the scope of “the executive”. This

⁸⁰ Phillip Joseph, *Constitutional and Administrative Law in New Zealand*, 3rd ed, (2007), 1148; Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 91-92; *Federated Farmers of NZ Inc v New Zealand Post Ltd* [1992] 3 NZBORR 339, 394

⁸¹ *M v Board of Trustees of Palmerston North Boys’ High School* [1997] 2 NZLR 60, 70; See also *R v Grayson and Taylor* [1997] 1 NZLR 399, 407 “a search and seizure actually carried out by an informer or other private individual will be governmental in character and subject to the Bill of Rights protections if there is governmental instigation or involvement in the search.”

⁸² Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 87-97

⁸³ *Eldridge v Attorney General of British Columbia* (1997) 3 SCR 624, para 42 per La Forest J; Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 91-93

⁸⁴ *Eldridge v Attorney General of British Columbia* (1997) 3 SCR 624, para 40 per La Forest J “government should not be permitted to evade their Charter responsibilities by implementing policy through the vehicle of private arrangements.”

⁸⁵ Joseph, *Constitutional and Administrative Law* (2007) 1148

⁸⁶ *McKinney v Board of Governors of the University of Guelph* (1990) 76 DLR (4th) 545 at 638 per La Forest J; Joseph, *Constitutional and Administrative Law* (2007) 1148; Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 93

⁸⁷ *CIR v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA)

approach looks to the nature and degree of control exercised by the Crown over the entity, including whether the entity is subject to legislation such as the Ombudsmen Act 1975.⁸⁸ The approach is more developed than “close and direct agency”,⁸⁹ and does not seem forced. The symbolic aspect of all acts being bound would also seem to be a relevant consideration.⁹⁰

2. *Why this matters – the relationship between s3(a) and s3(b)*

There are differences between these subsections, including the appropriate tests to be applied. Section 3(a) seeks to identify ‘core’ institutions of the State, while s3(b)’s functional test is broader. On the words of the statute, s3(b) applies when s3(a) does not.⁹¹ This does not appear to have been clearly grasped in the case law.⁹² There are even conflicting Court of Appeal rulings over which subsection the police are caught by.⁹³ The police surely occupy such a powerful symbolic position, and are so associated with government that they should be rendered subject to NZBORA under s3(a).

If the difference between these subsections is not understood, this is likely to confuse the appropriate tests, and may unnecessarily restrict s3(b)’s scope. This seems to have occurred in *Alexander v Police*.⁹⁴ There, the Court of Appeal drew on Canadian authority, which does not concern functional application, and implied that governmental control or agency was necessary to trigger s3(b). While there is likely to be disagreement over where s3(a) ends and s3(b) begins, it is evident that s3(b)’s scope far exceeds s3(a)’s.

⁸⁸ *CIR v Medical Council of New Zealand* [1997] 2 NZLR 297 (CA), 326-331 per Keith J

⁸⁹ *M v Board of Trustees of Palmerston North Boys’ High School* [1997] 2 NZLR 60, 70

⁹⁰ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, 554 per Lord Nicholls

⁹¹ Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 96

⁹² See for example *Legal Services Agency v Haslam* (8/2/07), Asher J, CIV 2006-404-4728 para 35

⁹³ *Wilding v Attorney General* (2003) 7 HRNZ 158, para 9 (s3(b)), *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260, 282 (s3(a)), *R v N* [1999] 1 NZLR 713, 718; and the discussion in Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 91

⁹⁴ (1998) 4 HRNZ 632 (CA)

Finally, there appears to be no prohibition on those caught by s3(a) or s3(b) enjoying the benefits of NZBORA rights.⁹⁵ Supporters of this prohibition consider the purpose of rights-instruments is to fetter the leviathan, not give it rights. Such a case might be able to be made under s29 which states that rights apply “so far as practicable”.⁹⁶ This would seem to be stronger against s3(a) actors. s3(b) actors after all are implicitly ‘private’ in some of their actions and should not be stripped of an ability to invoke rights merely because they may be subject to NZBORA in some of their actions.⁹⁷

In England, the situation is more fraught. Core public authorities are certainly prohibited from asserting rights themselves.⁹⁸ The position is unclear concerning 6(3)(b) public authorities. The courts have at times appeared sympathetic to the general idea of these entities being able to assert rights, but the point remains undecided.⁹⁹ It is also unclear whether this would cover all their actions, or only those outside the relevant public function.¹⁰⁰

⁹⁵ Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 112-113

⁹⁶ New Zealand Bill of Rights Act 1990, s29

29 Application to legal persons

Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

⁹⁷ Butler and Butler take a fairly expansive (and to my mind, more convincing) view on whether those caught by s3 may benefit from rights, *The New Zealand Bill of Rights Act* (2005) 112-113; Rishworth et. al take a harsher line on this issue, *The New Zealand Bill of Rights* (2003) 113-114

⁹⁸ The Human Rights Act (UK) 1998 s7(7) states that one can only be a ‘victim’ of an unlawful act (i.e. plead a rights-breach) if the definition of ‘victim’ in The European Convention on Human Rights, Art 34 is satisfied. This allows only ‘non-governmental’ entities to make rights-claims, excluding s6(1) ‘core’ public authorities; *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2004] 1 AC 546, 554 per Lord Nicholls. Compare the Joint Committee on Human Rights, Seventh Report, “The Meaning of Public Authority Under the Human Rights Act” (2003 HL 39, HC 32), 11 questioning whether this position is correct as a matter of principle.

⁹⁹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2004] 1 AC 546, 555 per Lord Nicholls; *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95, 121 per Baroness Hale; Catherine Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 260. Dawn Oliver takes the position that s6(3)(b) public authorities may be deprived of the benefit of Convention rights in “The Frontiers of the State: Public Authorities and Public Functions Under the Human Rights Act” (2000) PL 476

¹⁰⁰ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2004] 1 AC 546, 555 per Lord Nicholls; “A ‘hybrid’ public authority... is not absolutely disabled from having Convention rights. A hybrid authority is not a public authority in respect of an act of a private nature.... This feature throws some light on the approach to be adopted when interpreting s6(3)(b)” (emphasis added). See also *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95, 142 per Lord Neuberger; and commentary in Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 254-255

C. Section 3(b)

Recently *Falun Dafa*¹⁰¹ decided that a charitable trust organising a long-established children's 'Santa parade' was not exercising a public function. It reaffirmed *Ransfield*'s three-stage approach to s3(b):¹⁰²

The action in question must occur:

- (a) in the performance of a function, power or duty by any person or body;
- (b) which is conferred or imposed by or pursuant to law; and
- (c) which is public.

The key question is the last step, determining 'publicness'.

1. "By any person or body"

This wording clarifies that s3(b) applies to legal as well as natural persons.¹⁰³ Private entities are also covered due to the word "any".¹⁰⁴

2. "Acts done ... in the performance of"

To the extent that any act carried out by a person or body does not fall within the performance of a public function, power, or duty, NZBORA will not apply.¹⁰⁵ Whether the act itself can be characterised as 'public' or 'private' is irrelevant.¹⁰⁶ This reinforces the centrality of the 'publicness' enquiry.

¹⁰¹ *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* (2008) 8 HRNZ 680; [2009] NZAR 122

¹⁰² *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233, para 47; *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* (2008) 8 HRNZ 680; [2009] NZAR 122, para 39

¹⁰³ New Zealand Bill of Rights Act 1990, s29

29 Application to legal persons

Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

¹⁰⁴ *Lawson v Housing New Zealand* [1997] 2 NZLR 474, 492

¹⁰⁵ *R v N* [1999] 1 NZLR 713 (CA) 718 "wholly private conduct is left to be controlled by the law of the land"

¹⁰⁶ *Lawson v Housing New Zealand* [1997] 2 NZLR 474, 492-493

3. “Conferred or imposed ... by or pursuant to law”

Rishworth has long argued that positive imposition by the State is unnecessary. Rather, he considers that the phrase “conferred ... pursuant to law” covers certain voluntary assumptions of powers, functions, or duties.¹⁰⁷ There is certainly authority stating that it is unnecessary for a function to be explicitly mentioned in legislation for it to be ‘public’ under s3(b).¹⁰⁸

(a) Voluntary assumption?

Reading ‘conferred pursuant to law’ as merely ‘lawful’ is not straightforward. ‘Conferred’ connotes an element of giving, while ‘pursuant to law’ can be read as ‘in accordance with law’ rather than simply ‘lawful’. Rishworth suggests that a workable approach is to consider whether legal rules facilitated the function, power or duty in question.¹⁰⁹ He considers that following certain legal rules (pursuant to law) confers functions, powers, or duties (by facilitating voluntary assumption). In *Falun Dafa*, where the function was prescribed in a Trust Deed, Randerson J accepted, without deciding, that this interpretation was open.¹¹⁰

Functions falling outside legal rules, or unsupported by legal structures would not be covered. Rishworth sees *R v N*¹¹¹ as such a case. There, a so-called citizen’s arrest had been made for the purposes of finding out whether N had stolen from a store. According to Rishworth, the law played no facilitative role. Instead of ‘pursuant to law’, that function “rest[ed] on the general liberty to do that which is not prohibited”.¹¹²

¹⁰⁷ Rishworth et. al, *The New Zealand Bill of Rights* (2003) 96-98

¹⁰⁸ *Lawson v Housing New Zealand* [1997] 2 NZLR 474, 492

¹⁰⁹ Rishworth et. al, *The New Zealand Bill of Rights* (2003) 96-97

¹¹⁰ *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* (2008) 8 HRNZ 680; [2009] NZAR 122, para 40; in *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233, licences granted to the broadcasters were considered to satisfy ‘conferred or imposed by or pursuant to law’.

¹¹¹ [1999] 1 NZLR 713 (CA)

¹¹² Rishworth et. al, *The New Zealand Bill of Rights Act* (2003) 98. *R v N* [1999] 1 NZLR 713 (CA) 718-719 seems to have been decided on the basis that all powers of arrest are statutory, so with no statutory power there could be no arbitrary arrest or detention, rather than a general liberty to do what is not prohibited.

Distinguishing between conduct lawfully outside the law, and conduct occurring lawfully pursuant to the law, is difficult. Even when discussing this distinction in *N*, his paradigm example, Rishworth buttresses his argument with the ‘privateness’ of the function.¹¹³ In effect, the ‘publicness’ of the function, power, or duty is at the heart of s3(b), and that almost all lawful conduct will be caught.¹¹⁴ This is especially so because there are compelling reasons to include voluntary conduct within NZBORA’s scope.

(b) Reasons for a wide approach

Rishworth makes two arguments for the wider approach. Firstly he argues that if statutory imposition is necessary, this renders s3(b) largely redundant. This is because s6 directs a rights-consistent interpretation of enactments to be preferred.¹¹⁵ Secondly, a wide approach to this phrase is a better ‘fit’ with the law, giving NZBORA coextensive reach with judicial review and the common law.¹¹⁶ It would certainly be an odd result if natural justice under review should outstrip s27(1)¹¹⁷ especially given NZBORA’s symbolic status.

Rishworth may overstate the extent to which s3(b) would be rendered redundant. Statutory impositions may be so abstract that reading NZBORA limitations into them becomes difficult. In such situations, examining what has actually been done by the relevant entity under s3(b), would seem more natural. Both the Court of Appeal and the Supreme Court in *Cropp v Judicial Committee*¹¹⁸ which considered a statutory power to make racing rules, saw that case as being able to be decided under s3(b) or s6. As a result, triggering s6 does not seem to rule out using s3(b). Nevertheless, the

¹¹³ Rishworth et. al, *The New Zealand Bill of Rights Act* (2003) 98

¹¹⁴ Rishworth expected this to be a small category of cases, *The New Zealand Bill of Rights Act* (2003) 97

¹¹⁵ **6 Interpretation consistent with Bill of Rights to be preferred**

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

¹¹⁶ Rishworth et. al, *The New Zealand Bill of Rights Act* (2003) 97

¹¹⁷ **27 Right to justice**

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

¹¹⁸ [2007] NZCA 423 (CA) paras 7-9; [2008] NZSC 46 (SC) para 5

general point is sound, requiring a positive imposition by law would largely render s3(b) useless.

For these reasons, this paper considers that s3(b) can and should be read to cover voluntary assumptions of a power, function, or duty. *Falun Dafa* evidences some cautious support for this interpretation,¹¹⁹ which would also be in keeping with the direction to prefer a wide and generous approach to NZBORA.¹²⁰

Under the HRA(UK), s6(3)(b) clearly covers voluntarily assumed functions. The HRA(UK) also has an equivalent to NZBORA's s6, which would usually protect rights where functions have been statutorily imposed.¹²¹

4. *Public function, power, or duty*

While the three words “function, power, or duty” are often treated as one phrase, ‘function’ seems to have a particularly wide scope. The cases that separate the terms support this. In *Ransfield*, ‘radio broadcasting’ was either a function or power,¹²² while in *Falun Dafa*, there was no doubt that the Trust Board organising the parade was performing a function.¹²³

Although *R v N* held that a statutory immunity could not amount to a ‘power’ under s3(b), the Court did not consider in detail whether a ‘citizen’s arrest’ could amount to a ‘public function’.¹²⁴ It is possible that this one-off, ad-hoc detention by a passer-by and a store employee might not even be considered a ‘function’, although this was not discussed. Once more, this phrase does not restrict the application of s3(b) much, if at all.

¹¹⁹ *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* (2008) 8 HRNZ 680; [2009] NZAR 122, para 40

¹²⁰ *R v N* [1999] 1 NZLR 713 (CA) 721

¹²¹ Human Rights Act (UK) 1998

3. Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

¹²² *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233, paras 48, 71

¹²³ *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* (2008) 8 HRNZ 680; [2009] NZAR 122, para 43

¹²⁴ Rishworth et. al, *The New Zealand Bill of Rights Act* (2003) 108

C. s3 in the wider context of NZBORA

Falling within s3 imposes a rights-observing obligation directly on an entity.¹²⁵ However, for NZBORA to have any real effect, a right must first be prima facie infringed, and this must not be a justified limitation on the right under s5.¹²⁶ Existing remedies and causes of action may be taken into account in considering this question.¹²⁷ As considered in the White Paper, s3 only draws the line between public action and other action “in the first instance”.¹²⁸ McLean and Rishworth have even argued that determining whether or not a right has been unjustifiably infringed is not logically dependent on s3 being met.¹²⁹ They consider that cases could be more quickly and clearly decided if the courts simply avoid the public function question, and go straight to the rights issues.¹³⁰

There is scope for more nuanced outcomes than ‘public’ or ‘private’ in considering whether a right has been unjustifiably limited under s5. To adapt Dyzenhaus’ terminology,¹³¹ the justificatory inquiry, why rights-based intervention should occur, is dealt with by s3(b). On the other hand, s5 is the evaluative inquiry - what type of obligations should be imposed? The public/private distinction can be considered at both levels, but in greater depth on the second. These issues are considered further in Chapter Four.

¹²⁵ Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 86

¹²⁶ **5 Justified limitations**

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

¹²⁷ Andrew Butler and James Shaerf, “Limiting Fundamental Rights: How on Earth is s 5 Supposed to Work in Practice” in G Illingworth (chair) *NZLIS intensive: Using the Bill of Rights in Civil and Criminal Litigation* (2008) 26

¹²⁸ *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR A.6, paras 10.19, 10.23

¹²⁹ Rishworth, Paul and McLean Janet, *Direct Application of Human Rights Obligations: Antipodean Reflections on the YL Case and the Idea of “Public Function* (2009) a conference paper initially delivered in “Effective Judicial Review: A Cornerstone of Good Governance” (Hong Kong 8-10 December 2008) 10

¹³⁰ Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009) 16-17

¹³¹ David Dyzenhaus, “Law as Justification: Etienne Mureinik’s Conception of Legal Culture” (1998) 14 S. Afr. J. on Hum. Rts 11, 22

1. *s6 in the wider context of the HRA(UK)*

The HRA(UK) does not have a general rights-limiting provision like NZBORA's s5. Justifiable limits are included in certain rights. The difficulty is that these are generally based on the assumption that a core public authority has limited the right. It has been considered that these justifications would be largely irrelevant to private entities.¹³² Even where the justified limits include "the protection of the rights and freedoms of others",¹³³ it is unclear whether "others" would include the rights-limiter itself. Even if it does, the issue of whether and what rights 6(3)(b) public authorities can claim¹³⁴ remains to be dealt with.

In England then, finding that the jurisdictional question is met, in relation to private entities, may have the unfortunate consequence of rendering a plaintiff's rights effectively absolute.

D. Summary

There are five broad points to be made in relation to NZBORA. Firstly, ss3(a) and 3(b) are different, which needs to be taken into account in the tests applied. Secondly, the public function, power, or duty enquiry is the key enquiry under s3(b). Thirdly, the section certainly covers private as well as public actors, and seems to be capable of covering voluntarily assumed powers, functions or duties. There is no theoretical difficulty with this.

¹³² *R (Johnson) v Havering LBC* (CA) [2007] 2 WLR 1097, 1126-1127 (the Court of Appeal decision in *YL*); Catherine Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 259; Ian Leigh and Roger Masterman *Making Rights Real: The Human Rights Act in its First Decade* (2008) 148

¹³³ Human Rights Act (UK) 1998, Article 8(2)

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹³⁴ Human Rights Act (UK) 1998, Article 8(2)

Fourthly, finding that s3 is triggered has relatively little effect. While it must occur for rights obligations to apply, there may be no rights-infringement, or the right(s) involved may be tempered under s5. This is not the case in England. Finally, failing to establish direct application does not mean that NZBORA has no impact. Due to NZBORA's application to the judiciary, there is the possibility of indirect application, an issue discussed in more detail in Chapter Four.

Chapter III: The courts and s3(b) NZBORA

*A. Ransfield v The Radio Network Ltd*¹³⁵

The leading case, *Ransfield v The Radio Network*, was really the first to give in-depth consideration to s3(b) and consolidate the existing case law. It considered whether private radio broadcasters, who had banned certain callers from their talkback shows for life, were directly subject to NZBORA. Randerson J outlined an overarching, theoretical approach to determining ‘publicness’ under s3(b), which he later described as the “central question”¹³⁶

In a broad sense, the issue is how closely the particular function, power, or duty is connected to or identified with the exercise of the powers and responsibilities of the State. Is it "governmental" in nature or is it essentially of a private character?¹³⁷

‘Governmental’ was then described in terms of six general observations, and ten non-exclusive indicia.¹³⁸ Some of these are expressly evaluative, sitting somewhat uneasily with the ‘central question’. The approach stresses that the application of NZBORA will be fact dependent, and the indicia are non-determinative and non-exhaustive.

England’s overall approach is similar. There too, a fact sensitive, non determinative, factor based analysis has been adopted,¹³⁹ and ‘public’ has also generally been equated with ‘governmental’. Despite this, the English approach has become very restrictive, likely to impose rights-obligations only if the function is perceived as ‘essentially’ governmental, or if there is a close and substantial connection between the entity and a core public authority.¹⁴⁰

¹³⁵ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC).

¹³⁶ *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* (2008) 8 HRNZ 680; [2009] NZAR 122 para 43

¹³⁷ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC), para 69(f).

¹³⁸ See appendix 2

¹³⁹ Catherine Donnelly *Delegation of Governmental Power to Private Parties* (2007) 245-270

¹⁴⁰ These two cases are generally credited as having taken a very restrictive, institutional approach: *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48; *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366

Many of the high-profile decisions concern statutory obligations on core public authorities to either provide certain services themselves, or arrange for their provision.¹⁴¹ If the service is provided by the authorities themselves, the HRA(UK) applies.¹⁴² If ‘contracted out’, the s6(3)(b) public function question arises. The leading House of Lords decision in *YL* concerned a private aged-care provider which had terminated its contract with YL, an eighty-four year old tenant with Alzheimer’s disease. She claimed a breach of the Article 8 right to respect for home life, but the function was held, by majority, to be private.¹⁴³ This result has been legislatively overturned,¹⁴⁴ and the overall approach subject to much criticism.

1. *Contextual functionality*

The indicia considered relevant in *Ransfield* show that a ‘purely functional’ approach has not been adopted. Rather, some of the indicia are partially or entirely focussed on the entity exercising the function. This approach has been termed ‘contextual functionality’.¹⁴⁵ In effect, the function, power, or duty is defined partially by who performs it, or its source, rather than its substance. The approach could also be considered to treat ‘publicness’ as a ‘cluster concept’. A list of general ‘attributes’¹⁴⁶ can be identified, but none are sufficient or necessary.¹⁴⁷ However, a failure to possess a large number of these will lead to the function, power or duty falling outside the

These two cases are generally thought to allow for the possibility of a more expansive, functional approach: *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2004] 1 AC 546; *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95 (result of this case overturned legislatively under the Health and Social Care Act 2008, s145). Key commentary on the English position is contained in: Joint Committee on Human Rights, Seventh Report, “The Meaning of Public Authority Under the Human Rights Act” (2003 HL 39, HC 32) and; Joint Committee on Human Rights, Ninth Report, “The Meaning of Public Authority Under the Human Rights Act” (2006 HL 77, HC 410); Catherine Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 245-270

¹⁴¹ local councils, for example under the National Assistance Act (UK) 1948. See cases above at n.139

¹⁴² Human Rights Act (UK) 1998.

¹⁴³ *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95

¹⁴⁴ Health and Social Care Act (UK) 2008, s145; overturning the result in *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95

¹⁴⁵ Jenny Cassie and Dean Knight, “The Scope of Judicial Review: Who and What May be Reviewed” in *Administrative Law NZLS CLE* (2007) 66; Peter Cane, *Administrative Law* (2004) 6-7, 39-44

¹⁴⁶ This is not really an apposite term, as Cane puts it, ‘publicness’ is not an observable characteristic like ‘redness’, *Administrative Law* (2004) 17

¹⁴⁷ Hilary Putnam, “The Analytic and the Synthetic” in H Putnam *Mind Language and Reality: Philosophical Papers Volume 2* (1975) 52-53

concept. The difficulty with this is that the dominant focus of these ‘attributes’ is on formal connections to the State. This is not coextensive with the concept of a public function, and makes taking a simple cumulative approach difficult.

This chapter critically discusses the *Ransfield* indicia in three broad groups: the utility of the judicial review approach, the relevance of the nature of the entity, and dealing with what amounts to ‘governmental’ functions, powers or duties, in both a narrow and a wide sense. The aim is to give an overview of the approach, assessing its merits based on the criteria outlined earlier. As there are relatively few New Zealand cases on the issue, this analysis also draws on the English experience.

The indicia may bear different weights from case to case and are assessed holistically, so in examining them separately there is a risk of missing the forest for the trees. The nature of the approach will be addressed in an overall analysis of the indicia, and also when assessing the idea that underpinning the analysis is often another consideration mentioned in *Ransfield*; the risk the function, power, or duty poses to rights.¹⁴⁸

¹⁴⁸ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC), para 36

B. The Utility of Judicial Review Cases

1. The review approach – a brief overview

In order to establish jurisdiction to review, under both the Judicature Amendment Act 1972 and at common law, the ‘publicness’ of the impugned decision is crucial.¹⁴⁹ At the extremes, this may extend to reviewing exercises of power which “in substance are public or have important public consequences, however their origins and the persons or bodies exercising them might be characterised”.¹⁵⁰ This wide approach to jurisdiction is mitigated by the fact that ‘private’ characteristics of the entity (or power) can be considered at the grounds, intensity or remedies stages of review, rather than in relation to the binary jurisdictional question.¹⁵¹ In this manner, review does not always focus directly on the function’s ‘publicness’, often considering the broader question of whether the decision is amenable to review.¹⁵²

The threshold question of ‘publicness’ is not an abstract, *a priori* question in review. The concepts of ‘substantively public’ and ‘important public consequences’ are considered in the context of ‘public law values’.¹⁵³ Consider *Phipps*, where a report on a surgeon’s performance had been commissioned by his employer. The court referred to a value protected by review, procedural fairness, and found that the context, where livelihood was at stake, was “exactly the type of situation in which high standards of procedural fairness are expected”, finding jurisdiction to review.¹⁵⁴

¹⁴⁹ Cassie and Knight, “The Scope of Judicial Review: Who and What May be Reviewed” (2007) 76-77

¹⁵⁰ *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, 10-11

¹⁵¹ Cassie and Knight, “The Scope of Judicial Review: Who and What May be Reviewed” (2007) 92; *Electoral Commission v Cameron* [1997] 2 NZLR 421, 430: “finding that decisions of the board are amenable to review still leaves for consideration the grounds upon which review may be granted.... a more flexible approach may be called for”; Peter Cane, “Accountability and the Public/Private Distinction” (2003) 273-274

¹⁵² Janet McLean, “Public Function Tests” (2009) 195

Cassie and Knight, “The Scope of Judicial Review: Who and What May be Reviewed” (2007) 63-64, 90-96

Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board (2008) 8 HRNZ 680; [2009] NZAR 122 para 24

¹⁵³ Cassie and Knight, “The Scope of Judicial Review: Who and What May be Reviewed” (2007) 67-69; Michael Taggart, “The Province of Administrative Law Determined?” in Michael Taggart (ed), *The Province of Administrative Law* (1997) 3

¹⁵⁴ *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, 12

2. Relevance to NZBORA?

Ransfield held that the review approach to ‘publicness’ could not be determinative. Randerson J reasoned that “review may be available in relation to organisations of a purely private character”.¹⁵⁵ While this is correct, it ignores the extra requirement of ‘publicness’. He then stated that “[i]n contrast, the NZBORA has no application to purely private organisations carrying out private functions.” This is not in contrast to review. Review is also unavailable to private organisations carrying out private functions.¹⁵⁶ Randerson J seems concerned that the review approach is too expansive for s3(b), although his stated reasons are unconvincing.

More convincing reasons to distinguish the s3(b) question from jurisdiction to review can be based on the norms involved. ‘Public law values’, conceived of as distinct from private law, are not co-extensive with the more fundamental values concerning human rights, although there is a large shared area.¹⁵⁷ While review is generally unlikely to either apply or succeed in paradigmatically ‘private law’ areas, such as ‘commercial’ decisions,¹⁵⁸ NZBORA may not be so easily ousted. For example, *Federated Farmers* considered New Zealand Post’s price-increases under contract with its customers were not readily amenable to review, but on balance, fell within s3(b).¹⁵⁹

The courts also play a more assertive role under NZBORA than under their supervisory review jurisdiction.¹⁶⁰ In some situations, but not all, review cases may be

¹⁵⁵ the Judicature Amendment Act 1972, ss 3, 4

¹⁵⁶ As defined by the courts. See Cassie and Knight, “The Scope of Judicial Review: Who and What May be Reviewed” (2007) 96

¹⁵⁷ Michael Taggart, “The Province of Administrative Law Determined?” (1997) 3

¹⁵⁸ Cassie and Knight, “The Scope of Judicial Review: Who and What May be Reviewed” (2007) 84-85

¹⁵⁹ although no concluded position on this point was reached, and the New Zealand Bill of Rights Act claim was swiftly dismissed under s5. *Federated Farmers of NZ Inc v New Zealand Post Ltd* [1992] 3 NZBORR 339, 394

¹⁶⁰ Janet McLean, “Public Function Tests” (2009) 197; Sian Elias, “Righting Administrative Law” in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009) 56-57, drawing attention to the broad values of human rights adjudication, and noting that this is only a subset of administrative law. A similar distinction is evident in; Murray Hunt, “Against Bifurcation” in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009) which discusses Taggart’s perception of the differences between administrative law and human-rights law.

highly relevant. These situations would likely include considering the scope of s27,¹⁶¹ or drawing on ‘intensive’ review cases that have considered rights-issues.

In England, the concept of ‘publicness’ or ‘public function’ also underpins the jurisdictional question in review.¹⁶² The courts have also held that review cases should not determinatively influence the HRA(UK)’s application,¹⁶³ but for rather different reasons. The English approach to judicial review is far more restrictive than New Zealand’s. There have been comments from both the judiciary and academics that ‘functions of a public nature’ under the HRA(UK) should not be so restrictively considered, based on the more expansive norms involved.¹⁶⁴

The English approach is valuable in recognising this point. In contrast, the justification given for the different approaches in New Zealand seems to spring from a general unease concerning an expansive approach. Although there must be some line drawn between private and public functions under NZBORA, it would seem that this should be linked to the rights and freedoms that the Act seeks to affirm and protect.

¹⁶¹ **27 Right to justice**

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

M v Board of Trustees of Palmerston North Boys' High School [1997] 2 NZLR 60 effectively treated the issues as synonymous.

¹⁶² under the Civil Procedure Rules (CPR) part 54; Peter Cane, *Administrative Law* (2004) 7, 41;

Donnelly *Delegating Governmental Power to Private Parties* (2007) 296, 304-308

¹⁶³ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2004] 1 AC 546, 546 per Lord Hope; *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95, 105 per Lord Bingham, 125-126 per Lord Mance, 148 per Lord Neuberger

¹⁶⁴ See above n.162 and: Dawn Oliver, “Functions of a Public Nature Under the Human Rights Act” (2004) PL 329, 346-347; Catherine Donnelly, *Delegation of Governmental Power to Private Parties* (2007), 296, noting that the public function test is beginning to influence English judicial review.

C. Entity focussed considerations

The whole thrust of s(3)(b) is that the function, power, or duty itself can be ‘public’, regardless of the relevant entity’s categorisation.¹⁶⁵ Nevertheless, *Ransfield* held that although the primary focus is on the function, power or duty, the nature of the entity may be relevant.¹⁶⁶ This ‘contextually functional’ approach allows factors other than the nature or substance of the function (which, in the abstract is entirely vacuous) to be taken into account when determining ‘publicness’.¹⁶⁷

Intuitively, these considerations make sense. If an entity fell just shy of falling within s3(a), it would seem strange to declare all the factors taken into account completely irrelevant under s3(b). The seeming paradox between this, and s3(b)’s function-centric focus may be explained by considering the norms underlying the idea that ‘core’ government is obliged, for symbolic reasons, to act rights-compatibly in all their actions.¹⁶⁸

Extending this reasoning, the more an entity is under the control of, or connected to institutions of the State, the more important it is, for symbolic reasons, to subject their actions to rights-instruments. As a result, there simply need not be much consideration of the function, power or duty at issue. This need would arise if the entity was either not connected to the State, or relatively autonomous from the State in respect of the relevant function.¹⁶⁹ The absence of State-connection or control should not be treated as determinative however, as the key focus under s3(b) is on the function.

¹⁶⁵ The New Zealand Bill of Rights Act 1990, s3(b) “This Bill of Rights applies only to ... *any* person or body...” (emphasis added) see chapter 1.

¹⁶⁶ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(d)

¹⁶⁷ Cassie and Knight, “The Scope of Judicial Review: Who and What May be Reviewed” (2007) 66; Peter Cane, *Administrative Law* (2004) 6-7, 39-44

¹⁶⁸ New Zealand Bill of Rights Act s3(a)

¹⁶⁹ *Mangu v Television NZ Ltd* (9/9/05), Lang J, HC Auckland CIV-2005-404-487 paras 42-43, 19 where statute prescribed editorial independence of TVNZ.

1. *Motive*

Motivation, recognised in *Ransfield's* indicia,¹⁷⁰ seems to be generally accepted as a crude indicator of whether an entity is private or public.¹⁷¹ Private entities are considered to be primarily self-interested, as opposed to democratically accountable¹⁷² public entities, which act only in the public interest.¹⁷³ In *Falun Dafa*, Randerson J seemed to expand this reasoning to cover the 'self-interest' of a privately incorporated charitable trust.¹⁷⁴

Little weight should be given to the presence of a self-interested motive for performing the function, power, or duty. Even if this indicium is present, it gives no information about the entity's relation to the State, which was considered to be a justifiable reason to take entity-focussed considerations into account under s3(b). Applying this indicium strongly would mean rights-obligations would almost never be extended to private actors, especially given the potentially wide scope of 'self-interest'.

This risk is especially apparent in the English cases. In *YL*, Lords Scott and Mance appeared to rely heavily on the existence of a profit motive in finding the function of providing aged-care to be private, with Lord Scott finding it to be the summary reason for his decision.¹⁷⁵ However, both their Lordships consider the function of prison management 'public', even when performed privately, presumably for profit, which belies their formal reliance on this indicium.¹⁷⁶ Their Lordships appear to simply

¹⁷⁰ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(g)(i)

¹⁷¹ Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 6-10, 268; J Freeman, "The Private Role in Public Governance" (2000) 75 NYULR 543, 551; Michael Taggart, "The Province of Administrative Law Determined?" in Michael Taggart (ed), *The Province of Administrative Law* (1997) 3

¹⁷² Identified as an indicium in *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(g)(x).

¹⁷³ Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 6-10

¹⁷⁴ *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* (2008) 8 HRNZ 680; [2009] NZAR 122, paras 36, 60-61; Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 6-10 would agree with this wide conception of 'self interest'

¹⁷⁵ *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95, 108-109 per Lord Scott; 133, 138 per Lord Mance

¹⁷⁶ *YL v Birmingham City Council* [2008] 1 AC 95, 126 per Lord Mance (citing *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2004] 1 AC 546) 151 per Lord Neuberger

consider prisons ‘public’, attracting human-rights obligations, whereas aged care does not. While there may be reasons for this, it would be useful to have these clarified. The apparently strong reliance on motive may also have an undesirable precedent value.

While motivation may be a useful way to explain the distinction between public and private actors, it appears unreliable in considering whether NZBORA should apply to a particular function. It is unclear why motive should count determinatively against rights obligations applying, at least in the first instance, when it makes no difference to the function’s capacity to impact rights.¹⁷⁷

2. Institutional/relational¹⁷⁸ considerations

In line with earlier case law,¹⁷⁹ another *Ransfield* indicium concerns “the extent and nature of any governmental control of the entity”.¹⁸⁰ Earlier Court of Appeal authority had implied that governmental control or an agency relationship was necessary, drawing on Canadian jurisprudence and not explicitly mentioning s3(b).¹⁸¹ *Ransfield* does not expressly disagree with the decision, but does emphasise that the extent of governmental control is just one of many non-determinative indicia. This is to be preferred. The Canadian legislation does not match well with New Zealand’s, and making governmental control a necessary requirement for ‘publicness’ is unnecessarily restrictive.¹⁸²

This restrictive potential can be seen in comparing the English approach. Absence of a strong institutional/relational connection with the State has been treated as very

¹⁷⁷ Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 268

¹⁷⁸ Dawn Oliver’s term, “Functions of a Public Nature Under the Human Rights Act” [2004] PL 329, 331

¹⁷⁹ *Lawson v Housing New Zealand* [1997] 2 NZLR 474; *Federated Farmers of NZ Inc v New Zealand Post Ltd* [1992] 3 NZBORR 339; *Alexander v Police* (1998) 4 HRNZ 632 (CA); Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 100-102

¹⁸⁰ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(g)(iii)

¹⁸¹ *Alexander v Police* (1998) 4 HRNZ 632 (CA) 637

¹⁸² See chap 2

detrimental to establishing a public function.¹⁸³ Although *YL* may have moved away from this somewhat, it still remains a major factor.¹⁸⁴

(a) Regulatory background

In *Ransfield*, application of the governmental control indicium focused on the degree of regulation the private broadcasters were subject to. There were two regimes, one for private broadcasters, and the other, more onerous one, for public broadcasters. On a comparative basis, Randerson J concluded that this pointed towards the function being private.¹⁸⁵

The regulatory framework point had been considered relevant by the Court of Appeal pre-*Ransfield*. In *TV3 v Eveready*¹⁸⁶ TV3 was a private licensed broadcaster with responsibilities under the Broadcasting Act 1989. Cooke P seemed to think that this was relevant in NZBORA applying via s3(b).¹⁸⁷ While considering the regulatory regime does elucidate the extent of government control, it is in a different sense than considered in *Lawson, Alexander and Federated Farmers*.¹⁸⁸ There, the emphasis was on direct control by, or relationship with the State, rather than the State setting up background rules. This indicium seems to simply infer in favour of a public function from the fact that Parliament has decided to regulate. This has parallels with the problematic idea that the ‘private’ sphere is both regulation-free, and State-free.¹⁸⁹

¹⁸³ Compare *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 with *R (on the application of Heather) v Leonard Cheshire Foundation* [2002] EWCA Civ 366. See also the discussion in: Joint Committee on Human Rights, Seventh Report, “The Meaning of Public Authority Under the Human Rights Act” (2003 HL 39, HC 32) 3-4 and; Joint Committee on Human Rights, Ninth Report, “The Meaning of Public Authority Under the Human Rights Act” (2006 HL 77, HC 410) 12-13; Catherine Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 245-270. Also compare the situation in New Zealand Judicial Review where the presence of this indicium is usually determinative, but certainly not the absence Cassie and Knight, “The Scope of Judicial Review” (2007) 95

¹⁸⁴ Catherine Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 269-270.

¹⁸⁵ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 73

¹⁸⁶ *TV3 Network Services Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435 (CA)

¹⁸⁷ Although this point was not fully reasoned. *TV3 Network Services Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435 (CA) 441

¹⁸⁸ [1997] 2 NZLR 474; (1998) 4 HRNZN 632 (CA); [1992] 3 NZBORR 339

¹⁸⁹ Murray Hunt, “The ‘Horizontal Effect’ of the Human Rights Act” [1998] PL 423, 424-426

All ‘private’ activities are regulated in some manner. As Butler notes, people do not perform public functions solely by driving vehicles under licences.¹⁹⁰ It is also unclear in which direction this indicium points. Does comprehensive regulation point towards imposing further obligations under NZBORA, or against it? For similar reasons, this indicium has been criticised in the House of Lords.¹⁹¹ This indicium appears to carry more or less weight depending on the merits of the case,¹⁹² although it is useful in allowing for the possibility that s3(b) may apply to private entities.

3. Overall

While an absence of these entity-focussed considerations have not been treated as determinative, unlike in England, their presence has been treated as very helpful, based on fact situations which have predominantly involved State controlled entities.¹⁹³ Although I have offered some reasons for the relevance of these indicia, these are absent from the cases, which treat them as self-evident.

Rather than fully address the abstract and difficult enquiry of whether a function is public, the courts appear to import more certain considerations to make their task easier. Because of the position in s3(a) that the three branches of government are always subject to NZBORA, considering the entity’s connection and relationship with the State seems to be justifiable. In these situations, the concept of public function does very little work.

This approach carries with it the risk that factors more relevant to the public/private distinction in other contexts are perhaps unthinkingly being carried over to the specific s3(b) public/private distinction. Giving a lot of weight to selfish motivation would seem to be an example, especially as finding s3(b) to be met does not carry with it particularly significant consequences. In the absence of these entity-focussed indicia, more consideration must be given to the function itself.

¹⁹⁰ Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 105

¹⁹¹ *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95, 138 per Lord Mance, 143 per Lord Neuberger

¹⁹² Compare *TV3 Network Services Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435 (CA) 441; and *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC)

¹⁹³ Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 96-105

D. Function, power, or duty focussed considerations

1. Characterising the function

(a) Focussing on the particular function, power, or duty at issue

Ransfield emphasises the need to focus on the particular function, power or duty at issue, although the function there was considered to be ‘radio broadcasting’.¹⁹⁴ This appears to be directed at comments made in *Federated Farmers*, where New Zealand Post’s increase in rural delivery fees via contract was challenged. McGechan J characterised a broad range of New Zealand Post’s functions as ‘mail handling’, and then found this to be ‘public’, warning against making fine distinctions between functions. This analysis needs to be considered in the context of the case, which had already found a significant amount of Crown control over the entity.¹⁹⁵ In such cases, it seems that less emphasis is placed on the function. In situations where the function does have its genesis in voluntary decision, a more focussed description of the function, power, or duty would be desirable, so as not to over-extend any direct application.

The concern seems to be that if the function is characterised broadly, then a slew of activity will be subject to onerous rights-obligations. This may be overstated. Holding that NZBORA applied to New Zealand Post’s ‘mail handling’ function was a pyrrhic victory. The plaintiffs quickly failed to establish an unjustifiable limit on their claimed rights. The fact that ‘mail handling’ was considered a public function in this case has simply not led to a landslide of litigation against postal outlets or private courier companies. The *Ransfield* approach defines functions at least partially in relation to the entity exercising them, and is explicitly fact-dependent.¹⁹⁶

¹⁹⁴ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(e)

¹⁹⁵ *Federated Farmers of NZ Inc v New Zealand Post Ltd* [1992] 3 NZBORR 339,

¹⁹⁶ *Federated Farmers of NZ Inc v New Zealand Post Ltd* [1992] 3 NZBORR 339 “I have no difficulty regarding mail handling as a “public function”. It is carried out for the public, in the public interest, and moreover by a company which while technically a separate entity presently is wholly owned and ultimately controlled by the Crown”

Characterising functions in such a manner seems to reduce concerns based on precedent-setting potential.

(b) Showing the function to be similar to those exercised by private actors

In earlier s3(b) cases, a narrow, abstract characterisation of the function, power, or duty was used to make it seem obviously private.¹⁹⁷ In *TVNZ v Newsmonitor Services Ltd*, Blanchard J characterised a State owned enterprise's functions as "trading activities" indistinguishable from private enterprise, and hence 'private'.¹⁹⁸ Later cases took a more contextual approach, emphasising factors like the entity's relationship with the State.¹⁹⁹ *Ransfield's* approach means that it is unlikely *Newsmonitor* type arguments would succeed. The listed indicia serve to contextualise the function.

This approach is to be preferred. Showing that the function, power, or duty is similar or the same as those carried out by private actors does not, in itself, determinatively show that rights-observing obligations should be excluded. The point proves too much. Applied strongly, it could eviscerate the whole concept of public functions. As mentioned earlier, no function is inherently 'governmental' or without parallels in private law.²⁰⁰

¹⁹⁷ See the discussion in Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 100-102

¹⁹⁸ *TVNZ Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91 (HC), drawing on *Auckland Electric Power Board v ECNZ* (CA 45-93, 4 October 1993)

¹⁹⁹ Drawing on the review approach in *Mercury Energy v ECNZ* [1994] 2 NZLR 385 (PC). See *Lawson v Housing New Zealand* [1997] 2 NZLR 474, 492

²⁰⁰ Carol Harlow, "'Public' and 'Private' Law: Definition Without Distinction" (1980) 43 *Modern Law Review* 241, 256-258

E. Deciding what is ‘governmental’

Ransfield’s remaining function, power, or duty focussed indicia in can be broadly divided in two: those concerning a narrow understanding of ‘governmental’ as the State; and a broader, more evaluative understanding. It is unclear why *Ransfield* departed from the word used in the statute, ‘public’. Although Randerson J drew this from Canadian authority, he simultaneously rejected the Canadian approach to defining ‘governmental’.²⁰¹

1. *Governmental in a narrow sense*

(a) Generally

This ‘narrow sense’ is summed up in *Ransfield’s* ‘central question’, which asks whether the function is “connected to or identified with the exercise of the powers and responsibilities of the State”.²⁰² This effectively addresses whether the function is linked with the State, rather than whether its performance should be considered subject to rights obligations.

Making this connection is not necessarily helpful. The functions actually performed by the State are not necessarily ‘public’, although they may notionally be treated as such. The approach is also open to the objection that it makes direct rights application subject to the arbitrary criterion (in human rights terms) of whether there is a connection between the function or entity, and the State.²⁰³ This could potentially distinguish between self and State-funded receipt of the exact same services.

As discussed earlier, there is a risk that the term ‘governmental’ may restrict the scope of public functions. In England, the term is used restrictively in judicial review, under the ‘but for’ test. In theory, this looks to whether government would step in and

²⁰¹ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) paras 57-58

²⁰² *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC), para 69(f).

²⁰³ Joint Committee on Human Rights, Seventh Report, “The Meaning of Public Authority Under the Human Rights Act” (2003 HL 39, HC 32), 13; Joint Committee on Human Rights, Ninth Report, “The Meaning of Public Authority Under the Human Rights Act” (2006 HL 77, HC 410), 18

perform the function if no private actor was doing it. In practice, the willingness of a private actor to perform the function has precluded it from being ‘public’.²⁰⁴ Some of the judgments in the s6(3)(b) cases have begun applying similarly restrictive understandings of ‘governmental’.²⁰⁵ Whether or not the more evaluative indicia *Ransfield* considered relevant to ‘governmental’ may avoid this position in New Zealand is discussed below.

(b) Public funding

When considering this indicium in *Falun Dafa*,²⁰⁶ Randerson J seemed to find it relevant that any public funding was by way of donation, and did not signify control over the Trust Board’s functions.²⁰⁷ As discussed, an absence of State control should not be treated as determinative, although its presence may be useful.

It might be considered that there is symbolic importance in ensuring that public funds are spent in accordance with human rights obligations.²⁰⁸ However, it does not appear that the New Zealand courts are treating this indicium in such a light. The English cases seem to take a similar approach, and the majority in *YL* have taken a very restrictive view of what amounts to ‘funding’, treating public subsidisation as irrelevant.²⁰⁹

(c) Source of the power

In line with judicial review case law, *Ransfield* considers that the source of the function, power, or duty being statutory indicates publicness.²¹⁰ Statute appears to be seen as distinct from ‘private’ sources of power, such as contract. However, it is considered that s3(b) covers voluntary assumptions of power via such sources. For

²⁰⁴Colin Campbell, “The Nature of Power as Public in English Judicial Review” (2009) 68(1) CLJ 90, 92-96 referring to *R v Servite Houses ex p Goldsmith* (2000) 3 CCLR 325

²⁰⁵Most recently in *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95, 132 per Lord Mance, 149-150 per Lord Neuberger

²⁰⁶*Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(g)(iv)

²⁰⁷*Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* [2009] NZAR 122, para 44

²⁰⁸Donnelly *Delegation of Governmental Power to Private Parties* (2007) 230. 254-255

²⁰⁹*YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95, 150

²¹⁰*Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(g)(ii)

this reason, the absence of this indicium should not be particularly detrimental to a claim that a function, power or duty is public.

In England, the contractual source of the power has been treated as a major impediment to categorising the function as public. The majority in *YL* found it highly relevant that the immediate source of the private care provider's power was based in its contract with the local authority. This was despite the fact that this contract was only one step removed from the statutory obligations owed by the local authority to provide, or make provision for, the relevant services. It would drastically restrict the scope of s3(b) if such a simple expedient as contract came to be treated as ousting NZBORA's application.²¹¹

2. Governmental in a broader sense.

So far, the indicia discussed have not attempted to confront the difficult question of what makes a function, power or duty 'public'. Rather, they look to whether the entity or the function is connected with, or controlled by, the State. The following broader indicia move away from this somewhat, although there is little guidance as to how they might be applied in practice.

(a) 'Standing in the shoes of government'²¹²

(i) A wide reading

If read widely, this 'indiciu' is really a re-statement of the question, begging the question of government's proper role. Using the term 'government' may also lead to a restrictive interpretation by equating 'publicness' with the State, instead of conceiving the term in a wider sense.

²¹¹ Andrew Butler, "Is this a Public Law Case?", (2000) 31 VUWLR 747, 764

²¹² *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(g)

(ii) A narrower reading

This indicium can be interpreted more narrowly, looking to whether the State had historically performed the function. If so, a private entity might be seen as stepping into government's shoes. Such an interpretation seems useful in contracting-out cases, and is championed by Craig, who sees it as a sufficient criterion in these situations.²¹³ Otherwise, he argues, rights protection is dependent on the manner of service delivery.²¹⁴ He accepts that factor-based approaches are appropriate to non contracting-out cases where this difficulty does not arise.²¹⁵

Problematically, Craig's reasoning applies regardless of the function at issue. While all functions performed by s3(a) entities are treated as 'public', this is really only notional.²¹⁶ Once a function is being performed privately, it would seem that its 'publicness' should be back at issue. Otherwise, if a department contracts out the function of purchasing office supplies, the successful tenderer must be subject to NZBORA.

Craig concedes that not all functions contracted out will be 'public'. On his view, the successful office supplies tenderer would not be subject to a rights instrument, but he does not explain why this might be.²¹⁷ Focussing on the risk to rights, discussed below, would appear to be a useful way of looking at the matter. Craig also seems to view the phenomenon of privatisation as driven only by concerns of efficiency, not accountability.²¹⁸ Another perspective is that such changes were intended to free certain activities from human rights obligations by transferring them to the private sector.²¹⁹ Given these difficulties, it is difficult to consider this indicia determinative as Craig advocates.

²¹³In the UK context. Paul Craig, "Contracting Out and the Human Rights Act" (2002) 118 LQR 551, 558-559

²¹⁴As Oliver points out, the whole point of the institutional public/private distinction is to treat some entities differently simply because of who they are, "Functions of a Public Nature Under the Human Rights Act" [2004] PL 329, 340

²¹⁵Craig, "Contracting Out and the Human Rights Act" (2002) 558-559

²¹⁶Leigh and Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (2008) 146

²¹⁷Paul Craig, "Contracting Out and the Human Rights Act" (2002) 118 LQR 551, 556

²¹⁸Cane, *Administrative Law* (2004) 7; Craig, "Contracting Out and the Human Rights Act" (2002) 551, 555

²¹⁹Cane, *Administrative Law* (2004) 7

Finally, this indicium is inherently malleable. The public function approach under the United States' State action doctrine requires traditional performance of the function by the State before it can be considered 'public'. This has seen the courts look as far back as ancient Greece and Rome, finding it relevant that during these times private individuals commonly made arrests and prosecutions.²²⁰

(b) Is the power being exercised in the broader public interest?²²¹

This indicium has the potential to be very expansive, and is more obviously evaluative than 'governmental'. Finding a public interest in the exercise of a power, function or duty effectively justifies imposing certain obligations on its performance. In *Ransfield*, this was distinguished from the lesser concept of 'public benefit', which does not have such an impact.²²²

The fact that the courts may consider evaluative indicia like this leaves the door open for s3(b) to reach private actors. While similar indicia have been mentioned in the English cases, they have had very little direct impact on the analysis.²²³ Currently in England, the public interest seems to be closely associated with whether an entity is implementing a programme that government has assumed responsibility for.²²⁴ *Ransfield* made it clear that the concept of public interest in New Zealand is broader than this.²²⁵

Similar to the indicia discussed above, this predominantly looks to connections between the function and the State. As considered in *YL*, it would distinguish between State-funded residents in a care home who are part of the governmental programme,

²²⁰Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 241, discussing *Spencer v Lee* 864 F2d 1376 (7th Cir 1989)

²²¹ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(a), 69(g)(vi)

²²² *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(a), 69(g)(vi)

²²³ Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 245-270

Although factors like the public interest, public services and public expectations have been mentioned, the dominant trend seems to focus on institutional connection to the state.

²²⁴ *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95 per Lord Bingham and Baroness Hale, seeming to follow the recommendations in; Joint Committee on Human Rights, Seventh Report, "The Meaning of Public Authority Under the Human Rights Act" (2003 HL 39, HC 32), 46-48

²²⁵ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) paras 57-58

and self-funded residents who are not,²²⁶ although their situations might be materially indistinguishable.²²⁷

(c) exercising extensive or monopolistic powers²²⁸

Once more, this indicium is potentially very expansive, and useful in relation to private entities. It seems to return to the idea that rights should protect against those who wield significant power. Little consideration has been given to its scope so far. All that is really clear is that *Falun Dafa* did not consider the continued running of a children's Santa parade for 75 years to be relevant.²²⁹ It is difficult to consider this question in the abstract – what power is so extensive that it amounts to 'governmental'. Guidance might be drawn from considering the risk the function, power or duty poses to rights, discussed below.

(d) exercising 'coercive powers analogous to those of the State'

This indicium has been influenced by Dawn Oliver's writings.²³⁰ On the basis that private law and public law share the same underlying values, she contends that we should simply restrict applicability to 'core' functions of government, such as coercive and regulatory powers.²³¹ This indicium appeared to influence the judgment in *Beaton*, which placed great weight on the grant of regulatory powers (over accountants) via statute.²³²

²²⁶ *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95 where one concern of the majority seemed to be to avoid disparities between publicly funded residents of the home (within the governmental programme) and self-funded residents.

²²⁷ Maurice Sunkin, "Pushing Forward the Frontiers of Human rights Protection: The Meaning of Public Authority Under the Human Rights Act" (2004) PL 643, 657

²²⁸ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69(g)

²²⁹ *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* [2009] NZAR 122, para 44, noting that permits were available at large

²³⁰ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) paras 65-68, referring to; Dawn Oliver, "Functions of a Public Nature Under the Human Rights Act" [2004] PL 329; and Dawn Oliver, "The Frontiers of the State: Public Functions Under the Human Rights Act" [2000] PL 476

²³¹ Dawn Oliver, "Functions of a Public Nature Under the Human Rights Act" [2004] PL 329, 340

²³² *Beaton v Institute of Chartered Accountants of New Zealand (7/11/05)*, Allan J, HC Auckland CIV 2005-404-2042, paras 170-171

Oliver's conception of 'core' government functions is not as self-evident as she presents. In other jurisdictions, coercively detaining psychiatric patients is considered a 'private' function.²³³ Under the Crimes Act 1961 parents are allowed physically coercive 'powers of discipline' over their children,²³⁴ something that many appear to consider intrinsically private. At some point a judgment must still be made as to whether performing a particular function should impose an obligation to observe rights. It is more worthwhile focussing on this question than referring to a disputable list of supposedly 'core' government functions. Fortunately, *Ransfield* considered these examples non-exhaustive.²³⁵

²³³ Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 241, discussing *Spencer v Lee* 864 F2d 1376 (7th Cir 1989)

²³⁴ Crimes Act 1961, s[59]

²³⁵ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69

F. Initial Analysis

Formally, the approach in *Ransfield* considers a range of indicia to determine whether a function has a public ‘stamp’ on it.²³⁶ Although the approach is nominally the same in England, the English cases have treated certain indicia as effectively determinative, although none of these seem able to convincingly perform this role. Based on the above discussion, it is particularly desirable that the absence of connections between the State and the entity or the function do not come to be treated as determinative, as they are in England. The same goes for the presence of a self-interested motive. If they were, then the public function test would be effectively useless at reaching private actors.

Realistically, given the small volume of cases New Zealand has considered, categorical conclusions can hardly be drawn. What can be said, however, is that the ‘central question’, which equates public functions with ‘governmental’, and ‘governmental’ with the State, seems geared towards catching functions performed by entities who are fairly closely connected to the State. The tendency of the courts to applying s3(b) in arguably s3(a) type situations seems to support this. While rights against the State are certainly useful, rights protection may still be desirable against private actors.

On paper, the cases seem amenable to bringing private actors, and functions carried out pursuant to contract within the scope of s3(b). However, the facts of the cases that have made the most expansive pronouncements on s3(b) belie such an optimistic conclusion. The ‘private’ entities in those situations were created by the State under statute, and subject to State control.²³⁷ In relation to ‘fully’ private entities, there is really only a short remark in *TV3 v Eveready* and the judgment in *Ransfield* to go on.²³⁸ New Zealand, unlike England, has simply not considered in detail more difficult cases where the entity is private, the source of the function is (immediately)

²³⁶ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 63, referring to *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48

²³⁷ *Lawson v Housing New Zealand* [1997] 2 NZLR 474; *Federated Farmers of NZ Inc v New Zealand Post Ltd* [1992] 3 NZBORR 339

²³⁸ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC); *TV3 Network Services Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435 (CA)

contractual, and there is little or no State control. In fact, the cases to date that are similar to this have all been held to fall outside s3(b).²³⁹

Certainly, *Ransfield's* more evaluative factors have the potential to prevent developing a restrictive approach akin to England, especially when combined with our more expansive approach to jurisdiction under judicial review. However, as the English courts also purport to consider similarly evaluative factors, this is no guarantee.

The English courts have also recognised difficulties in drawing this distinction. Judges have expressed discontent about the binary nature of the distinction, and the fact that the reasoning essentially comes down to policy preferences, which are not always clearly enunciated.²⁴⁰ The courts are considered to have struggled with this abstract distinction.²⁴¹ Indeed, the *Ransfield* approach at times has the feel of a rather loosely collated set of factors with an addendum that none are determinative, which makes it rather difficult to evaluate, especially with the lack of subsequent case law. Potentially, focussing on the risk of a rights breach is a more useful way of understanding and dealing with the cases.

²³⁹ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 69

Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board (2008) 8 HRNZ 680; [2009] NZAR 122, para 44

Alexander v Police (1998) 4 HRNZ 632 (CA)

Mangu v Television NZ Ltd (9/9/05), Lang J, HC Auckland CIV-2005-404-487

²⁴⁰ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2004] 1 AC 546, 597 per Lord Rodger; *YL v Birmingham City Council and others* [2008] 1 AC 95, 142 per Lord Neuberger

²⁴¹ McLean, "Public Function Tests" (2009) 198-199

G. The relevance of considering the risk to rights

Considerations that have been conspicuously absent from the discussion so far are the rights themselves, or any explicit consideration about the desirable scope of human rights. The more evaluative factors remain largely untested, and connecting the entity or the function to the State is essentially a proxy for this reasoning that should be considered neutral in relation to private actors. Rishworth and McLean suggest that the threat to rights is nevertheless being taken into account in both England and New Zealand, and is the decisive consideration in assessing whether the function is ‘public’ in relation to private entities.²⁴²

1. The risk to rights

Ransfield recognises the importance of the human rights context, although not in the ten indicia. While opining that the NZBORA rights were not directly in issue, Randerson J held that the scope and significance of the right(s) at issue is relevant in considering whether NZBORA has been engaged.²⁴³ Similarly, in *YL* Baroness Hale considered the “undoubted risk that rights will be violated” an important factor in her holding that the care provider was subject to the HRA(UK).²⁴⁴ Lord Bingham also found it “relevant to consider the extent of the risk, if any, that improper performance of the function might violate an individual’s Convention right”. He then noted that in some fields, such as sport, the risk of infringing a Convention right appears to be small.²⁴⁵ While the majority do not expressly endorse this approach, they appear to implement it.

This type of reasoning ties the public/private distinction into the human rights context, and focuses on the particular function at issue. One of the major assumptions underpinning the institutional approach is, after all, that the State possesses significant

²⁴² Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009)

²⁴³ This has echoes of the approach taken to *s5 Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, para 14

²⁴⁴ *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95, 120 per Baroness Hale

²⁴⁵ *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95, 105 per Lord Bingham

power to infringe rights. It seems useful to define the publicness of the function at least partially in terms of its threat to rights.

2. *How this analysis has been conducted in the courts*

While *Ransfield* accepted that there was a prima facie case that the talkback bans had infringed the plaintiffs' freedom of expression, it appears to have been considered quite weak. Randerson J refers to s5's ability to justify a prima facie limitation, and mentions that the broadcaster had a competing right to freedom of expression.²⁴⁶ Instead of utilising s5 to fully consider the merits of the rights dispute, it was effectively merged with the question of public function.²⁴⁷

Later cases also seem to find a weak rights-case influential as to the question of whether a public function existed. *Falun Dafa* was an interim injunction application, so it is clear that the claim there was considered "very weak". *Mangu* dealt with a decision by Television New Zealand not to include a low polling electoral candidate in a news item. NZBORA was held, in obiter, not to apply to day-to-day operational decisions, which could be seen as a focussed definition of the relevant function. The overall thrust of the judgment was that the plaintiff's case was insufficiently compelling to justify overriding editorial independence. The fact that specialist regulators existed was also considered relevant.²⁴⁸ On the facts, it was simply unnecessary to impose rights-observing obligations, and so the case was dealt with at the threshold stage.

This 'merging' is far more evident in the English cases. In *YL*, the majority felt that, based on the existing regulatory framework, and alternative remedies open to *YL*, there was "no need to depart from the ordinary meaning of 'functions of a public nature'".²⁴⁹ They effectively considered *YL*'s Article 8 right was not threatened and then found the function to be 'private'. Some of the assumptions the majority makes

²⁴⁶ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233 (HC) para 44

²⁴⁷ Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009) 15

²⁴⁸ *Mangu v Television NZ Ltd* (9/9/05), Lang J, HC Auckland CIV 2005-404-487 para 51. Compare *Dunne v Canwest TVWorks Ltd* [2005] NZAR 577 (HC)

²⁴⁹ *YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95 110 per Lord Scott

regarding alternative contractual remedies open to YL can be questioned.²⁵⁰ Explicitly balancing YL's Article 8 right against the interests of the care provider in managing a financially viable home appear to have been a less confusing way of deciding the case.

Especially in cases that seek to impose rights obligations on private parties, the underlying rights conflicts do seem to be taken into account in categorising the function. The potential issue with this is that considering these issues under the blunt 'public function' enquiry arguably does not encourage fulsome reasoning. The specific rights issues are seen as just another indicia. Moreover, the perceived importance of the public function enquiry encourages protracted, and hypothetical discussion of indicia which as has been seen, are often unhelpful. This is costly, and removed from the facts at issue. The effects of this have been especially evident on the English experience. As Leigh and Masterman put it, eviction for failing to pay rent is very unlikely to breach the Article 8 right to respect for a home. Nevertheless, in *Poplar Housing*,²⁵¹ lengthy discussion of the public function issue took place,²⁵² and arguably created unnecessarily restrictive precedent.

There may be more of a justification for merging the threshold enquiry with the substantive rights dispute in the English context. The consequences following from finding a function exercised by a private entity to be public are potentially far more severe. As discussed in Chapter 4, these difficulties do not arise so strongly under NZBORA.

²⁵⁰ Donnelly, *Delegation of Governmental Power to Private Parties* (2007) 266-267
 Joint Committee on Human Rights, Seventh Report, "The Meaning of Public Authority Under the Human Rights Act" (2003 HL 39, HC 32); Joint Committee on Human Rights, Ninth Report, "The Meaning of Public Authority Under the Human Rights Act" (2006 HL 77, HC 410); which all mainly deal with privity issues. The opposite view is taken in; Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009) 8-10

²⁵¹ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48

²⁵² Leigh and Masterman *Making Rights Real: The Human Rights Act in its First Decade* (2008) 146-147.

Chapter IV: Assessments

A. The story so far...

It is fairly uncertain as to how New Zealand will deal with direct rights-claims against private actors, especially those performing functions voluntarily. While there is no guarantee that New Zealand will follow the restrictive English approach, there are sufficient similarities between the two jurisdictions to justify viewing their approach as a cautionary example. The first chapter suggested that clarity of the normative reasoning, bluntness, and over-restrictiveness were useful criteria to assess the public/private distinction in practice. Based on these, it seems fair to conclude that direct rights application under a functional public/private distinction in New Zealand has some problematic potential.

Often, the reasoning actually given for the categorisation is opaque, especially in situations involving private actors. This is more obvious in the English cases, but is still the situation in New Zealand. Certain indicia of variable weight, such as connections to the State are asserted to show ‘publicness’, as if this were an objective characteristic. This carries with it the risk of developing an overly restrictive approach where aids to reasoning supplant the reasoning itself. It also serves to create a time consuming and lengthy debate over jurisdiction that has been described as overly abstract and “near theological”, despite the fact that relatively simple disputes might be involved.²⁵³ In England, where more difficult cases have been dealt with, concerns have been raised over the bluntness of the distinction.

Despite this, there are positive aspects of the current approach. These include the fact that it may extend to private actors, the fact-sensitive contextual definition of functions that may ensure flexibility, and the consideration of a wide range of factors in relation to ‘publicness’. In fact, a rights-balancing enquiry of some sort seems to be taking place at the threshold stage, relating the public/private distinction back to its purpose.

²⁵³ Ian Leigh and Roger Masterman *Making Rights Real: The Human Rights Act in its First Decade* (2008) 146

This chapter considers whether there are any alternative ‘deflationary’ approaches to the s3(b) question which might make it less likely for problems like those experienced in England to develop. This would seem to be achievable by utilising s5.

1. *When is direct application necessary?*

The potential issues regarding the s3(b) approach are really only problematic if rights are insufficiently protected by the general law. If they are, then it is unlikely on the current approach that NZBORA will directly apply. The main focus of this chapter is on applying rights against private actors. The current approach to s3 means that State-action, and associated action will likely be caught.

B. Existing rights-protections

1. *Legislative protection*

(a) The Human Rights Act 1993 (HRA)

The major piece of legislation (other than NZBORA) extending rights obligations to private actors is the Human Rights Act 1993. This has a far wider scope than NZBORA, with discrimination by reason of the prohibited grounds, by ‘any person’ prohibited in various areas.²⁵⁴ Unlawful discrimination under the Human Rights Act does not tally exactly with the right to freedom from discrimination under NZBORA, but it effectively protects several NZBORA rights.

More importantly, the s3 question is of fundamental importance to the HRA. Entities falling within s3 are subject to the HRA concerning more of their actions, and to a different standard than ‘private’ actors outside s3.²⁵⁵ The existence of this legislation does not seem to be a good reason to justify considering the s3(b) question unimportant.

²⁵⁴ Human Rights Act 1993, part 1A, part 2

²⁵⁵ Human Rights Act 1993, part 1A, part 2

(b) General legislation, international law, and section 6 NZBORA

Often legislation will protect the substance of NZBORA rights in key areas, such as the Employment Relations Act 2000, which effectively renders the s 27 rights redundant in employment matters.²⁵⁶ Similarly, international instruments often focus on the State as the key actor. Moreover, if the instrument is not incorporated domestically, its status remains unclear. As a result, international law cannot be absolutely relied on to provide effective rights protection against private actors.²⁵⁷ Finally, the statutory obligation to read legislation rights-consistently also upholds NZBORA rights. However, conduct outside statute, and conduct taken pursuant to a broadly framed provision escapes s6, leaving s3(b) to fill the gap.

Overall, while there is certainly legislative provision for the protection of rights against private actors, coverage is not complete. Moreover, there remain important reasons to focus on the s3(b) question.

(c) General common law protections

Some commentators, most notably Oliver,²⁵⁸ consider that there is no need to take an expansive approach to public functions. The general law is seen as sufficiently rights-protecting. Certainly, common law doctrines have long protected the substance of many NZBORA rights.²⁵⁹ This approach has the benefit of not treating rights-protection as a contest between public and private law. After all, the important point is surely whether or not rights are sufficiently protected.

²⁵⁶ Employment Relations Act 2000, s 4(1A); Paul Rishworth, "New Zealand: Taking Human Rights into the Private Sphere" in Dawn Oliver and Jorg Fedtke (eds) *Human Rights And the Private Sphere: A Comparative Study* (2007) 332-333; Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 47-59

²⁵⁷ Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 60-71

²⁵⁸ Dawn Oliver, "Functions of a Public Nature Under the Human Rights Act" [2004] PL 329; Dawn Oliver, "The Frontiers of the State: Public Functions Under the Human Rights Act" [2000] PL 476; Dawn Oliver, "Common Values in Public and Private Law and the Public/Private Divide" [1997] PL 630

²⁵⁹ Butler and Butler, *The New Zealand Bill of Rights Act* (2005) 37-47

On Oliver's view, private law and public law share the same underlying values, making it likely that rights will be adequately protected.²⁶⁰ While it is true that some areas of private law have developed to protect what might be conceived of as 'public law values',²⁶¹ Oliver's broad proposition is unconvincing if it is taken to mean that one should just assume that the general law will always sufficiently protect rights.²⁶² The supposedly common values between public and private law are arguably pitched at such a high level of abstraction that they may elide very important differences on application.²⁶³ Tort and contract, for example, have rather different remedial objectives than human rights law.²⁶⁴

Commentators of this bent do not generally make this assumption. Rather, they take the position that the general law usually protects rights, but if it does not, then it can be made to do so via the rights-instrument's indirect application.²⁶⁵

(d) Indirect 'horizontality'

It is accepted that NZBORA applies indirectly and 'horizontally' in relation to private litigation, as the judiciary are subject to NZBORA.²⁶⁶ This is not direct application, but a way in which human rights norms influence the development and application of the common law. This in turn provides the background framework for private action. It is generally supported over direct application for being incrementally developed, in line with common law reasoning.²⁶⁷ Potentially then, this could provide sufficient protection for rights in relation to private actors. Unfortunately, the extent of

²⁶⁰ Dawn Oliver, "Common Values in Public and Private Law and the Public/Private Divide" [1997] PL 630

²⁶¹ J Freeman, "Extending Public Law Norms Through Privatization" (2003) 116 HLR 1285, 1285

²⁶² The difficulty of assuming this, especially in relation to contract is discussed in: Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009) 5-6; Catherine Donnelly, "Leonard Cheshire Again and Beyond" [2005] PL 785, 786.

²⁶³ Peter Cane, "Accountability and the Public/Private Distinction" (2003) 268-269; Michael Taggart, "The Province of Administrative Law Determined?" in Michael Taggart (ed), *The Province of Administrative Law* (1997) 5

²⁶⁴ Janet McLean and Paul Rishworth, *Direct Application of Human Rights Obligations* (2009) 17

²⁶⁵ Dawn Oliver, "Functions of a Public Nature Under the Human Rights Act" (2004) PL 329, 343

²⁶⁶ The New Zealand Bill of Rights Act 1990, s3(a)

²⁶⁷ Paul Rishworth, "New Zealand: Taking Human Rights into the Private Sphere" (2007) 335-350

NZBORA's indirect horizontal effect is unclear, being likened to a "constitutional can of worms".²⁶⁸

The major issue, how 'bound' the courts are by NZBORA, remains unanswered. There are conflicting dicta that the courts must apply NZBORA in disputes between private citizens, or that it is NZBORA's general values that 'inform' judicial decisions. The process appears thoroughly discretionary. Nevertheless, there appears to be a consensus that NZBORA has some effect on the common law, which may be 'vetted' under s5, and that NZBORA may influence the development of new causes of action.²⁶⁹

In England, a major limitation of indirect horizontality is considered to be that it depends on a pre-existing cause of action to get the issue before the courts.²⁷⁰ In New Zealand the strength of this argument can be questioned. New causes of action have been created based on rights-considerations and lacunae in the common law,²⁷¹ the scope of judicial review is far wider, and there is protection in the general law of many rights against private actors. Despite this, the point that horizontality may not be a perfect proxy for direct application remains sound.

When considered in conjunction with the uncertain state of indirect horizontality in New Zealand and the fact that legislative protections do not achieve complete coverage, it seems that direct application may still be useful, albeit in rather limited circumstances.

²⁶⁸ Jan Stemplewitz, "Horizontal Rights and Freedoms: The New Zealand Bill of Rights Act 1990 in Private Litigation (2006) 4 NZJPIL 197, 200

²⁶⁹ Paul Rishworth, "New Zealand: Taking Human Rights into the Private Sphere" (2007) 337-344, discussing; *Hosking v Runting* [2003] 3 NZLR 385; and *Television New Zealand Ltd v Rogers* [2006] 2 NZLR 156 (CA)

²⁷⁰ Joint Committee on Human Rights, Seventh Report, "The Meaning of Public Authority Under the Human Rights Act" (2003 HL 39, HC 32), 30-31

²⁷¹ *Hosking v Runting* [2003] 3 NZLR 385; *Simpson v Attorney General [Baigent's Case]* [1994] 3 NZLR 667

C. Direct application - alternatives to the current approach

1. A legislated list

A similar approach to the Ombudsmen Act 1975 or the Crown Entities Act 2004 could be taken, with direct application restricted to certain scheduled entities. Potentially, classes of entities could be included, introducing a degree of flexibility. In England it has been suggested that this type of list could clarify that private delegates of public power are covered.²⁷² Such an approach might be more certain, although the publicness of the power would still have to be assessed, but the more useful and certain a list, the more institutional the approach would seem to become. Flexible and generous application of NZBORA has long been considered a desirable goal.²⁷³ New Zealand, has not (yet) experienced widespread dissatisfaction and uncertainty which might justify such an approach, although it could be worthwhile if this did eventuate.

2. Rishworth and McLean's approach – ignoring s3(b)?

Rishworth and McLean suggest that reasoning could be made clearer and more focused by examining whether rights have been unjustifiably infringed before considering the public function issue under s3(b).²⁷⁴ As they note, s3(b) does not affect the question of whether a right has been unjustifiably limited, but merely what consequences will follow.²⁷⁵ In their view, considering whether rights have been infringed before s3(b) does not render the section irrelevant, but considers the question in a larger context.²⁷⁶ In effect, the argument is for full direct application of

²⁷² Joint Committee on Human Rights, Seventh Report, “The Meaning of Public Authority Under the Human Rights Act” (2003 HL 39, HC 32), 34-36

²⁷³ *R v N* [1999] 1 NZLR 713, 721

²⁷⁴ Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009) 10 - 17 referring to the Constitution of South Africa (1996), s8(2) as an example of their preferred approach; Janet McLean “Public Function Tests” (2009) 200

²⁷⁵ Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009) 10

²⁷⁶ Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009) 17

NZBORA, tempered according to context and carried out incrementally using common law methods.²⁷⁷

The focus is not on imposing rights observing obligations on the entity, but on whether the legal framework has permitted an unacceptable degree of rights-infringing conduct. Shifting the focus in this manner alleviates the possibility of arbitrary outcomes based on indicia such as funding, or historic performance. They consider freedom of contract as a possible area where this might occur, with rights instruments providing the basis for a re-evaluation of common law baselines of contract and tort.

On this argument, the public function issue merely gets in the way of considering whether the law adequately protects rights on the facts of the case.²⁷⁸ They suggest that considering cases like *YL* in this manner, the common law might be developed to include an implied term in care-contracts, or perhaps a declaration could be issued that the law as it stands falls short of rights-standards.²⁷⁹ In New Zealand, *Ross v Police* while not entirely analogous, might be considered a comparable example. This case concerned a protest in a bank, with the court being prepared to consider the ‘quasi public’ nature of the space in assessing reasonableness under the Trespass Act 1980.²⁸⁰ This type of approach, they consider, is more even-handed, and does far more to protect rights than a fixation on public function.

While this approach has some attraction, it is telling that it is based on the very differently worded South African Constitution, under which rights apply to anyone as far as applicable.²⁸¹ In contrast, NZBORA simply does not apply directly to everyone. Although it does apply indirectly through the judiciary, this cannot currently be relied on to the extent Rishworth and McLean consider desirable. While Rishworth

²⁷⁷ Rishworth, “New Zealand: Taking Human Rights into the Private Sphere” (2007) 340-341, taking the view that although the Constitution of South Africa (1996) s 8(2) establishes full direct horizontality, in effect it operates indirectly.

²⁷⁸ Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009) 10

²⁷⁹ Rishworth and McLean, *Direct Application of Human Rights Obligations* (2009) 9

²⁸⁰ *Ross v Police* (2002) 6 HRNZ 734 (HC), paras 49-51, although it had been held that the police officer issuing the notice on behalf of the private occupier was performing a public function.

²⁸¹ the Constitution of South Africa (1996), s8(2)

(2) A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that it is applicable, taking into account the nature of the right and of any duty imposed by the right.

emphasises the similarities of the South African approach with the normal development of the common law, in reality this would seem to be a significant constitutional change.

Like it or not, s3(b) is part of NZBORA, and needs to be given some effect. The real question is how to appropriately deal with it, taking into account the potential problems identified above. Continuing with the current approach need not result in an overly rigid doctrine if s5 is resorted to in appropriate cases.

3. Setting the s3(b) threshold

The current New Zealand approach to s3(b) is not (yet) obviously problematically restrictive, unlike the analogous English approach. The cases so far have also not descended too far into long-winded speculation on what makes a function public. ‘Publicness’ under s3(b) appears to be considered in relation to the entity exercising the function, and its capacity to infringe rights including consideration of existing remedies. The less the entity or the function are connected to the State, the more the focus seems to shift to the capacity of the relevant function to infringe rights, considered against the rights of the entities performing the function. Concerning private parties, this threshold seems to be set fairly high, likely to encompass regulatory and coercive power such as prison-management, but falling short of a *Ransfield* or *Falun Dafa* type situation.

Drawing the public/private boundary in this manner is in keeping with the ‘meaningful signifier’ sense of the distinction discussed above. Without a high level of connection to the State, functions are more closely examined. Radio broadcasting in a competitive market, and organising a parade when permits are openly available appear to be considered an insufficient threat to the relevant rights to justify labelling them (relatively) ‘public’. This is especially so given the competing rights and interests of the entities performing these functions. On this basis, it can be seen why the coercive nature of prison management is treated differently from the coercion in disciplining a child.

Drawing some sort of initial public/private distinction in this manner is necessary to give effect to s3(b). However, setting too high a threshold and fixating on this question ignores the fact that it only draws the public/private boundary in the first instance, and may ossify into a lengthy, restrictive approach based on relatively arbitrary criteria. For instance, while *Ransfield* and *Falun Dafa* can be considered to concern relatively private functions, the situation in *YL* is more complex.²⁸² It involved some degree of State connection, public funding, and a real threat to the Article 8 right.²⁸³ At least in the first instance it would seem legitimate to consider this function public, rather than attempt to resolve the issue in the abstract vocabulary of public and private.

Admittedly, there are no clear-cut lines in making this threshold distinction. However, unlike Rishworth and McLean, I do not consider that this necessitates essentially abandoning the distinction. On the statutory framework, s3(b) performs a useful gate-keeping role. The point is, while a judgment call has to be made, in more difficult cases it seems justifiable to err on the side of ‘public’ under NZBORA. s5 seems to provide a useful tool to clearly consider the issues, alleviating the need to rely so heavily on the threshold test of public function, which seems more suited to roughly drawing an initial boundary.

Retaining a filtering role for s3(b), and, where appropriate, shifting the rights issues to be more clearly considered under s5 appears to be a useful “unravelling” of the strands comprising the public/private distinction.²⁸⁴ For the reasons below, there would not seem to be any major objections to this.

²⁸² [2005] 1 NZLR] 233; [2009] NZAR 122; 1 AC 95

²⁸³ Catherine Donnelly, “Leonard Cheshire Again and Beyond” [2005] PL 785, 786; Joint Committee on Human Rights, Seventh Report, “The Meaning of Public Authority Under the Human Rights Act” (2003 HL 39, HC 32), 38-42

²⁸⁴ Peter Cane, “Public Law and Private Law” (1987) 70

4. *Applying section 5*²⁸⁵

(a) ‘Prescribed by law’

Common-law doctrines meet a sufficient level of prescription to fit within the phrase ‘prescribed by law’ under section 5.²⁸⁶ Allegedly rights-limiting conduct of a private entity acting under contract or companies legislation would fit easily within this. As s3(b) already imposes the “conferred or imposed pursuant to law” requirement, this phrase would not seem to restrict s5’s application to private actors.

(b) ‘Reasonable limits...demonstrably justified in a free and democratic society’

The s3(b) question is binary and shorthand for a range of normative criteria, some of which are of dubious relevance to rights-application. Under s5 it is accepted that the function has the capacity to limit rights, and the focussed issue is what degree of rights obligations, if any, should be imposed. Section 5 operates in a spectrum-like manner, but the spectrum extends to zero. Where the general law is deemed adequate, no obligations need be imposed.

In this instance, the only difference between calling the function ‘private’ is that the entity is technically subject to NZBORA for acts done in the function’s performance. As discussed above, this need not carry any significant precedent value, due to the context-specific characterisation of a ‘function’, which would likely be narrowly construed when the function or entity is not connected to the State. Where the general law is inadequate, this may even open the door for indirect application in the manner Rishworth and McLean consider desirable.

The s5 enquiry is well developed in relation to statutes limiting rights, but is not restricted to these situations. In *Brooker v Police*²⁸⁷ the defendant had been convicted of disorderly behaviour, after serenading an off-duty police officer in the early

²⁸⁵ **5 Justified limitations**

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

²⁸⁶ *Hosking v Runting* [2003] 3 NZLR 385; *Brooker v Police* [2007] 3 NZLR 91 (SC)

²⁸⁷ *Brooker v Police* [2007] 3 NZLR 91 (SC)

morning by way of protest. He pleaded that his freedom of expression had been unjustifiably limited. In considering this issue, the court read the right widely, and considered a range of competing interests and factors under s5, focussing on the particular fact-circumstances.²⁸⁸

The decision opens the door for s5 to apply in all rights-limiting situations, even where a statute is not at issue.²⁸⁹ In more difficult cases, competing rights or interests, the permissible leeway to give to self-interest, and the “rationalities”²⁹⁰ of particular activities appear more suited to detailed consideration under s5, rather than as a factor in determining whether a function is public. Although difficult, the type of balancing that goes on in a *Brooker* type case is one that is well known to the common law. It poses fewer difficulties, is fact specific, and is more clearly focussed than relying on the abstract public/private distinction.²⁹¹

(c) Overly onerous?

s5’s spectrum-like nature counters concerns that private actors will necessarily be subject to onerous obligations if they are found to be exercising a public function. Any obligations will be dependent on whether a right has been unjustifiably limited.

When considering justifiable limitations, the same standards simply do not have to apply to private actors as State actors. The entity’s private status, motivations, and other factors could all be taken into account in considering what amounts to a reasonable, justified limit. For example, s5 would seem to be a fine-grained enough analytical tool to take account of the different characters of State-run schools, and private schools under the Education Act 1989, and impose any obligations accordingly.²⁹²

²⁸⁸ Andrew Butler and James Shaerf, “Limiting Fundamental Rights: How on Earth is s 5 Supposed to Work in Practice” in G Illingworth (chair) *NZLIS intensive: Using the Bill of Rights in Civil and Criminal Litigation* (2008) 26; *Brooker v Police* [2007] 3 NZLR 91 (SC), para 132

²⁸⁹ Butler and Shaerf, “Limiting Fundamental Rights” (2008) 26

²⁹⁰ Gunther Teubner, “After Privatization? The Many Autonomies of Private Law” (1998) CLP 393, 396

²⁹¹ McLean, “Public Function Tests” (2009) 199

²⁹² Andrew Butler, “Is this a Public Law Case?”, (2000) 31 VUWLR 747, 768-769

Consequences of the HRA(UK)'s application to private entities that have been considered particularly weighty against a relatively generous approach in England simply do not apply under NZBORA. Whereas bringing non-State bodies within the HRA(UK) subjects them to a range of limitations designed with State-actors in mind, NZBORA is framed more widely. Entities caught by section 3 would appear able to enjoy the benefit of rights under an s5 analysis, and also rely on it to show justified limitations.

5. Possible objections to a greater role for s5

(a) Uncertainty/hyper-litigation

Whether this approach would open up an unattractive invitation to litigation is a cogent objection. However, a threshold would still be drawn by s3(b), which would seem likely to be able to dispose of frivolous or unmeritorious cases fairly easily, drawing a boundary at the first instance as occurred in *Ransfield* and *Falun Dafa*.

Applying s5 need not be radical to the point of uncertainty. Existing mechanisms for rights-protection would seem to be prime candidates for consideration when determining whether a right had been unjustifiably limited.²⁹³ In effect, s5 would often be assessing the adequacy of existing legal protections for rights, not overriding them completely. This would be similar to the position in other jurisdictions, which nominally have a wider direct application, but have in effect indirectly developed the common law.²⁹⁴ There might be little difference from the theoretical operation of horizontal effect under s3(a). Especially given the rather uncertain state of horizontality, a mutually reinforcing role could be played by s5.

The courts also appear wary of being dragged into dealing with issues they are ill-placed to consider solely because rights are mentioned. For example, in *Federated Farmers* the Court expressly took into account its institutional competency. It refused to be drawn into becoming a price-fixing tribunal, assessing the 'reasonableness' of

²⁹³ *Solicitor General v Smith* [2004] 2 NZLR 540, para 136; *R v Harris* (21/11/06), Miller J, HC Palmerston North CRI-2006-054-1008

²⁹⁴ Dawn Oliver and Jorg Fedtke (eds) *Human Rights And the Private Sphere: A Comparative Study* (2007) 477-481

the price increase only in very general terms.²⁹⁵ This effectively sets a boundary relating to what the courts will and will not consider at the secondary stage, unrelated to the supposed ‘publicness’ of a function. Drawing an analogy with review, the question becomes whether the specific case is amenable to rights-application, rather than whether the function is ‘public’.

(b) Devaluing rights?

It has been considered that treating rights in this manner devalues and trivialises their inalienable and fundamental nature, seriously devaluing their currency.²⁹⁶ In contrast, Clapham welcomes taking such an approach to human rights. For him;

“It does not trivialise human rights; rather it enriches the whole concept of human rights. It is simply a question of where you are standing. To privatise human rights helps shift human rights from the sphere of political rhetoric into the spheres of daily reality.”²⁹⁷

This type of reasoning is appealing. On the face of NZBORA, rights are clearly not absolute. The ‘shouting match’ situation that rights-based arguments can often descend to shows the limitations of taking an overly absolutist approach. Moreover, rights are already being balanced in exactly this manner by the courts, just in a rough and ready manner, under the cover of the public/private distinction. When this balancing act is difficult, it would seem worthwhile to carry it out in the open under s5, which provides a clearer and more comprehensive mechanism for assessing interests.

²⁹⁵ *Federated Farmers of New Zealand Inc v New Zealand Post Ltd* [1992] NZBORR 339; compare *Mangu v Television New Zealand Ltd* (9/9/05), Lang J, HC Auckland CIV-2005-404-487, para 51

²⁹⁶ H Quane, “The Strasbourg Jurisprudence and the Meaning of a “Public Authority” under the Human Rights Act” [2006] PL 106

²⁹⁷ Andrew Clapham, “The privatisation of Human Rights” (1995) 1 EHLR 20, 31

6. Summary

Admittedly, this whole discussion could be seen as a solution looking for a problem. In New Zealand, the cases that have arisen do not spark anywhere near the same amount of controversy as the English situations. It would not seem too harsh to describe *Ransfield's* claim for six million dollars in “exemplary damages” for a talkback radio ban as opportunistic.²⁹⁸ It is also unclear whether similar issues would arise, as the political and legislative backgrounds between the two jurisdictions are rather different.

Nevertheless, the availability of s5 is a significant difference with the HRA(UK) that would appear to be a useful way of considering more difficult questions of what amounts to a public function, power, or duty if and when they do arise. In England, the distinction appears to be developing into an unnecessary and confusing procedural hurdle. Utilising s5 to avoid the bulk of these difficulties, while maintaining a gatekeeping role for s3(b) seems to be an alternative way forward that does not do violence to the statute, nor present unacceptable consequences for civil society. In short, shifting difficult issues to be discussed under s5 this approach would focus the discussion on rights-issues more clearly, make judgments more understandable (although no less controversial), and serve the symbolic purpose of promoting and affirming fundamental rights and freedoms more adequately and realistically.

²⁹⁸ *Ransfield v The Radio Network Ltd* [2005] 1 NZLR 233, para 16

Conclusion

I began this paper with the concern that a public/private distinction in this area had the potential to remove concentrated institutional power from the scope of NZBORA. In hindsight, this appears to be an overstatement of the situation. The much-feted removal of rights via the process of privatisation²⁹⁹ simply has not occurred to a large extent, and where it has, the general law seems largely adequate in protecting NZBORA rights. However, on the other side of the argument, it also seems that an expansive approach to direct application need not have unacceptable consequences for civil society, and may even enrich the concept of human rights. Both sides appear guilty of overstating the consequences of the other's position.

Considering these issues through the lens of the public/private divide has highlighted some paradoxical aspects of rights-application, showing the shortcomings of both institutional and functional approaches to the distinction. On the institutional approach everything done by the State is 'public' although no consequences may follow from this. It is also blind to private power unless some link, often arbitrary, can be made with the State. While theoretically able to remedy these deficiencies, in practice functional approaches are so indeterminate that they are 'contextualised' by reference to institutional criteria and non-determinative indicia. This is potentially the worst of both worlds, incentivising lengthy and confusing judgments while still giving inappropriate weight to arbitrary linkages with the State.

This highlights the futility in defining what is public and private in the abstract. In practice, the courts can be seen to consider the merits of the specific underlying rights case on the facts, and in relation to the values of the relevant rights instrument. This approach should be encouraged, and appears in line with Cane's conception of a meaningfully significant 'values based' public/private distinction, neither institutional nor functional.³⁰⁰ In England this development seems to have been somewhat

²⁹⁹ Ian Leigh and Roger Masterman *Making Rights Real: The Human Rights Act in its First Decade* (2008) 144-147

³⁰⁰ Cane; "Accountability and the Public/Private Distinction" (2003) 273-274; discussing Gunther Teubner, "After Privatization? The Many Autonomies of Private Law" (1998) 51 CLP 393

hampered by the methodology and precedent that has developed around the public function question. Ensuring that this does not occur in New Zealand is a worthwhile goal that can be achieved by treating ‘functions’ as having little significant precedent value, and clearly considering controversial cases under s5. This does not entail abandoning the threshold question and judicially enacting full direct application of NZBORA. Rather, it alleviates the need for s3(b) to be used in difficult situations where it arguably provides little assistance anyway, and also provides opportunities to draw boundaries at a secondary level.

Writing on the English cases concerning the public function question in 2004, Wade presciently considered it “obvious... that long vistas of argument and disagreement lie ahead”.³⁰¹ While this can hardly be avoided, the suggested approach would at least make it clearer what we are disagreeing about.

³⁰¹ Wade *Administrative Law* (2000) 178

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Appendix One:

Selections from the Human Rights Act (UK) 1998 and the European Convention on Human Rights and Fundamental Freedoms 1950

Human Rights Act (UK) 1998

6.— Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

- (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
- (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section “public authority” includes—

- (a) a court or tribunal, and
- (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) “Parliament” does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) “An act” includes a failure to act but does not include a failure to—

- (a) introduce in, or lay before, Parliament a proposal for legislation; or
- (b) make any primary legislation or remedial order.

European Convention on Human Rights and Fundamental Freedoms 1950

Right to respect for private and family life

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Appendix Two

Observations on the public function issue in *Ransfield v The Radio Network* [2005] 1 NZLR 233

[69] Having considered the submissions and authorities, my views can be summarised as follows:

- a) The fact that the entity in question is performing a function which benefits the public is not determinative. If it were, anyone delivering goods or services to the public under licence or other authority conferred by law, would fall within the section. That could not have been intended.
- b) Whether the function, power, or duty is carried out in public is immaterial. A public function, power, or duty under s 3(b) may be performed in private.
- c) Whether the entity is amenable to judicial review is not necessarily decisive and some care needs to be taken in applying decisions from that context for the reasons I have set out.
- d) The primary focus of inquiry under s 3(b) is on the function, power, or duty rather than on the nature of the entity at issue. Nevertheless, the nature of the entity may be a relevant factor in determining whether the function, power, or duty being exercised is a public one for the purposes of s 3(b).
- e) A person or body may have a number of functions, powers, or duties, some of which may be public and some private. It is essential to focus on the particular function, power, or duty at issue.
- f) Given the many and varied mechanisms modern governments utilise to carry out their diverse functions, no single test of universal application can be adopted to determine what is a public function, duty, or power under s 3(b). In a broad sense, the issue is how closely the particular function, power, or duty is connected to or identified with the exercise of the powers and responsibilities of the State. Is it "governmental" in nature or is it essentially of a private character?
- g) Non-exclusive indicia may include:
 - i) Whether the entity concerned is publicly owned or is privately owned and exists for private profit;
 - ii) Whether the source of the function, power, or duty is statutory;
 - iii) The extent and nature of any governmental control of the entity (the consideration of which will ordinarily involve the careful examination of a statutory scheme);
 - iv) Whether and to what extent the entity is publicly funded in respect of the function in question;
 - v) Whether the entity is effectively standing in the shoes of the government in exercising the function, power, or duty;
 - vi) Whether the function, power, or duty is being exercised in the broader public interest as distinct from merely being of benefit

- to the public;
- vii) Whether coercive powers analogous to those of the State are conferred;
- viii) Whether the entity is exercising functions, powers, or duties which affect the rights, powers, privileges, immunities, duties, or liabilities of any person (drawing by analogy on part of the definition of statutory power under s 3 Judicature Amendment Act 1972);
- ix) Whether the entity is exercising extensive or monopolistic powers;
- x) Whether the entity is democratically accountable through the ballot box or in other ways.

