

# PROTESTS AND THE CHINESE PRESIDENT – AN INDEX OF FREEDOM

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*In 1999, the police disrupted several protests aimed at Jiang Zemin, President of the Peoples' Republic of China, during the APEC Leaders Summit held in New Zealand. In this article, the author considers whether the protesters' rights under the New Zealand Bill of Rights Act 1990 were infringed by police actions. In doing so, the author traverses relevant international and domestic jurisprudence on freedom of speech, movement and association, including the recent decision of the High Court in *Police v Beggs*. After concluding that the rights of the protesters were prima facie infringed, the author goes on to consider whether the infringements were justified in a free and democratic society in terms of section 5 of the Bill of Rights Act.*

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[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer; the generosity and sympathy with which such facilities are made available is an index of freedom.<sup>1</sup>

## I INTRODUCTION

Protest is one of the cornerstones of any free and democratic society. In New Zealand we imagine that our right to protest is stringently protected by the state. However, as recent events show, in New Zealand this is not always the case.

The Asia Pacific Economic Conference (APEC) Leaders Summit is a biennial meeting of world leaders to discuss free trade. In 1999 it was held in Auckland, New Zealand. Subsequent to the APEC summit Jiang Zemin, the President of the Peoples' Republic of China, was the focus of protests related to the Chinese occupation of Tibet. The protests were disrupted by the police. This article will discuss the exercise of state power to

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1 Harry Kalven Jr "The Concept of the Public Forum: *Cox v Louisiana*" [1965] Sup Ct Rev 1, 11-12. Cited with approval by Lamer CJ in *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139, 152.

disrupt protest in the light of general Bill of Rights principles and the specific rights involved in protest action. I will argue that the rights of protesters were infringed, and that the infringements cannot be justified in a free and democratic society.

The Justice and Electoral Sub Committee has investigated the police actions during Jiang Zemin's visit.<sup>2</sup> Their report concluded that the police's actions were illegal and unjustifiable.

## **II THE RELEVANT RIGHTS**

In order to protest a person needs to be able to convey the message of their choice to an audience. Protest action usually takes place as part of a procession or stationary group of people. The group needs access to a public place. Protest actions therefore generally involve the rights to freedom of expression, peaceful assembly and movement ("the rights"). All three rights are protected by the New Zealand Bill of Rights Act 1990 (BORA).<sup>3</sup> Before considering the specific attributes of the rights it is necessary to discuss the unique place of the BORA in New Zealand, and the specific rules relating to its interpretation.

### **A The General Approach to BORA Rights.**

Since its inception the BORA has been the subject of extensive jurisprudential discussion. The BORA has two features which distinguish it from Bills of Rights in other jurisdictions. Firstly, the BORA is not supreme law.<sup>4</sup> Secondly, the BORA is not entrenched.

The BORA does however share some characteristics with other basic rights documents. As with many other basic rights documents, the BORA has its roots in international human rights law. It was created "to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".<sup>5</sup> Recital (a) of the long title makes it clear that the BORA is intended to "affirm, protect and promote" human rights in New Zealand. Both of these points have been of use to the courts in developing New Zealand's rights jurisprudence, and have allowed the courts to adopt rules of interpretation from constitutional jurisdictions.

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2 Justice and Electoral Committee "Inquiry into matters relating to the visit of the President of China to New Zealand in 1999" (December 2000) ["The Inquiry"].

3 BORA, ss 14, 16 and 18.

4 BORA, s 4.

5 BORA, Long title, recital (b).

The BORA has not been interpreted in the same way as other New Zealand statutes. Various principles of interpretation specific to the BORA have emerged from the case law. The courts have found that despite the fact that the BORA is neither entrenched nor supreme it should not be subjected to a strictly legalistic interpretation.<sup>6</sup> Rights should be interpreted generously.<sup>7</sup> Bill of Rights values can change over time.<sup>8</sup> Regard should be had to the history and international context of rights,<sup>9</sup> and the BORA should be interpreted so as to confer effective rights on the people it is designed to affect.<sup>10</sup> The specific rights of protesters must be interpreted in light of these principles.

### ***B The Right to Freedom of Expression***

The right to freedom of expression is set out in section 14 of the BORA.

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

It is clear on the face of the section that the right has three main aspects: to seek, receive and impart any information.<sup>11</sup>

The ambit of the right can be found in the International Covenant on Civil and Political Rights (ICCPR), in case law, both international and domestic, and in the White Paper on the Bill presented by the Minister for Justice at the time, Sir Geoffrey Palmer.

The right to freedom of expression is set out in Article 19 of the ICCPR:

- 1 Everyone shall have the right to hold opinions without interference.
- 2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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6 *R v Goodwin* [1993] 2 NZLR 153, 168 (CA) per Cooke P.

7 *Simpson v Attorney General* [1994] 3 NZLR 667, 691(CA) [*Baigent's case*].

8 *Baigent's case*, above n 7, 703.

9 *Ministry of Transport v Noort* [1992] 3 NZLR 200, 270 (CA) [*Noort's case*].

10 *Baigent's case*, above n 7, per Cooke P.

11 The right should not be analysed exclusively on these grounds. To restrict the right to these three areas would be inconsistent with the principle that rights should be interpreted broadly, as well as with the use of the word "including" in the section.

3 The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary :

- (a) For respect of the rights and reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

In light of the long title of the BORA this section should be given effect to in interpreting the scope and application of section 14. The wording of the right and the jurisprudence on the ICCPR are directly relevant to our understanding of the New Zealand right.

International cases give various rationales for the right to freedom of expression. In *Handyside v United Kingdom* the European Court of Human Rights (ECHR) described the right of free expression as essential for the functioning of a democratic society.<sup>12</sup> Without the right of freedom of expression citizens would be unable to participate effectively in the decision making process on which all democracies depend.

Other theories base the right on the concept of a "marketplace of ideas" - the Millsian ideal of the search for truth through freedom of expression,<sup>13</sup> or alternatively the need for individual self expression and fulfilment.<sup>14</sup> All of these theories apply simultaneously. The right is necessary both as a means to an end, namely the functioning of a democratic society, and as an end in itself by allowing the self fulfilment of the citizens it protects.

For these reasons the right is of primary importance in a democratic society:<sup>15</sup>

The basic right to freedom of opinion [and speech] is the most immediate expression of the human personality in society and, as such, one of the noblest of human rights. ... It is absolutely basic to a liberal democratic constitutional order because it alone makes possible the constant intellectual exchange and the contest among opinions that form the life-blood of such an order.

The right has been seen as one with a broad ambit. In *Irwin Toy v Quebec* the Canadian Supreme Court found that the right to expression included any activity which attempted to convey meaning.<sup>16</sup>

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12 *Handyside v United Kingdom* (1976) 1 EHRR 737, 755.

13 *Irwin Toy v Quebec* [1989] 1 SCR 927 [*Irwin Toy*].

14 *Irwin Toy*, above n 13.

15 *Luth's Case* (1958) 7 BVerfGE 198.

The content of a statement will generally not be a ground for denying protection under the BORA. In *Redmond Bate v DPP* the English courts found that:<sup>17</sup>

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative ... Freedom only to speak inoffensively is not worth having.

In Germany the right of freedom of expression, which is given constitutional protection by the Basic Law,<sup>18</sup> has been seen as creating a positive obligation on the State to create an environment conducive to the exercise of the right as well as a negative obligation not to restrict the right.<sup>19</sup> The German approach to the right is broadly shaped by two policy considerations: the importance of the right in a free and democratic society and the need for self fulfilment through expression.<sup>20</sup>

In order to educate the populace and to allow the self fulfilment of individuals all expression requires an audience. To ensure an audience, vocal expression, especially protest, must be able to take place in the public domain, not just on private land. In *Commission for the Commonwealth of Canada v Canada* the Canadian Supreme Court unanimously held that the right of freedom of expression encompassed a right of access to public land.<sup>21</sup> However, the Court was split as to the precise nature of the right. Lamer CJ found that the right would only come into play where the expression would not interfere with the function of the place.<sup>22</sup>

The example Lamer CJ gives is that of a public library. It would not be an exercise of freedom of expression to protest loudly in a library as this would interfere with the functions of the place. Whether the limit on the right is reasonable would not be considered until the decision as to whether freedom of expression in the desired form is appropriate has been taken.<sup>23</sup>

As McLauchlin J points out, this approach raises a number of problems. It will not always be clear what constitutes the function of a place. Further, it is not clear how

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16 *Irwin Toy*, above n 13, 968. See also *Brockdorf Case* (1985) 69 BVerfGE 206.

17 *Redmond Bate v DPP* (1999) 7 BHRC 375, 383.

18 Article 5.

19 *Luth's Case*, above n 15.

20 *Luth's Case*, above n 15.

21 *Commission for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 [Canada].

22 *Canada*, above n 21, 156.

23 *Canada*, above n 21, 157.

important the function must be before it automatically prevents freedom of expression - does the function have to be the primary or essential function, or will a minimal or an optimum function suffice?<sup>24</sup> Another consideration is that the onus of establishing the function of the place would be on the party seeking to establish the right. Her Honour argues that this will often be difficult in the face of superior government knowledge and credibility about how the site functions.<sup>25</sup>

A further objection could be made to Lamer CJ's approach on grounds advanced in a different cause by Tipping J in *Quilter v Attorney General*. His Honour argued that:<sup>26</sup>

if restrictions which may legitimise or justify [limitations] in some circumstances are built into the right itself the risk is that they will apply in other circumstances when they are not legitimised or justified.

In the present case if access to public land were restricted before turning to the question of justifiability simply because of the nature of the public place (such as, for example, a library) there would be a risk that the right could also be limited for that place in situations where the limit is not justifiable.

McLaughlin J preferred a test based on the fundamental rationales behind freedom of speech. Access to public places will be allowed only when a link with these goals is established. The right of access will then also be subject to any limits consistent with the test in section 1 of the Canadian Charter.<sup>27</sup>

L'Heureux-Dube J also disagreed with Lamer CJ, taking the approach that any limitation must be reasonable under section 1. The prevention of access to any place was a limitation on the right of access, whether or not subsequently found to be reasonable due to the nature of the place.<sup>28</sup> Professor Hogg points out that in essence the tests provided for by L'Heureux-Dube and McLaughlin JJ are the same, as any exercise of freedom of expression can be seen as aimed at least one of the purposes of the right.<sup>29</sup> The extra limitation imposed by McLaughlin J is meaningless.

The New Zealand High Court in *Police v Beggs* recently considered the question of public access based on the Bill of Rights. The Court in that case was considering the

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24 *Canada*, above n 21, 235.

25 *Canada*, above n 21, 236.

26 *Quilter v A-G* [1998] 1 NZLR 523, 576 (CA) [*Quilter*].

27 *Canada*, above n 21, 239. The section is identical to s 5 of the BORA.

28 *Canada*, above n 21, 193.

29 Peter Hogg *Constitutional Law of Canada* (3 ed, Thomson Canada Ltd, Toronto, 1992) 980.

expulsion of protesters from Parliament grounds. Though finding for the protesters, the Court held that the Bill of Rights does not authorise entry onto any land.<sup>30</sup> The Speaker was required to have regard to the Bill of Rights in exercising her powers under the Bill, but there was no right of access to land in general.<sup>31</sup> The Court's approach in *Beggs* provides a woefully limited scope for the exercise of freedom of expression. In a New Zealand context the approach taken by L'Heureux-Dube J is preferable to that of Lamer CJ. Freedom of expression is to be given a broad interpretation - this cannot extend to implying limits into the right without first subjecting them to the test as to whether or not they are demonstrably justified.

The most recent case dealing with section 14 of the BORA in New Zealand was *Moonen v Film and Literature Board of Review*. The Court of Appeal there described section 14 as conferring a wide and powerful right. Tipping J held that "[the] right is as wide as human thought and imagination".<sup>32</sup>

In the absence of express statement to the contrary it is to be presumed that the international principles spelt out above apply to the New Zealand Bill of Rights.<sup>33</sup> This point is made clear by the White Paper presented by the Minister for Justice during the drafting of the Bill, which reflects the international genesis of the BORA.

The White Paper on the Bill of Rights acknowledges the international genesis of the right. The Paper expressly refers to both the Canadian Charter and the ICCPR.<sup>34</sup> Further, the Paper's analysis of the purposes and role of the right is clearly drawn from the international consensus described above. The right to freedom of expression was seen by the Minister for Justice (as he then was) the Hon Geoffrey Palmer as having four "grand purposes".<sup>35</sup> These were firstly to allow "individual fulfilment through self expression", secondly to enable citizen participation in a democracy, thirdly "to advance knowledge

30 *Police v Beggs* (1999) 5 HRNZ 108, 114 (HC) [*Beggs*]. The point is best discussed in the unreported version of the case: *Police v Beggs* (22 March 1999) Unreported High Court Wellington AP 293/98, 17.

31 *Beggs*, above n 30, 125.

32 *Moonen v Film and Literature Board of Review* (17 December 1999) Unreported Court of Appeal CA 42/99, 9 [*Moonen*].

33 There is a well developed series of Court of Appeal decisions to the effect that New Zealand Bill of Rights law draws extensively on international decisions and attitudes. See *Noort's case*, above n 9, 270 per Cooke P, 278 per Richardson J; *Quilter*, above n 26, 543. The Justice and Electoral Committee also made reference to international law in their report, above n 2, 31.

34 The Rt Hon Geoffrey Palmer *A Bill of Rights for New Zealand* (Government Printer, Wellington, 1985) 79 ["White Paper"].

35 *White Paper*, above n 34, 78.

and reveal truth", and fourthly to "achieve a more adaptable and hence a more stable community".<sup>36</sup> The Minister described the right as "of central importance in a democratic state", and as being "basic and of broad scope".<sup>37</sup>

The right of freedom of expression is not narrow. The ICCPR, the White Paper, and the case law both in New Zealand and overseas all indicate that the right is essential in a democratic society. The right allows anyone to express themselves in any way they like. Expression is a wide concept which includes but is not restricted to the ability to seek, receive, and impart information. The state has a positive duty to encourage free expression, and is *prima facie* bound to allow access to public land in the interest of the right. Protest action is not however based solely on the right of free expression. It also involves the right to peaceful assembly.

### C *Peaceful Assembly*

The right of peaceful assembly is conferred by section 16 of the BORA.<sup>38</sup> Again, the BORA right is itself derived from the ICCPR<sup>39</sup>

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Not every assembly qualifies for protection as a peaceful assembly. The term is not defined in the BORA. In regard to the ICCPR Nowak argues that:<sup>40</sup>

It is beyond doubt that not every assembly of individuals requires special protection. Rather, only *intentional, temporary gatherings of several persons for a specific purpose* are afforded the protection of freedom of assembly.

The right to peaceful assembly also has an important initial restriction, namely that in order to qualify for protection the assembly in question must be peaceful.

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36 *White Paper*, above n 34, 79.

37 *White Paper*, above n 34, 79.

38 The section reads "Everyone has the right to peaceful assembly".

39 ICCPR, article 21.

40 M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, Kehl, 1993) 373. Emphasis in the original.

Although an autonomous right, freedom of peaceful assembly is closely related to freedom of expression. Protest action relies on both rights heavily. To curtail the right to freedom of peaceful assembly will often have the effect of preventing the effective exercise of the right to freedom of expression. In *Re Munhumeso* the Zimbabwean Supreme Court discussed the role of assembly as a mode of expression:<sup>41</sup>

A procession, which is but an assembly in motion, is by its very nature a highly effective means of communication and one not provided by other media. It stimulates public attention and discussion of the opinion addressed. The public is brought into direct contact with those expressing the opinion.

To refuse to allow an assembly to take place is therefore to restrict a group from using an important vehicle of free speech.<sup>42</sup>

The right to peaceful assembly is similar to the right of freedom of expression in that it is seen as a fundamental right in a democratic society.<sup>43</sup> The right is essential to allow the conduct of democratic government, as it allows citizens to meet and to shape their opinions through discussion.<sup>44</sup>

One of the essential elements of any protest is that it has a venue suitable for the exercise of the rights involved. Such a venue will generally be provided by public land. As noted, in New Zealand it has been held that the BORA does not grant a right of access to public land either under the head of freedom of expression or peaceful assembly.<sup>45</sup> Preventing access to public land is a limit on the right of peaceful assembly. The right to protest in one's own back yard is not a vindication of the rights of the individual. The ability to form and disseminate ideas and opinions would be precluded if assemblies could only take place on private land, as would the role of peaceful assemblies as a mode of speech. The approach in *Beggs* is therefore inconsistent with the justifications for the right to peaceful assembly.

Freedom of peaceful assembly is a fundamental right in a democracy, allowing the formulation and dissemination of political ideas and personal opinions. In protest action it is inextricably intertwined with the right to freedom of expression, and forms an important

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41 *Re Munhumeso* [1994] 1 LRC 282, 288.

42 *Brockdorf Case*, above n 16.

43 *Re Munhumeso*, above n 41, 289. See also *Ezelin v France* (1991) 14 EHRR 362, 386.

44 *Kalven*, above n 1.

45 *Beggs*, above n 30, 114.

vehicle of speech. The right requires that all citizens be able to access public land for any peaceful purpose at any time.

#### **D Freedom of Movement**

The right to freedom of movement is set out in section 18 of the BORA:

- (1) Everyone lawfully in New Zealand has the right to freedom of movement and residence in New Zealand.
- (2) Every New Zealand citizen has the right to enter New Zealand.
- (3) Everyone has the right to leave New Zealand.
- (4) No one who is not a New Zealand citizen and who is lawfully in New Zealand shall be required to leave New Zealand except under a decision taken on grounds prescribed by law.

The section is based on articles 12 and 13 of the ICCPR. For present purposes only Article 12(1) is relevant. It provides:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his own residence

The most frequently used aspect of the right is its guarantee of free movement into and out of New Zealand.<sup>46</sup> However, the section clearly sets out that all citizens have the right to move freely within New Zealand.

The right of movement is an essential part of the exercise of freedom of expression in processions.<sup>47</sup> Freedom of movement is an important vehicle of free expression. When exercised in the "speech" context the right to free movement has clear links to the rationales of free expression. Protests, parades and processions allow messages to be distributed widely in a ceremonial form, thereby satisfying the individual need for self fulfilment and aiding in the functioning of a democratic society. There has unfortunately been little domestic judicial discussion of the domestic aspects of the right, and none of its role in demonstrations. The interrelationship of the two rights has not been acknowledged in New Zealand.

#### **E Summary of Rights**

The rights of freedom of expression, peaceful assembly and movement are all set out in the BORA. All are to be interpreted broadly, and in the light of international human rights

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<sup>46</sup> The majority of the cases on the right relate to immigration issues.

<sup>47</sup> *Re Munhumeso*, above n 41.

norms, especially the ICCPR. All three rights are integral to protest action. Together the rights ideally provide protesters with the ability to demonstrate on the subject of their choosing in the place and manner of their choosing. However, the close relationship of the three rights in a protest and the functions of peaceful assembly and movement as vehicles of free expression have not as yet been recognised in New Zealand.

### III WERE THE RIGHTS OF PROTESTERS INFRINGED?

Was the removal of protesters by the police from Jiang Zemin's proximity a limitation of the rights of the citizens concerned? It is important to stress here that just because a right is infringed does not mean the infringement is unjustifiable. The BORA and the ICCPR both expressly set out that the rights can be limited in some situations. Whether any potential limitations on the rights are justifiable will be discussed in subsequent chapters.

#### A *The Facts*

During the leaders' visits in September 1999 several protests were disbanded by the police. On 11 September 1999 two protests were shut down. One group was in Wellington, protesting the Chinese occupation of Tibet. According to an article in the *New Zealand Herald*, about 40 protesters were standing on the corner of Mountain and Almorah roads, in the path of President Zemin's motorcade which was en route to Government House. The group had a permit to hold a parade and were standing peacefully waving flags. As the motorcade approached, after an hour of peaceful protest, 50 police officers formed a line in front of the group. A bus was parked between the group and the motorcade, and the protesters were forced across to the other side of the road, out of sight of the entrance to Government House. Police claimed the action was triggered by an attempt by the protesters to move from their agreed position.<sup>48</sup>

Protesters advocating a free Tibet were again removed from the view of the Chinese President on the night of the 14 September 1999 in Christchurch. Again, the protesters had been peacefully exercising their right to assembly for some time:<sup>49</sup>

Protesters - waving flags, beating drums, blowing whistles and chanting "Free Tibet" - had stood vigil about 50 m from the hotel [in which the President was staying] entrance. Police claimed the activists had caused a disturbance as the night wore on, and that it was a police decision to shut the protest down.

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48 T Wall and M Dearnaley "Free Tibet protest thwarted by police" (13 September 1999) *The New Zealand Herald*, Auckland, New Zealand, A6.

49 T Wall and J Armstrong "State dinner crisis for PM : Chinese furious at Tibet protest" (15 September 1999) *The New Zealand Herald*, Auckland, New Zealand, A12.

In order to prevent a disturbance the police pulled buses between the protesters and the hotel and turned on the sirens on their police cars to drown the protesters' voices. It is also worth noting that guests in the hotel could not hear the protesters even when expressly keeping silent.<sup>50</sup> Police later claimed their actions were due to fighting among some of the protesters.<sup>51</sup> In the Select Committee inquiry into their actions the justification advanced for the police actions was altered to the protection of "the President's safety, freedom or dignity".<sup>52</sup>

In the case of the Jiang protests the majority of the protesters were moved on, or concealed, rather than being forced to disband. Does this constitute an infringement of their right to free expression? Section 14 expressly legislates that the right to freedom of expression includes the right to impart information. The police prevented the protesters from effectively communicating their messages to the intended recipients, by forcing them to move and by concealing their protests behind buses and around street corners, and by drowning their chants under police sirens. The protesters were allowed to say what they wanted when they wanted, but not where they wanted or to whom they wanted.

The rights of peaceful assembly and movement were also infringed. The protesters were not able to assemble where they wished or move in the direction they wished. The effect of the protest, which depended on the use of a group as a vehicle of free expression, was undermined. In turn the denial of these rights affected the right of freedom of expression.

The ability to protest when, where and how one wishes is essential to the effective vindication of the rights concerned. The state has a positive duty to create an environment conducive to the exercise of the impugned rights.<sup>53</sup> In the case of the Jiang Zemin protests, the state exercised its powers of coercion to prevent the protesters exercising their rights in the manner they chose - a manner, moreover, which formed an essential part of their mode of speech.

The rights of the protesters were infringed by the police actions. The state did not fulfil its duty to encourage protest action and prevent interference with those lawfully exercising their rights. Rather the protesters were prevented from moving, from assembling for political purposes and from conveying the message of their choice at the

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50 "State dinner crisis", above n 49.

51 T Wall "Police deny pressure to end protest" (16 September 1999) *The New Zealand Herald*, Auckland, New Zealand, A16.

52 Submission of Acting Commissioner Robert James Robinson to the Justice and Electoral Subcommittee (10 April 2000) 2.

53 Above Part II A.

time and in the manner of their choosing. The rights of free expression, peaceful assembly and movement were all subjected to significant and cumulative restrictions.

#### **IV WERE THE LIMITS DEMONSTRABLY JUSTIFIABLE IN A FREE AND DEMOCRATIC SOCIETY?**

Freedom of expression, freedom of peaceful assembly and freedom of movement can be subject to limitations. The BORA makes express provision for limiting rights in section 5. Section 5 is derived from section 1 of the Canadian Charter of Rights and Freedoms, and reads:

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.

In this section the BORA expressly acknowledges that the rights and freedoms it contains may be subject to some limitations. However, these limitations are strictly controlled by the requirements of reasonableness, prescription by law and demonstrable justification. Section 5 should also be read in the context of the ICCPR and international jurisprudence. The general approach of the courts both in New Zealand and internationally to section 5 or equivalent limiting provisions is to read the power to limit rights narrowly:<sup>54</sup>

An enactment which limits the rights and freedoms contained in the Bill of Rights should be given such tenable meaning and application as constitutes the least possible limitation.

A narrow construction of section 5 is a necessary consequence of the broad and generous approach taken in defining the ambit of the BORA rights.

##### **A The General Approach to Limitations**

In *R v Oakes* Dickson CJC held that invoking section 1 of the Canadian Charter required exceptional circumstances:<sup>55</sup>

The presumption is that the rights and freedoms are guaranteed unless the party invoking s 1 can bring itself within the exceptional criteria which justify the limitation.

As section 5 of the Bill of Rights is identical to section 1 of the Charter, the point has equal force in New Zealand. Section 5 has three elements. A limit must be "reasonable",

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54 *Noort's case*, above n 9, 283. See also *Moonen*, above n 32, 10 and *R v Oakes* (1984) 24 CCC (3d) 325 (SCC) [*Oakes*].

55 *Oakes*, above n 54, 346.

"prescribed by law", and "demonstrably justifi[able] in a free and democratic society".<sup>56</sup> The elements of each of these criteria will be addressed in turn then applied to the limits placed on the rights of protesters during Jiang Zemin's visit.

### 1 *Prescribed by Law?*

In *Sunday Times v The United Kingdom* the European Court of Human Rights read the phrase "in accordance with law" as having two elements. In order to comply, a limit must be adequately accessible and must also be "formulated with sufficient precision to allow the citizen to regulate his conduct."<sup>57</sup> The Court noted with regard to the second requirement that "many laws are inevitably couched in terms which ... are vague and whose interpretation and application are questions of practice."<sup>58</sup>

The Supreme Court of Canada in *R v Thomsen* held:<sup>59</sup>

The limit will be prescribed by law within the meaning of s 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from a common law rule.

The two passages outline different aspects of an approach to "prescribed by law". *Thomsen* deals with the procedural origin of a putative limit while *Sunday Times* sets out the substantive requirements which apply to all limits regardless of their origin.

The international jurisprudence on the meaning of "prescribed by law" or "in accordance with law" is uniform and clear. Limits must have a basis in national law. The law can be written or unwritten, but must at the least be accessible and sufficiently certain. While clarity of law is important, the section does not require absolute precision from statutes. However, a wide discretion to limit rights unfettered by considerations restricting its exercise is likely to fall outside the scope of the phrase. In the case of freedom of expression the degree of permissible imprecision is subject to stricter controls.<sup>60</sup>

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56 The "reasonable" and "demonstrably justifiable" requirements are generally dealt with conjointly. Hogg, above n 29, 866.

57 *Sunday Times v The United Kingdom* (1979) 2 EHRR 245, 271 [*Sunday Times*].

58 *Sunday Times*, above n 57.

59 *R v Thomsen* (1988) 63 CR (3d) 1, 10 (SCC). Cited in *Noort's case*, above n 9, 272.

60 *Chavunduka and another v Minister of Home Affairs and another* [2000] 8 BHRC 390, 399 [*Chavunduka*].

[E]ven stricter standards of permissible statutory vagueness must be applied where freedom of expression is at issue; for at jeopardy are not just the rights of those who may wish to communicate and impart ideas but also those who may wish to receive them.

The only recent addition to the approach in *Sunday Times* is that a law must also conform to the rule of law, affording a measure of protection against the arbitrary exercise of power by public authorities.<sup>61</sup>

It is not clear whether the New Zealand Courts have adopted this approach to the meaning of the section. The first case to deal with the meaning of "prescribed by law" in New Zealand was *Noort's case*. Cooke P, as he then was, noted in passing that the question of whether a limit was prescribed by law would be an important part of any section 5 inquiry.<sup>62</sup> His Honour also quoted from the definitions advanced in *Sunday Times* and *Thomsen*. However, it was not clear whether Cooke P endorsed either decision, only remarking that both were "leading exposition[s] of the phrase."<sup>63</sup>

Richardson J expressly held that limits must be adequately identifiable, accessible, and sufficiently precise to allow the public to regulate their conduct and foresee the consequences of their actions.<sup>64</sup>

The courts have since argued that the decision of the ECHR in *Sunday Times* should be treated with care, as rules evolved in the context of the European Courts would often be inappropriate for flexible common law jurisdictions,<sup>65</sup> and that there was "little help" to be found in *Sunday Times*, on the grounds that the European Convention was not comparable to the BORA.<sup>66</sup>

Opinion has been divided on the proper interpretation of the approach Cooke P advocated in *Noort*. In *Solicitor General v Radio New Zealand* the Court read the judgment as requiring limits to be identifiable, adequately accessible and sufficiently precise, despite finding the *Sunday Times* ruling little help.<sup>67</sup> The Court went on to hold that these

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61 *Halford v United Kingdom* (1997) 24 EHRR 523, *Kopp v Switzerland* (1998) 27 EHRR 91.

62 *Noort's case*, above n 9, 272.

63 *Noort's case*, above n 9, 272.

64 *Noort's case*, above n 9, 283.

65 *Duff v Communicado Ltd* [1996] 2 NZLR 89, 100 (CA) [*Duff*].

66 *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48, 62 (CA) [*Radio New Zealand*].

67 *Radio New Zealand*, above n 66, 63.

requirements were relaxed when considering common law rules, adopting the stance taken by Canadian Courts in *Irwin Toy*.<sup>68</sup>

With respect, this is incorrect. ECHR decisions are clearly helpful in interpreting the BORA. The ECHR has made it clear that the word "law" includes both statutory and common law legal principles.<sup>69</sup> Further, the Court makes express provision to allow for the flexibility of common law jurisdictions, holding that:<sup>70</sup>

It would clearly be contrary to the intentions of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not "prescribed by law" on the sole ground that it is not enunciated in legislation: this would deprive a common law State ... of the protection of Article 10(2) and strike at the very roots of that State's legal system.

It is also important to note that the phrases "prescribed by law" and "in accordance with law" alternate throughout the text of the European Convention, and are represented by the same French formulation in the equivalent French text, "*prevue par la loi*", suggesting that the meaning of the English alternatives are identical or at least proximate in meaning.<sup>71</sup> In *Chavunduka v Minister of Home Affairs* the Court held that the phrases "prescribed by law", "in accordance with law", "under the authority of any law" and "provided by law" had substantially the same meaning.<sup>72</sup> There is therefore no reason, as suggested in *Radio New Zealand*, not to have regard to decisions of the ECHR on the grounds that the court is considering an incomparable provision.

The New Zealand approach to the meaning of "prescribed by law" is not clear. While the importance of the phrase has been noted, it is not clear whether the courts can hold legislation not to be prescribed by law on the grounds that it does not fulfil certain substantive requirements, or if that is the case on what grounds such a strict reading would be justified. It is clear that a restrictive reading of section 5 is essential when placing limits on rights. A high threshold test for a limit to be prescribed by law would be in keeping with the general principle of reading down the grounds on which limitations will be available. It would also ensure that limits will be clear to those who are affected by them and those who seek to apply them, and would prevent over-wide discretions being given to anyone charged with the exercise of a public power with the potential to infringe rights.

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68 *Radio New Zealand*, above n 66, 64.

69 *Sunday Times*, above n 57, 270.

70 *Sunday Times*, above n 57, 270.

71 This was noted in *Malone v United Kingdom* (1984) 7 EHRR 14, 39.

72 *Chavunduka*, above n 60, 397.

## 2 *Reasonable Limits Demonstrably Justified?*

The Court in *Oakes* set out what has become the classic three part test for determining whether a limit was entitled to the protection of section 1.

First, the court must determine whether the limit is prescribed by law. In that case the question of legality was not at issue, the impugned limit being set out in a "duly enacted legislative provision".<sup>73</sup>

Secondly, the court must enquire as to the objective the limiting measures are intended to achieve. The objective must "relate to concerns which are pressing and substantial in a free and democratic society" to attract section 1 protection.<sup>74</sup>

Thirdly, the party invoking the section must demonstrate that the means chosen to attain the objective are both reasonable and demonstrably justified. The New Zealand Court of Appeal in *Moonen* recently set out the test to be applied to this part of section 5.<sup>75</sup> The New Zealand approach largely adopts the Canadian test,<sup>76</sup> and consists of three limbs. In order to be reasonable and demonstrably justified, a limit must fulfil the following criteria:

- (1) The means by which the offending legislation's objective is achieved must have a rational connection with the objective;<sup>77</sup>
- (2) The means by which the objective is achieved must impair the infringed right as little as possible;<sup>78</sup>
- (3) The means by which the objective is achieved must be reasonably proportionate to the importance of the objective.<sup>79</sup>

The Canadian Courts have elaborated the third limb of the proportionality test by describing the type of situation that it was intended to prevent<sup>80</sup>

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73 *Oakes*, above n 54, 345.

74 *Oakes*, above n 54, 348.

75 *Moonen*, above n 32, 11.

76 *Oakes*, above n 54, 348.

77 *Moonen*, above n 32, 11.

78 *Moonen*, above n 32, 11.

79 *Moonen*, above n 32, 11.

80 *Oakes*, above n 54, 349.

Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonably and demonstrably justified in a free and democratic society.

### ***B The Police and the Protesters: Section 5 Analysis.***

The protesters prevented from protesting on 11 September 1999 were the subject of rights infringements. The actions of the police were the subject of a Parliamentary inquiry.<sup>81</sup> This article will critically assess submissions on behalf of both protesters and police, and the eventual findings of the Justice and Electoral subcommittee.<sup>82</sup>

#### ***1 Prescribed By Law?***

The first step in determining whether the police actions come within section 5 is determining whether the limits were prescribed by law. The police advanced various provisions which, they argued, constituted legal authority for their actions.

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81 The Inquiry, above n 2.

82 One initial point which deserves attention is a passage from a submission of Philip A Joseph's, which appears to suggest that the rights of the protesters were not limited and that the police actions should therefore not be subject to section 5 of the BORA. (Philip A Joseph "The Illusion of Civil Rights: The State Visit of President Jiang" Submission to the Justice and Electoral Subcommittee (March 2000) 3.) There is some judicial authority for this proposition, though of dubious value. In *Attorney General of Quebec v Quebec School Boards* [1984] 2 SCR 66 the Court held that a law limiting access to English schools was a denial, not a limit, of the right to education in a minority language anywhere in Canada and that it could not therefore be justified under section 1 of the Charter. Professor Hogg notes, however that the authority has largely fallen into disuse: Hogg, above n 29, 861.

This approach to limits on rights is potentially dangerous and cannot be correct. There will clearly be situations in which a potentially acceptable limit placed on a right will completely prevent the exercise of the right. An example is penal sentencing. The denial of the right should nonetheless come within the ambit of s 5. The denial of a right should still be tested against the twin requirements that it be prescribed by law and is reasonable and demonstrably justified in a free and democratic society.

The delineation between conduct sufficiently severe to constitute the complete denial of rights and that which only limits rights is not intuitively obvious. Where it is, to distinguish between situations in which a right is limited but can still be used and those in which the right is entirely negated is only appropriate within a s 5 inquiry. If this were not the case either the courts would be prevented from finding any complete abrogation of rights BORA consistent, or a standard would have to be created to deal with denial of rights. Such a standard would be difficult to justify if based on different criteria than those in s 5, and superfluous if based on the same.

These are section 42 of the Crimes Act 1961, which deals with police powers in preventing a breach of the peace; section 86(4) of the Crimes Act which prohibits unlawful assembly; section 3 of the Summary Offences Act 1981, which legislates against disorderly behaviour; section 5A of the same, which prevents disorderly assembly; section 22 of the Summary Offences Act, which proscribes the obstruction of public ways; and sections 3 and 4 of the Trespass Act, which make trespass on any place an offence once warned to leave or to stay off by the occupiers.<sup>83</sup>

All of these sections relate to the prevention of violent assemblies, or the obstruction of public ways. There are no grounds for assuming that the protesters around Jiang's hotel or in Wellington were likely to breach the peace or to cause others to do so. Both protests were peaceful and had legal authority to be there, in the form of a permit.<sup>84</sup> Both protests were within the parameters police had set out in advance.<sup>85</sup> Both sets of protesters had been exercising their rights for some time before any police action was taken. None of the sections quoted by the police afford a legal power to move or to conceal protesters, especially those who have sought and received permission to protest in the place and in the manner they are doing.

The Committee confirmed this view, finding that the police were not empowered to prevent peaceful protest, either by moving the protesters or by screening their protests with buses and sirens.<sup>86</sup> The finding that the police actions were not prescribed by law was key to the Committee's decision that the methods used by the police to prevent protest were contrary to the BORA.<sup>87</sup>

The police, in the present case, had no grounds for the removal of either set of protesters, who were engaged in lawful action at the time of their removal. The actions of the police are clearly not prescribed by law on statutory or common law grounds and do not merit the protection of section 5. Questions of the quality of the law do not arise as there is no legal basis for the actions of the police.

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83 Submission of Acting Commissioner Robert James Robinson to the Justice and Electoral Subcommittee (10 April 2000) 2.

84 This was acknowledged in the police submissions to the Committee. Assistant Commissioner Paul Harris states that "The protesters were well behaved ... [The] protesters caused no concern for the security of the President ..."

85 This was confirmed by the Inquiry, above n 2.

86 The Inquiry, above n 2, 36 - 37.

87 The Inquiry, above n 2, 36 - 37.

## 2 *Freedom of Speech: Reasonable Limit Demonstrably Justified?*

### (a) Objective

In a legal opinion submitted to the Subcommittee the police claim their actions were intended to protect the dignity of the President. The basis for this right is to be found in international customary law. In support of this proposition the opinion cites the passage from *Satow's Guide to Diplomatic Practice* set out here:<sup>88</sup>

It has been established for several centuries in customary international law that a sovereign, or head of state, who comes with [sic] the territory of another sovereign is entitled to wide privileges and to ceremonial honours appropriate to his dignity ... it is the curious consequence of the developments of the last few decades, which have brought greater certainty to the law concerning diplomats, consuls and other state officials and to the law which regulates the immunities of the state itself, that the position of the head of state has become less clear.

A problem with the justification advanced above can be found in *Satow's Guide*. The learned author goes on to list the rules of customary law regulating the personal status of a visiting head of state<sup>89</sup>

The personal status of a head of a foreign state therefore continues to be regulated by long-established rules of customary international law which can be stated in simple terms. He is entitled to immunity ... from criminal and civil jurisdiction. His residence, person and movable property are inviolable. He is entitled to exemption from customs duty and from search of goods he brings with him. His wife and other close members of his family travelling with him - and possibly all the members of his suite - are also entitled to the same degree of privilege and immunity.

The list purports to be exclusive. There is no mention of the protection of visiting dignitaries from protest or political critique. Even following *Satow's Guide* there do not appear to be any grounds in international law for the actions taken by the police.

The principle does not come within any of the grounds of limitation set out in the ICCPR, with the possible exception of the respect for the reputations of others in Article 19.<sup>90</sup> The exemption only applies to freedom of expression. If made out, the breaches of

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88 Lord Gore-Booth *Satow's Guide to Diplomatic Practice* (5 ed, Longman, London, 1979) 2. Cited in "Legal Opinion: State Visit of Chinese Premier - Use of Sirens and Buses At Christchurch" submitted to the Justice and Electoral Subcommittee (8 February 1999) 9.

89 Lord Gore-Booth, above n 88, 10.

90 Each Covenant right sets out the exclusive circumstances in which it can be limited. Any limitation on grounds other than those in the ICCPR will be in breach of New Zealand's obligations and contrary to recital (a) of the long title. This reading of the ICCPR is consistent with the approach taken to other constitutional documents which set out grounds for limitations.

the other rights are still not exempt under section 5 under this head. Further, even this ground must be subject to a strict construction to avoid completely undermining the right. Nowak notes that particularly in the political arena states must be cautious how this acceptable limitation is used to sanction expression, as freedom of expression would otherwise be stripped of its opinion shaping role in the political process of a functioning democracy.<sup>91</sup>

The *Siracusa Principles* expressly state that the limitation "shall not be used to protect the state and its officials from public opinion or criticism".<sup>92</sup> While the limitation is not excluded on this basis, which only relates to criticism of the limiting state, the principle behind the exemption is clear. The goal of protection of reputation should not be used to prevent political speech. The protesters were not engaged in an attack on the reputation of President Zemin. Rather the protest was intended as a political critique of the actions of his administration. The "reputations" limitation is not available to the police under the ICCPR.

Nonetheless, the much broader approach in New Zealand<sup>93</sup> could extend to allowing economic and social considerations favouring the removal of the protesters to provide a legitimate objective for the police actions. The importance of New Zealand's relationship with China is the most obvious example.

If the limit were allowed on these grounds it would constitute a breach of New Zealand's obligations under the ICCPR. The rule that limits are to be construed strictly would obviously mitigate against such a finding. Limits must be "pressing and substantial" and consistent with the values of a free and democratic society.<sup>94</sup> The

In *Chavunduka*, above n 60, 400, the Zimbabwean Supreme Court held that limitations not listed in the Constitution were not valid.

The interpretation above is also consistent with the wording of the ICCPR, which in the relevant sections sets out that freedom of movement "shall not be subject to any limitations except those which are [objectives follow]", freedom of expression limitations "only such as are [reasons set out]", and peaceful assembly may have no limitations "other than those [permissible limitations listed]".

91 Nowak, above n 40, 353.

92 International Commission of Jurists *Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Rights* (American Association for the International Committee of Jurists, Washington, 1985) para 37.

93 *Noort's case*, above n 9, 283. The scope of the inquiry as to objective is, at domestic law, considerable wider than that under the ICCPR. Richardson J described the scope of a s 5 inquiry as one which would "properly involve consideration of all economic, administrative and social implications."

94 *Oakes*, above n 54, 138-139.

standard is stringent. It is possible, though unlikely, that the justification advanced above would meet it.

The Justice and Electoral Committee agreed with submissions from the police to the effect that there was, in international customary law, an obligation on New Zealand officials to protect the dignity of visiting Heads of State.<sup>95</sup> However, the Committee decided that any measures taken with the goal of protecting the dignity of the President must conform with the BORA. The protection of dignity extended, in the eyes of the Committee, to preventing the humiliation of a Head of State, but not to shielding visiting dignitaries from lawful, non-violent protest.<sup>96</sup>

(b) Proportionality

If we assume that the police actions had a legitimate objective, the question of their proportionality arises for consideration. There is a rational connection between the objective (preserving the dignity of the President or protecting New Zealand's international links with China) and the means used (preventing the protesters from being heard or seen), assuming we accept that the dignity of the President would have been compromised had the protest taken place.

The action taken could be seen as the least possible limit on the protesters' rights. The President could have avoided the protesters, by taking an alternative route or postponing the trip to his destination until the protesters had left. In Christchurch, dinner could have been cancelled or rescheduled - a small price to pay to ensure the observance of the fundamental right to freedom of expression. Arguably however this would not protect the dignity of the President. Assuming the objective requires that the President reach his destination the limits on freedom of expression were as minor as possible. The protesters were allowed to continue protesting up until the arrival of the President. The speech was allowed to continue - it was merely prevented from being communicated. If the Police argument as to objective is accepted there is a strong argument to be made that this ground of the test is also satisfied.

The limitations on the relevant rights were, however, not proportionate to the objective. As noted, the right to free expression is essential in a free and democratic society. Political speech especially should be protected by the State. While it is important to allow foreign dignitaries the pomp and circumstance generally accorded their positions, this should not authorise the complete denial of the rights of citizens. The niceties of

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<sup>95</sup> The Inquiry, above n 2, 42.

<sup>96</sup> The Inquiry, above n 2, 42. The Committee, having reached this conclusion, did not feel the need to further investigate the legality or otherwise of the police actions.

diplomatic practice cannot be allowed to interfere with the foundations upon which a democratic state is built.

### 3 *Freedom of Peaceful Assembly.*

#### (a) Objective

The right to freedom of peaceful assembly was infringed on the same grounds as the right to free speech. The peaceful assemblies concerned were deemed offensive to the dignity of the President. None of the possible grounds of limitation in the ICCPR apply to a limitation on these grounds. As with freedom of expression, however, the objectives could come within the wider test set out by Richardson J in *Noort*.<sup>97</sup>

#### (b) Proportionality

Assuming the legitimacy of the objective, the means used by the police have a rational connection to the preservation of the dignity of President Zemin. Again, if the objective is accepted as legitimate the measures taken, limited in time and space, can be seen as the least possible limitation on the right to peaceful assembly. The assembly was allowed to continue. The purpose of the assembly was only negated for a short period.

However, the proportionality requirement is not met, for much the same reasons as for freedom of expression. The right to assemble peacefully is one of the cornerstones of democracy. Free and democratic societies cannot subvert fundamental rights on the grounds of political expediency. If they do, the rights cannot meaningfully be described as fundamental. While protecting the dignity of the President of China is arguably important for the maintenance of New Zealand's diplomatic relations, allowing the practicalities of international relations to override basic rights would render the Bill of Rights toothless.

### 4 *Freedom of Movement*

#### (a) Objective

The objective for the limitation is the protection of the President from protest in order to maintain amicable relations with China. The objective, while potentially available to the police under the wide approach taken by Richardson J, also breaches the ICCPR restrictions on the types of limitations available.<sup>98</sup>

#### (b) Proportionality

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97 Above Part IV(B)(2)(a). As discussed, such an outcome would result in New Zealand being in breach of its international obligations under the ICCPR.

98 Above Part IV(B)(2)(a).

The limit on freedom of movement, namely the prevention of the protesters from moving outside the police cordons, was clearly rationally connected to the objective of protecting the President's dignity.

Limiting the right to movement was also potentially within the second requirement of the *Oakes* test, namely that the limit be the least possible. Unlike freedom of expression and freedom of peaceful assembly, freedom of movement is not always seen as essential in a free and democratic society. Planning decisions, road works, and police operations all frequently operate as a *de facto* restriction on our right to go where we please. The limit on the protesters in this case was not on the face of it a stringent one. The right to freedom of movement arguably did not play a central role in the protests. The protesters were not engaged in a procession - the disrupted protests were both stationary. Further, the rights of the protesters were only briefly limited.

However, in assessing the limitation of freedom of movement it is important to have regard to the context in which the right is being exercised. The ICCPR expressly sets out that any restriction on the right to freedom of movement must be consistent with other ICCPR rights.<sup>99</sup> Rather than analysing the right separately from the other rights of the protesters the analysis should have regard to the context in which the right is exercised. Not to do so would be to fail to allow for the effective exercise of the rights concerned and would be inconsistent with the broad, rights-centred approach taken by the courts to rights documents.

The right to freedom of movement can only be limited where the limitation is consistent with the other rights in the ICCPR. In the present case the limitations prevented the protesters from exercising their rights of freedom of expression. The limitation is therefore not proportionate to the objective sought.

## 5 Summary

The surrounding of the protesters was not prescribed by law. None of the provisions cited by the police as authorisation for their actions were relevant to the situation - the protesters' actions were lawful, and should not have been subject to the restraints imposed by the police. Whether there was a sufficiently important objective for the police actions is also an open question. Even if the police actions had been both prescribed by law and in pursuit of a legitimate objective, they would none the less fall foul of the proportionality test set out in *Oakes* and *Noort*. The actions of the police are not able to be justified under section 5 of the Bill of Rights.

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<sup>99</sup> ICCPR, art 12(3): "The [right to liberty of movement] may not be subject to any restrictions except those which are ... consistent with the other rights recognised in the present Covenant".

## V CONCLUSION

The attitude of the police demonstrates that in New Zealand the rights exercised during protest action are seen as unimportant and able to be subjected to substantial limitations. This raises concerns both for the specific rights involved and for the Bill of Rights as a whole.

Protest is a sign of a healthy democracy. The cavalier attitude of the police in restricting the rights of protesters to please foreign dignitaries is not acceptable. The State, under the ICCPR, has a positive duty to create an environment conducive to the exercise of the rights of its citizens. The police actions did precisely the opposite. While the restrictions imposed on protesters during Jiang Zemin's visit will not have affected the majority of New Zealanders, this does not alter the fact that the restrictions have widespread implications. The small instances of oppression and intimidation and the everyday denial of rights is exactly where the Bill of Rights has a role to play in New Zealand society. The rights the Bill of Rights enshrines were not affirmed, protected, or promoted, by the State. Rather, they were ignored.

The rights of freedom of expression, peaceful assembly and movement are all exercised in the course of protest action. The rights are protected in New Zealand at common law, by the Bill of Rights, and internationally by the International Covenant on Civil and Political Rights, to which New Zealand is a signatory. Nevertheless, when the government was asked to host the APEC conference these rights and obligations were systematically ignored. Statutory and common law rights were overlooked, international obligations were breached. The attitude of the New Zealand Government towards some of the central freedoms which make up a democratic state is less than exemplary. The irony of the situation lies in the fact that the motivation for the breaches of the fundamental rights of New Zealand citizens was concern for the face New Zealand was presenting to the rest of the world.

