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The Regulatory Autonomy of States and Human Rights

A number of developments under national law, international investment law, and international human rights law in the last twenty years have paved the way to discussions about the role of the state in the provision of essential services, and how it should fulfill its international legal obligations arising from human rights treaties and treaties aimed at the protection of international investments. These developments include:

a. the liberalization and privatization of essential services in various sectors such as corrections and the provision of drinking water. This has been accompanied by the recognition of the need to regulate the conduct of private actors taking over the provision of these services, the establishment of regulatory bodies to ensure compliance with regulations, and the adoption of rules detailing the provision of services through minimum standards such as universal service obligations;

b. an explosive surge in investment arbitration as a result of alleged breaches of bilateral investment treaties (BITs) by States hosting foreign investments. Many of these arbitral disputes involve the adoption of 'regulatory' measures by host states, which were necessary to safeguard certain public interests like the protection of human rights. It has been claimed however that the disputed measures breach obligations to protect foreign investments from arbitrary expropriation, and to treat them in a fair and equitable way;

and c. the growing realization under international human rights law that States must not only respect human rights but also to consider their obligations to protect and fulfill the realization of a number of rights. Under these obligations States have to adopt proactive measures to safeguard the rights of groups and individuals from the activities of private actors such as multinational companies providing privatized services;

The paper aims at exploring a number of salient issues in these areas of law. These involve the autonomy of the State to adopt regulatory measures to protect the rights of individuals and groups and to guarantee an acceptable level of provision of essential services, while at the same time respecting other possibly conflicting international legal obligations such as those ensuing from BITs. Although States seem to have in principle a broad freedom to regulate essential services, other international legal obligations may affect the effectiveness of this regulation, and potentially affect the proper implementation of human rights at a practical level. The paper suggests that this problem may require the development of what could be called 'international public service law'.