

## **“The Vibe of the Thing”: Implementing Economic, Social and Cultural Rights in New Zealand**

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*This article discusses the plight of economic, social and cultural rights (ESCR) in New Zealand. The oft forgotten sibling of civil and political rights, ESCR offer an avenue for improving social standards, particularly in jurisdictions with a strong rule of law tradition. New Zealand’s obligations under the International Covenant on Economic, Social and Cultural rights are canvassed and compared against the current protection apparatus in New Zealand. The article then examines protection regimes for ESCR from three foreign jurisdictions: South Africa, India and Finland. The key objections to ESCR as justiciable human rights are discussed and rebutted. Finally, a model enabling justiciability of these rights in New Zealand is offered. The article concludes that justiciability of ESCR would be relatively easy to achieve in the current New Zealand legal system and that such justiciability could only help social standards in this country.*

### **I THE NATURE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

In this article, I discuss New Zealand’s options for improving constitutional protection of economic, social and cultural rights (ESCR).

ESCR are human rights that aim to ensure people enjoy a comfortable, dignified life and full participation in society. They function in the same vein as the more widely publicised civil and political rights, which enshrine the conditions for full, free and democratic societies. It has been argued that fulfilling ESCR is vital to fulfilling civil and political rights.<sup>1</sup>

In international law, ESCR are expressed in the International Covenant on Economic, Social and Cultural Rights (the Covenant).<sup>2</sup> The Covenant, together with the International Covenant on Civil and Political

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1 Constitutional Advisory Panel *New Zealand’s Constitution: A Report on a Conversation* (November 2013) at 50.

2 International Covenant on Economic, Social and Cultural Rights 933 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) [ICESCR].

Rights (ICCPR), are the preeminent international human rights covenants.<sup>3</sup> New Zealand ratified both in 1976.<sup>4</sup>

The Covenant affirms that ESCR are human rights and, as such, are equal to and indivisible from the rights found in the ICCPR.<sup>5</sup> In a report to the United Nations Committee for Economic, Social and Cultural Rights (CESCR), the New Zealand Government affirmed that “the indivisibility of human rights is a principle of paramount importance to New Zealand”.<sup>6</sup>

The Covenant lists a number of rights. These include: employment rights;<sup>7</sup> the right to an adequate standard of food, clothing and housing;<sup>8</sup> the right to healthcare;<sup>9</sup> the right to education;<sup>10</sup> and the right to take part in cultural life.<sup>11</sup>

## II CURRENT LEVELS OF ESCR IN NEW ZEALAND

I will briefly consider issues in New Zealand regarding the rights to housing, health and work.

The right to “adequate” housing is recognised in art 11 of the Covenant. It is well established that the absence of adequate housing has detrimental effects on health. Equally, the perils of insecure housing and homelessness are obvious.<sup>12</sup> In the aftermath of the 2011 earthquakes, Christchurch has suffered from a significant housing crisis with an estimated 5,510–7,405 people living with insecure housing arrangements in 2013.<sup>13</sup> The national situation is also disheartening. A study based on 2006 census data found that 34,000 people were “severely housing deprived” in 2006 and suggested that the scale of the problem was likely to increase in subsequent years.<sup>14</sup> The same study hypothesised that 12,900–21,100 houses were needed, on top of the rate of construction servicing existing demand, to deal with increased housing demand as at 2006.<sup>15</sup> These figures illustrate that many people in New Zealand are not having their right to housing met. It is

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3 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

4 Margaret Bedggood “Constitutionalising Rights and Responsibilities in Aotearoa/New Zealand” (1998) 9 Otago LR 343 at 344.

5 ICESCR, at Preamble.

6 Committee on Economic, Social and Cultural Rights *Implementation of the International Covenant on Economic, Social and Cultural Rights: Third periodic reports submitted by States parties under articles 16 and 17 of the Covenant: New Zealand E/C12/NZL/3* (2011) at [18].

7 Articles 6–8.

8 Article 11.

9 Article 12.

10 Article 13.

11 Article 15.

12 New Zealand Human Rights Commission *Consideration of New Zealand’s third periodic report on the implementation of the International Covenant on Economic, Social and Cultural Rights* (March 2012) at 4.

13 Ministry of Business, Innovation and Employment *Housing Pressures in Christchurch: A Summary of the Evidence* (March 2013) at 1.

14 Kate Amore and others *Severe Housing Deprivation: The problem and its measurement* (Statistics New Zealand, September 2013) at 7–8.

15 At 54.

imperative that we explore all avenues, legal or otherwise, through which this can be remedied.

The right to healthcare is likewise enshrined in the Covenant.<sup>16</sup> Despite widespread acknowledgement of this right, New Zealanders still suffer from preventable diseases such as rheumatic fever — a disease more common in “developing” than “developed” countries.<sup>17</sup> It should not be found in New Zealand, one of the most developed countries in the OECD.<sup>18</sup> Rheumatic fever particularly affects Māori and Pacific Island New Zealanders, who are, respectively, 22 and 75 times more likely to contract it than New Zealand Europeans.<sup>19</sup> The interrelated nature of ESCR can be demonstrated through the rights to housing and healthcare, as “severe housing deprivation is very likely to have negative health ... consequences.”<sup>20</sup>

The right to work is also affirmed in the Covenant. Moreover, the right to work encompasses rights to a healthy and safe workplace, equal pay for equal work, limited working hours and adequate holidays.<sup>21</sup> Employment rights such as these have traditionally been protected in New Zealand.<sup>22</sup> But there are still shortcomings, particularly regarding pay equality: on average, females in New Zealand suffer pay rates 9.9 per cent lower than those of males in comparable work.<sup>23</sup> The right to work in the Covenant creates an obligation on states to move towards “full and productive employment”,<sup>24</sup> which New Zealand is arguably failing to meet: unemployment rates have averaged 6.3 per cent from 2009 to 2014.<sup>25</sup>

### III UNDERSTANDING THE COVENANT

As the key international covenant in this area, it is important to understand the Covenant’s operation and its significance to New Zealand. This is necessary as courts will endeavour to interpret domestic legislation consistently with international obligations.<sup>26</sup>

The Covenant does not prescribe the manner in which member states should seek to incorporate it into domestic law.<sup>27</sup> However, it places obligations on members to take steps to progressively realise the rights

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16 Article 12.

17 Ministry of Health *RapidE: Rheumatic Fever — A Systematic Review of the Literature on Health Literacy, Overcrowding and Rheumatic Fever* (May 2011) at 1.

18 Khalid Malik *Human Development Report 2013: The Rise of the South — Human Progress in a Diverse World* (United Nations Development Program, New York, 2013) at 144.

19 Ministry of Health, above n 17, at 2.

20 Amore, above n 14, at 54.

21 Articles 6–7.

22 Jane Kelsey *The New Zealand Experiment* (2nd ed, Auckland University Press, Auckland, 1997) at 3.

23 Ministry of Women’s Affairs *Gender pay gap* (June 2014).

24 Committee on Economic, Social and Cultural Rights *The Right to Work: General Comment No 18: Article 6 of the International Covenant on Economic, Social and Cultural Rights* E/C 12/GC/18 (2006) at [2].

25 Statistics New Zealand “Unemployment” NZ Social Indicators <www.stats.govt.nz>.

26 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) at [44].

27 Matthew Craven “The Domestic Application of the International Covenant on Economic, Social and Cultural Rights” (1993) 40 NILR 367 at 375.

within it to the maximum of their available resources, particularly through legislative measures.<sup>28</sup>

CESCR has published comments elucidating the scope of the obligations and rights contained in the Covenant. The CESCR, composed of 18 independent experts, was established in 1985 to monitor state parties' compliance with the Covenant.<sup>29</sup> The CESCR's comments are arguably authoritative statements on the meaning of the Covenant.<sup>30</sup> They are therefore helpful when considering the obligations it imposes. General Comment 3 states that the requirement for progressive realisation imposes upon state parties “an obligation to move as expeditiously and effectively as possible towards” full realisation of ESCR.<sup>31</sup> The requirement to progressively realise rights also restricts states from weakening protections of ESCR because “deliberately retrogressive measures ... need to be fully justified” by the state on the basis of protecting other rights.<sup>32</sup>

The limitation inherent in requiring realisation of rights “to the maximum of [a state's] available resources” allows states to claim scarcity of resources in defence of a failure to fully recognise ESCR.<sup>33</sup> Yet this defence is itself limited by the general limitation provision in art 4.<sup>34</sup> Article 4 provides that states may only limit rights in accordance with law, “in so far as ... compatible with the nature of [the] rights and solely for the purpose of promoting ... general welfare”<sup>35</sup>

#### IV PROTECTION MECHANISMS IN NEW ZEALAND

ESCR currently depend on benevolent government policy and a collection of non-human rights statutes for protection.<sup>36</sup>

There are many statutes that purport to protect ESCR. The Covenant rights to work and to just and favourable conditions of employment are safeguarded by the Minimum Wage Act 1983, the Health and Safety in Employment Act 1992, the Employment Relations Act 2000 and the Holidays Act 2003.<sup>37</sup> Likewise, the Covenant rights to an adequate standard of living,<sup>38</sup> and social security,<sup>39</sup> are provided for to varying extents by the

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28 Article 2.

29 *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights* ESC Res 1985/17, E/RES/1985/17 (1985) at (a)–(b).

30 Matthew Craven *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press, Oxford, 1995) at 4.

31 Committee on Economic, Social and Cultural Rights *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)* E/1991/23 (1990) at [9].

32 At [9].

33 ICESCR, art 2(1).

34 Joss Opie “Economic, Social and Cultural Rights in New Zealand: Their Current Legal Status and the Need for Change” (LLM Thesis, University of Toronto, 2010) at 16.

35 Article 4.

36 New Zealand Law Society *Shadow Report to New Zealand's 2nd Universal Periodic Review* (New Zealand Law Society Human Rights and Privacy Committee, 2013) at 3.

37 ICESCR, arts 6–7.

38 Article 11.

Housing Corporation Act 1974, the Housing Restructuring and Tenancy Matters Act 1992 and the Social Security Act 1964. Finally, the Public Health and Disability Act 2000 and the Accident Compensation Act 2001 can be seen as implicit efforts to satisfy art 12 of the Covenant, the right to mental and physical health.<sup>40</sup>

The New Zealand Law Society has advocated introducing a formal process to ensure ESCRs are considered in the making of new policy and legislation.<sup>41</sup> The Society noted that Parliament and the media pay little attention to our obligations under the Covenant.<sup>42</sup> But implementing a formal process could encourage greater awareness and recognition of ESCR.

The status quo is deeply unsatisfactory. The New Zealand Bill of Rights Act 1990 was created to protect future generations from government encroachment on rights.<sup>43</sup> There is no valid reason for denying ESCR similar protection. Although the New Zealand Government has argued that ESCR are adequately protected by subject-specific legislation and government policy,<sup>44</sup> this argument carries little weight. Core civil and political rights were not under attack in New Zealand when the Bill of Rights Act was being developed. Yet that Act was considered necessary to prevent the “incremental erosion” of these rights.<sup>45</sup>

## V CASES INVOLVING ESCR IN NEW ZEALAND

To understand the micro level effects of New Zealand’s current legal protections of ESCR, it is useful to examine the treatment of the right to housing and the right to education in two cases.

### *Lawson v Housing New Zealand*

*Lawson v Housing New Zealand* concerned judicial review of decisions made relating to housing reforms in New Zealand.<sup>46</sup> The Government transferred control of state houses to Housing New Zealand, constituted as an incorporated company.<sup>47</sup> As a result, rent was subsequently increased to market rates.<sup>48</sup> The increase in rent made it effectively impossible for Mr and Mrs Lawson to continue to reside in their state house and they were subsequently evicted.

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39 Article 9.

40 Article 12.

41 New Zealand Law Society, above n 36, at [21].

42 At [23].

43 Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] 1 AJHR A6 at 5.

44 Ministry of Justice *Response of the Government of New Zealand to Recommendations in the report of 11 May 2009 of the Working Group on the Universal Periodic Review A/HRC/12/8* (2009) at [15].

45 Opie, above n 34, at 236.

46 *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC).

47 At 478.

48 At 478.

Mrs Lawson claimed that Housing New Zealand failed to have proper regard to the Crown’s social objectives and that charging market rents without regard to the impact on tenants’ living standards breached her right to life under s 8 of the Bill of Rights Act.<sup>49</sup> Mrs Lawson also alleged that the Ministers of Housing and Finance had failed to have proper regard to New Zealand’s international obligations under the Covenant.<sup>50</sup>

Williams J found against Mrs Lawson on every claim. His Honour found that Housing New Zealand’s decision to raise rents was not reviewable because Mrs Lawson’s claim was directed to the merits of the decision and not to the procedure leading to that decision.<sup>51</sup> Williams J held that the Ministers had followed a proper procedure to develop, publicise and implement the housing policy and, therefore, their decisions did not “readily lend themselves to judicial review.”<sup>52</sup> The Judge also stated: “any hardship which [Mrs Lawson] experienced [as a result of the policy] is unsusceptible to judicial review.”<sup>53</sup>

On that basis, the Judge discussed Mrs Lawson’s claim that the Ministers had failed to take account of New Zealand’s international obligations under the Covenant. His Honour ultimately found that the law did not require the Ministers to “specifically consider” international covenants, “as long as they inform the decision-making process”.<sup>54</sup> The Government had stated in multiple official documents that the right to adequate housing was fundamental to the housing reform process and this satisfied the Judge that the appropriate standard had been met. Williams J could not examine the effect of the reforms on the right to housing on a substantive level, as the judicial review could only be directed at procedural propriety.

This case reinforces the limited nature of judicial protection for ESCR under judicial review and illustrates the susceptibility of ESCR to government erosion under prevailing legal conditions.

### *Attorney-General v Daniels*

In *Attorney-General v Daniels*,<sup>55</sup> 15 parents of special needs children sought to judicially review decisions by the Minister of Education to disestablish certain special needs facilities and to implement the policy “Special Education 2000”.<sup>56</sup>

The parents’ case was based on the right to free primary and secondary education in s 3 of the Education Act 1989 and the guarantee in s 8 that special needs children have the same rights to enrol and receive an education as other students. The parents also alleged that the new policy

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49 At 478–479.

50 At 479–479.

51 At 486.

52 At 487–488.

53 At 488.

54 At 498.

55 *Attorney-General v Daniels* [2003] 2 NZLR 742 (CA) [*Daniels* (CA)].

56 At [23].

unlawfully discriminated against their children, in breach of the Human Rights Act 1993 and the Bill of Rights Act.<sup>57</sup>

In the High Court, Baragwanath J held that the Education Act created a justiciable right to an education that was regular, systematic and not clearly unsuitable.<sup>58</sup>

The Judge then gave effect to this right by claiming a role for the judiciary in substantively assessing whether the Government had discharged its duty in respect of individual students. Baragwanath J held that “the question whether education is clearly unsuitable for a child is well capable of determination by a Court assisted by appropriate expert evidence”.<sup>59</sup> In this case, judicial review was possible due to evidence in an independent report that found clear failings in Special Education 2000.<sup>60</sup>

The Court of Appeal took a rather different view of both the effect of the Education Act and the role of the courts in judicial review of executive action. The Court of Appeal interpreted the Education Act as conveying a right to special education only if the Secretary of Education had deemed that the student should have a special education.<sup>61</sup> This heavily qualified the right asserted by Baragwanath J in the High Court. Keith J affirmed that the Education Act did confer some justiciable rights on students but these were of a more specific nature, such as the right to free enrolment in zone and the right to natural justice in suspension and expulsion.<sup>62</sup>

Ultimately, the Court of Appeal found that the Minister of Education, when implementing Special Education 2000, had failed to undertake a thorough examination of whether mainstream schools would be able to provide for the needs of the special needs children. This amounted to procedural impropriety.<sup>63</sup>

Arguably, the Court of Appeal protected the respondents’ children’s right to education by holding the Minister accountable. But by reading down the right to education, the Court of Appeal reduced the right to a limited entitlement, which the Government may breach so long as it acts with procedural propriety. This is considerably weaker than the right to education recognised in the Covenant.<sup>64</sup> The Court of Appeal allowed the right to education to be eroded far too easily and gave no consideration of New Zealand’s international law obligations.

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57 At [3].

58 *Attorney-General v Daniels* HC Auckland M1615-SW99, 3 April 2002 at [77].

59 At [107].

60 Sally Varnham “Daniels v The Attorney-General: Children with Special Needs and the Right to Education in New Zealand” (2005) 1 *IJELP* 236 at 238.

61 *Daniels* (CA), above n 55, at [81].

62 At [80].

63 At [109].

64 ICESCR, art 13.

## VI COMMON LEGAL OBJECTIONS TO ESCR AS NZBORA RIGHTS

The common objections to including ESCR in the Bill of Rights Act are: that judges are incapable of adjudicating in areas of social policy; that the separation of powers precludes courts from engaging in areas traditionally considered government matters; and that ESCR are part of a secondary class of rights and therefore do not deserve the same protection as civil and political rights.

### Too Complex for the Court

Sir Geoffrey Palmer has championed the assertion that judges are ill-placed to consider the wide range of social policy issues that are involved in cases concerning ESCR. In an address delivered in 2006, Sir Geoffrey claimed that New Zealand judges do not have the required “background or capacities” to determine issues involving social policy.<sup>65</sup> In the same address, he registered his opposition to setting judges “loose on ... social policy”, suggesting that they would be incapable of making decisions on ESCR without overreaching.<sup>66</sup>

The South African Constitutional Court raised the same concerns in *Minister of Health v Treatment Action Campaign*.<sup>67</sup> In that case, the Court claimed that “[c]ourts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community.”<sup>68</sup>

This criticism is misguided on two counts. First, judges already adjudicate in cases involving widespread social effects. Secondly, the inclusion of ESCR into the Bill of Rights Act would not result in the judiciary usurping the legislature’s authority or position as lawmaker on social issues.

A clear example of a judge’s decision having social and economic consequences is criminal sentencing. Imposing a prison sentence has social and economic consequences for the subject of the sentence, who will likely find it difficult to reintegrate into society and find employment.<sup>69</sup> The sentence will also often affect society at large. It is well established that incarceration causes economic and social damage to the offender’s community, with the absence of the offender often destabilising families and weakening community social bonds.<sup>70</sup> Moreover, judges are implicitly

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65 Geoffrey Palmer “The Bill of Rights Fifteen Years On” (speech to the Ministry of Justice Symposium, 10 February 2006) at [28].

66 At [29].

67 *Minister of Health v Treatment Action Campaign* [2002] 10 BCLR 1033 (CC).

68 At [38].

69 José Cid “Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions” (2009) 6 EJC 459 at 461–462.

70 Jeremy Travis and Michelle Waul *Prisoners Once Removed: The Impact of Incarceration and Reentry on Children, Families and Communities* (Urban Institute Press, Washington, 2003) at 2.



allowed to consider these wider concerns when sentencing offenders.<sup>71</sup> In another example, the Children, Young Persons, and Their Families Act 1989 requires judges to consider broad social factors such as family stability, and other ESCR factors such as education and health, when making decisions under that Act.<sup>72</sup>

A further retort to the argument that courts lack the ability to adjudicate on areas involving social policy is that under the current Bill of Rights Act framework in New Zealand, courts are unlikely to affect the entirety of government policy in an area. Thus, any judicial interference in government policy will be of a limited scope. I will suggest a model in Part VIII of this article by which this process could be implemented for ESCR.

Later in this article I will discuss the experience of judges in South Africa, India and Finland in reviewing government programmes and decisions that impact ESCR. The cases in these jurisdictions lend support to the claim that judges would be at least capable of acquiring the necessary skills and knowledge to assess the reasonableness of government measures regarding ESCR.

### Separation of Powers Precludes Justiciability

Allowing courts to challenge government actions on the grounds of ESCR raises separation of powers issues. Indeed, in the *Child Poverty Action Group v Attorney-General* litigation,<sup>73</sup> discussed below, the Crown argued that the “courts should stay well clear of getting involved in claims” in the area.<sup>74</sup>

Perhaps the most influential opponent of ESCR inclusion in the Bill of Rights Act on separation of powers grounds has been Sir Geoffrey. In a book published after he had left Parliament, Sir Geoffrey stated that he had opposed the inclusion of ESCR into the Bill of Rights Act as it would “suggest such matters may be capable of judicial resolution”.<sup>75</sup> Similarly, Aryeh Neier believes that recognising ESCR as justiciable rights will inevitably lead to situations which are “unmanageable through the judicial process” and are properly the domain of the legislature.<sup>76</sup>

In *Child Poverty Action Group*, the New Zealand Court of Appeal accepted that “some latitude or leeway is given to the legislature ... particularly in a case ... which involves the complex interaction of social, economic, and fiscal policies”.<sup>77</sup> However, the Court limited the extent of its deference in these areas by confirming that in cases of human rights breaches or discrimination the “onus is on the Crown to justify” the breach

71 Sentencing Act 2002, ss 8(h) and 9(4).

72 Children Young Persons and Their Families Act 1989, ss 5(c) and 5(g).

73 *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729.

74 Frances Joychild “Child Poverty Action Group v Attorney General – what did we gain?” (speech to Child Poverty Action Group end of year gathering, December 2013) at 3.

75 Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming our Political System* (John McIndoe, Dunedin, 1992) at 57.

76 Aryeh Neier “Social and Economic Rights: A Critique” (2006) 13 Hum Rts Brief 1 at 1.

77 *Child Poverty Action Group*, above n 73, at [91].

and the justification by the Crown must be “demonstrable”.<sup>78</sup> This decision emphasised that the courts will require the Crown to justify any limitation of human rights and will not be overly deferential.

This article submits that a less deferential stance by the courts is appropriate. The Bill of Rights Act and the Human Rights Act clearly envisage a role for the courts in scrutinising government power. Even without these enactments, it is clear that the judiciary do interfere, to some extent, with governmental decision-making and resource allocation. Sentencing decisions, for example, have a far from negligible impact on government finances; for example, the cost of keeping an inmate incarcerated for a year was \$90,936 as at December 2011.<sup>79</sup> It is hypocritical to criticise protecting ESCR on the basis that the judiciary would infringe upon the Government’s decision-making domain whilst supporting the judiciary’s role in sentencing given the resulting costs to the government. Minister of Finance Bill English’s admission that New Zealand prisons are a “moral and fiscal failure” demonstrates that sentencing decisions made by judges and the associated costs are impacting government finances in a way that sits uncomfortably with the executive.<sup>80</sup> It is difficult to argue against the justiciability of ESCR on the sole basis that courts should not infringe on the separation of powers, as we already sanction this in other areas.

### **ESCR as Second-Class Rights**

Some argue that ESCR are second-class human rights behind civil and political rights (CPR) because ESCR impose positive obligations on the state and are too political, whereas CPR impose negative obligations and are apolitical.<sup>81</sup>

This argument is at odds with the principle of indivisibility of human rights. The New Zealand Government has affirmed indivisibility as a principle of “paramount importance” in our human rights protection framework.<sup>82</sup> The International Commission of Jurists also affirmed indivisibility as “one of the guiding principles of international human rights law”.<sup>83</sup> In 1993, the World Conference of Human Rights included the indivisibility and interrelatedness of human rights as an article in the Vienna Declaration and Programme of Action.<sup>84</sup> The principle of indivisibility holds that all human rights are equal and interrelated, and that human rights will not be protected if one set of rights is accorded a privileged status.

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78 At [92].

79 Department of Corrections *Prison Facts and Statistics – December 2011* (January 2012).

80 “Prisons: ‘Moral and Fiscal Failure?’” *Otago Daily Times* (online ed, Dunedin, 24 May 2011).

81 Palmer, above n 43, at [10.179].

82 CESCR, above n 6, at [18].

83 Inter-American Institute of Human Rights/International Commission of Jurists *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Imprimerie Villière, 2010) at 24 [IAHR/ICJ].

84 World Conference on Human Rights *Vienna Declaration and Programme of Action* A/Conf.157/23 (1993) at art 5.

The Constitutional Court of South Africa eloquently formulated this principle in *Government of the Republic of South Africa v Grootboom*:<sup>85</sup>

There can be no doubt that human dignity, freedom and equality ... are denied to those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy [civil and political rights].

The attempt to differentiate CPR from ESCR on the basis that CPR impose only negative obligations is patently misguided. CPR impose positive obligations on the state to facilitate their recognition in much the same way as ESCR would. For example, the right to legal aid protected by the Bill of Rights Act clearly imposes positive obligations on the state to expend resources to ensure the right is realised.<sup>86</sup> The right to vote in periodic elections has the same effect.<sup>87</sup> The most recent Government budget allocated \$31.4 million for provision of electoral services and \$123.3 million for legal aid services and community law centre funding.<sup>88</sup> The Government has also passed laws facilitating the realisation of CPR, such as the Electoral Act 1993 to provide for voting and elections and the Legal Services Act 2011 to provide the framework for legal aid. These examples demonstrate that protecting CPR involves both legislative change and substantial resourcing. There is no obvious difference between these obligations and those that would be imposed on the Government if ESCR were protected in the Bill of Rights Act.

Sir Geoffrey further asserts that ESCR actually reflect a particular political viewpoint, rather than fundamental rights, so should not be included in the Bill of Rights Act.<sup>89</sup> There are two possible answers to this assertion. The first follows the Universal Declaration of Human Rights (UDHR) in asserting that all human beings are born with inherent human rights that exist independently from positive law.<sup>90</sup> The second argues that all rights are inherently political and so ESCR are no different from CPR.

The preambles of both the ICCPR and the Covenant mention that human rights “derive from respect for the inherent dignity” of all humans.<sup>91</sup> If we accept this and also accept that ESCR are human rights — which the Covenant confirms — it is difficult to reject ESCR on the basis that they are not fundamental. Rejection on the grounds that ESCR are political rather than fundamental may in fact reveal a political stance taken by those rejecting them, instead of an accurate statement based on human rights law.

The notion of human rights as inherent to all people derives from international legal instruments, which include the ICCPR, Covenant, UDHR, the Charter of the United Nations, and the Helsinki Accords. These

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85 *Government of the Republic of South Africa v Grootboom* [2000] 11 BCLR 1169 (CC) at [23].

86 New Zealand Bill of Rights Act 1990, s 24(f).

87 Section 12.

88 Ministry of Justice *Vote Justice* (May 2015) at 71.

89 Palmer, above n 43, at [3.14].

90 *Universal Declaration of Human Rights* GA Res 217 A, A/RES/3/217 A (1948).

91 ICESCR, above n 2; and ICCPR, above n 3.

instruments recognise human rights derive from the notion of inherent human dignity.<sup>92</sup> This in itself is problematic for those asserting that certain rights are fundamental whilst others are political, as human dignity is an undefined concept that has been applied largely according to “intuitive understanding, conditioned in large measure by cultural factors.”<sup>93</sup> Attempts to argue that different human rights can be categorised into different classes are little more than assertions of particular cultural and political beliefs.

The converse argument is that, while ESCR are undeniably political in their aims, so are CPR — and indeed all human rights. North America provides a clear example of the political nature of civil rights. African Americans were historically denied the privileges of voting and representation.<sup>94</sup> The movement to gain civil rights for African Americans was, at its heart, deeply political. Civil rights for African Americans were not at all universally accepted in the way suggested by fundamental, inherent notions of human rights.<sup>95</sup> Further, the idea of inherent human rights was “foreign to the Western World prior to the mid-seventeenth century”, which suggests that human rights are politically motivated.<sup>96</sup> The history of accepted CPR can be seen as a history of political movements that succeeded in gaining accepted status for the demanded rights. The suffragette movement in New Zealand is a perfect example of this: the right to vote was won by women on the back of a strong political movement.<sup>97</sup>

## VII INTERNATIONAL EXPERIENCE WITH ESCR

To determine an appropriate model for ESCR protection in New Zealand, I examine the protection regimes in three overseas jurisdictions. South Africa has taken on a “globally prominent” role in protecting ESCR as justiciable rights.<sup>98</sup> India protects ESCR by including them in the Constitution of India as “directive principles” rather than justiciable rights.<sup>99</sup> Finally, Finland presents an interesting model of ESCR protection. While it has always

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92 Oscar Schachter “Human Dignity as a Normative Concept” (1983) 77 AJIL 848 at 848.

93 At 849.

94 Pamela S Karlan “Ballots and Bullets: The Exceptional History of the Right to Vote” (2003) 71 U Cin L Rev 1345 at 1345.

95 Jacquelyn Dowd Hall “The Long Civil Rights Movement and the Political Uses of the Past” (2005) 91 The Journal of American History 1233 at 1240 and 1255.

96 Jack Donnelly *Universal Human Rights in Theory and Practice* (3rd ed, Cornell University Press, New York, 2013) at 81.

97 Francisco O Ramirez, Yasemin Soysal and Suzanne Shanahan “The Changing Logic of Political Citizenship: Cross-National Acquisition of Women’s Suffrage Rights, 1890 to 1990” (1997) 62 ASR 735 at 741.

98 Henry J Richardson III “Patrolling the Resource Transfer Frontier: Economic Rights and the South African Constitutional Court’s Contributions to International Justice” (2007) 9 African Studies Quarterly 81 at 84.

99 Constitution of India 1950, arts 39–43.

scored highly in social standard statistics,<sup>100</sup> Finland has nonetheless incorporated some ESCR into its Constitution, making them justiciable.<sup>101</sup>

## South Africa

### 1 Constitutional Status

The Constitution of the Republic of South Africa Act 1996 is supreme law. One of the Constitution's foundational values is the "advancement of human rights and freedoms".<sup>102</sup> The Bill of Rights, provided in ch 2 of the South African Constitution, binds all state institutions, including the judiciary,<sup>103</sup> and enshrines a number of ESCR alongside CPR.<sup>104</sup>

However, ESCR in South Africa are not absolute. Section 7(3) of the Constitution provides that all guaranteed rights are subject to s 36, a general limitations provision.<sup>105</sup> Section 36 states that rights may be limited to the extent that "the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".<sup>106</sup>

### 2 Justiciability

ESCR are *prima facie* justiciable due to their constitutional status. I will briefly describe cases in which South Africa's Constitutional Court has dealt with the substantive effect of this justiciability and explain how ESCR have been given effect.

(a) *Soobramoney*: The Court will be Slow to Interfere

*Soobramoney v Minister of Health (KwaZulu-Natal)* concerned a man who required dialysis to stay alive but was refused treatment in the public health care system on the basis that resources were scarce and could be put to better use for patients with higher chances of survival.<sup>107</sup>

The Court deferred to the judgements of the local health authority and relevant doctors, holding:<sup>108</sup>

A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.

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100 Martin Scheinin "Protection of the Right to Housing in Finland" in Scott Leckie (ed) *National Perspectives on Housing Rights* (Martinus Nijhoff Publishers, The Hague, 2003) 241 at 241.

101 At 242; and Ministry for Foreign Affairs of Finland *Government Report to Parliament on the Human Rights Policy of Finland 2009* (14/2009, 2010) at 141.

102 Constitution of the Republic of South Africa Act 1996, s 1(a).

103 Section 8(1).

104 These include: s 23(1), the right to fair labour practices; s 26(1), the right to adequate housing; s 29, the right to education; and s 27(1), the right to adequate healthcare, food, water and social security.

105 Section 7(3).

106 Section 36.

107 *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] 12 BCLR 1696 (CC) at [2].

108 At [29].

This was a responsible stance by the Court. The evidence in the case was that the doctors had acted appropriately and were in a unique position to determine the value of any treatment.<sup>109</sup> Any interference would have overstepped the Court’s proper constitutional function.

(b) *Grootboom*: Adopting Reasonableness Review

In *Government of the Republic of South Africa v Grootboom*,<sup>110</sup> the Court dealt with the right to adequate housing under s 26(1) of the Constitution.<sup>111</sup> The Court held that the claim should be determined by whether the South Africa’s actions were reasonable rather than whether it could have done better.<sup>112</sup>

The Court also established the criteria to be considered when reviewing a state programme for reasonableness. The Government must ensure that “the appropriate financial and human resources are available”,<sup>113</sup> the programme must be “capable of facilitating the realisation of the right”,<sup>114</sup> policies and programmes must be reasonable both in their academic conception and practical implementation;<sup>115</sup> the programme must contain a component directed at those who require emergency help;<sup>116</sup> and a reasonable programme cannot exclude “a significant segment of society”.<sup>117</sup>

Yacoob J rejected a submission that s 26(1) imposed a minimum core obligation on South Africa to provide housing.<sup>118</sup> His Honour thereby distanced South Africa from the CESCRC understanding that the Covenant places minimum core obligations on states to uphold ESCR.<sup>119</sup> The submission was rejected on the basis that the Court would need extensive information to determine the appropriate content of South Africa’s minimum core obligation and this information was unavailable to the Court.<sup>120</sup>

This was disappointing reasoning. The Court did not have to determine a universal minimum core obligation for every future case. Rather, it could have easily defined general principles to underlie the concept of a minimum core obligation regarding ESCR, which would then be applied in subsequent cases.<sup>121</sup>

A further significant aspect of the case is that the Court formulated the South Africa’s obligation in negative terms: not to prevent or impair

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109 At [45].

110 *Government of the Republic of South Africa v Grootboom* [2000] 11 BCLR 1169 (CC).

111 Constitution of the Republic of South Africa Act, s 26(1).

112 *Grootboom*, above n 110, at [41].

113 At [39].

114 At [41].

115 At [42].

116 At [68].

117 At [43].

118 At [32].

119 CESCRC, above n 31, at [10].

120 *Grootboom*, above n 110, at [33].

121 Sandra Liebenberg “South Africa’s evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?” (2002) 6 LDD 159 at 174.

access to ESCR. This obligation is binding on both the Government and private persons and entities.<sup>122</sup>

Ultimately, the Court read into the statute a requirement for South Africa to provide basic housing for those who needed emergency shelter. The absence of such provision in the Government's housing programme was unacceptable.<sup>123</sup>

### (c) The *Treatment Action Campaign* Case: The Success Story

*Treatment Action Campaign* concerned distribution of an AIDS prevention medicine, Nevirapine, to mothers at risk of passing their HIV infections on to their children.<sup>124</sup> The Government had been offered the medicine free of charge for five years by the manufacturers,<sup>125</sup> but opted to make it available only in pilot treatment centres.<sup>126</sup>

The Treatment Action Campaign group brought a case against the Government, claiming it had violated the constitutional right to healthcare.<sup>127</sup> In turn, Treatment Action Group demanded that the Government deliver the drug nationwide.<sup>128</sup> This case is significant with respect to standing, as Treatment Action Campaign were allowed to bring the action on behalf of all those who were being denied the medicine.

The Court found that there was no reasonable basis for the Government's failure to make Nevirapine widely available.<sup>129</sup> This decision is significant as it shows the Court was unafraid to critique — and find unsatisfactory — the Government's assertions relating to its inability to fulfil ESCR. The Court ordered that the drug be provided widely in hospitals and clinics, and that the Government provide counsellors at those facilities.<sup>130</sup> This development of the right to healthcare was based upon expert medical opinion put forward during the case.<sup>131</sup>

The Court in this case followed the sentiment of *Grootboom*, holding that its appropriate role was to “subject the reasonableness of these [government] measures to evaluation” rather than to allow individual rights-holders demand a minimum level of services from the Government.<sup>132</sup> As such, the Court limited its role in ESCR cases, stating: “Courts are ill-suited to adjudicate upon issues where ... orders could have multiple social and economic consequences”.<sup>133</sup> But in explicitly granting the Court powers to strike down legislation and to review national and provincial legislation for

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122 At 178.

123 *Grootboom*, above n 110, at [95].

124 *Treatment Action Campaign*, above n 68.

125 At [19].

126 At [41].

127 Constitution of the Republic of South Africa Act, s 27(1)(a).

128 *Treatment Action Campaign*, above n 68, at [5].

129 At [122].

130 At [135].

131 At [45].

132 At [38].

133 At [38].

consistency with the Constitution, it is clear that the legislature envisioned a role for the Court in making such orders.<sup>134</sup>

(d) *Mazibuko*: Solidifying the Position

*Mazibuko v City of Johannesburg* concerned the right to sufficient water.<sup>135</sup> The City of Johannesburg limited its free basic water supply to six kilolitres per household per month and installed pre-paid water metres to charge consumers for use of water beyond this limit. The applicants claimed that this policy breached s 27 of the Constitution, which guarantees a right to have access to sufficient water. The Court found that the City’s measures were reasonable and lawful.

*Mazibuko* reinforced the position that the Court will only look at whether South Africa took “reasonable legislative and other measures progressively to realise the achievement of the right ... within available resources”.<sup>136</sup> The Court will not attempt to quantify the content of the right.<sup>137</sup> Under a reasonableness challenge, the Government will have to explain to the Court the choices made, the information considered and the process followed in making the decision.<sup>138</sup>

3 *Outcomes*

The realisation of ESCR in South Africa, until now, has been mixed. The country has maintained high levels of inequality and sub-par social standard statistics.<sup>139</sup> Litigation has also had mixed results: the *Grootboom* plaintiffs, for example, had not benefitted from any substantial improvement in their housing situation four years after the judgment.<sup>140</sup>

However, *Treatment Action Campaign* has had a vastly positive effect on AIDS treatment rates in South Africa.<sup>141</sup> The litigation has been recognised as a key factor in catalysing the Government’s introduction of a national treatment program, which by 2009 provided vaccines to 95 per cent of public facilities.<sup>142</sup>

**India**

India offers an interesting middle ground. Its Constitution neither excludes ESCR from constitutional protection, nor includes them as entirely justiciable.

134 Constitution of the Republic of South Africa Act, s 172.

135 *Mazibuko v City of Johannesburg* [2010] 3 BCLR 239 (CC).

136 At [50].

137 At [50].

138 At [71].

139 Jeremy Seekings “Taking Disadvantage Seriously: The ‘Underclass’ in Post-Apartheid South Africa” (2014) 84 Africa 135 at 135.

140 Bonny Schoonakker “Treated with Contempt” *Sunday Times* (online ed, Johannesburg, 21 March 2004).

141 Lisa Forman “What contribution have human rights approaches made to reducing AIDS-related vulnerability in sub-Saharan Africa? Exploring the case study of access to antiretrovirals” (2013) 20 Global Health Promotion 57 at 60.

142 At 60.



## 1 Constitutional Status

Economic and social rights are contained in pt 4 of the Indian Constitution under the heading “Directive Principles of State Policy”,<sup>143</sup> whilst some cultural rights are contained in pt 3 under the heading “Fundamental Rights”.<sup>144</sup>

Article 37 of the Constitution states that the principles in pt 4 are not enforceable by courts but that, nevertheless, the state is under a duty to apply the principles when making laws. ESCR can therefore be said to have an aspirational character in the Indian Constitution; they are intended merely as guiding principles.

## 2 Justiciability

Although art 37 appears to preclude justiciability in India, the Indian courts have found ways to vindicate ESCR.

### (a) *Paschim Banga Khet Majoor Samity v State of West Bengal*

This case concerned a man who was refused treatment at five successive state hospitals after sustaining injuries falling from a train.<sup>145</sup> All five hospitals refused to treat him on the basis that they had inadequate facilities or no spare beds.<sup>146</sup>

The Supreme Court read the guaranteed right to life under art 21 of the Constitution to include the provision of emergency medical assistance and thus imposed a duty upon the government to provide timely medical treatment to a person in need.<sup>147</sup>

The Court was not afraid to step into the policy-making role, making a series of specific recommendations to the state to improve its healthcare system. Significantly, the Court also stated that a lack of financial resources would not be a legitimate defence for states who failed to implement the new programme.<sup>148</sup>

### (b) Public Interest Litigation Jurisdiction

The Public Interest Litigation (PIL) jurisdiction was invented and developed by judges in the late 1970s as a response to historical failures of the courts to vindicate even the most fundamental constitutional rights.<sup>149</sup>

The PIL jurisdiction was extremely innovative as it allowed any concerned person to bring an action while also dispensing with the

<sup>143</sup> Constitution of India 1950, arts 39–43.

<sup>144</sup> Articles 29–30.

<sup>145</sup> *Paschim Banga Khet Majoor Samity v State of West Bengal* (1996) 4 SCC 37.

<sup>146</sup> At [2].

<sup>147</sup> At [9].

<sup>148</sup> At [16].

<sup>149</sup> Ashok H Desai and S Muralidhar “Public Interest Litigation: Potential and Problems” in BN Kirpal and others (eds) *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, New Delhi, 2000) 159 at 161.

requirement of a formal petition drafted in legal language.<sup>150</sup> The courts also allowed cases to begin with barely adequate or unsubstantiated facts, before then appointing amicus curiae and expert commissioners to present the case and check the claimed facts.<sup>151</sup>

A common feature of early cases in the PIL jurisdiction was the Supreme Court adapting the fundamental rights in pt 3 of the Constitution to protect the rights contained in normal statutes and the directive principles under pt 4 of the Constitution.

In *Hussainara Khatoon v State of Bihar*,<sup>152</sup> the Court interpreted the right to life and liberty protected under pt 3 of the Constitution as implicitly including the right to free legal aid, even though the legal aid right is only included as a directive principle in pt 4.<sup>153</sup> This enabled the Court to rule that the deprivation of legal aid to the poor was a breach of the claimant’s right to life, therefore effectively creating a justiciable right to legal aid.

In *Bandhua Mukti Morcha v Union of India*,<sup>154</sup> the Court reinforced provisions of various social welfare statutes by affirming the rights of all workers to live with human dignity and therefore to be free of bonded labour, a fundamental right under art 21.<sup>155</sup>

### 3 Outcomes

Despite the obscene levels of poverty still found in India there has been an incremental reduction over the last forty years.<sup>156</sup> Yet, generally, the courts have failed to meaningfully raise ESCR standards in India. Although there have been micro successes achieved in particular cases, these successes rarely translate to commensurate changes to Indian society as a whole.<sup>157</sup>

There has also been recent concern that the use of PIL has become detached from its original role as a force for enabling the poor to access justice. Instead, private interests have arguably dominated this litigation.<sup>158</sup> Further, the courts have, in more recent times, overextended their reach into the realm of the legislature. This overreach has arguably moved outside the realm of reasonableness. Courts have legislated in areas that are clearly the responsibility of government, such as requiring roads to be constructed and creating noise control regulations.<sup>159</sup> Such outcomes have lessened the accountability of the legislature: rather than seeking to legislate in accordance with the directive principles of the Constitution, it can rely on the judiciary to correct enactments.<sup>160</sup>

150 Pritam Kimar Ghosh “Judicial Activism and Public Interest Litigation in India” (2013) 1 GJLS 77 at 84.

151 Desai and Muralidhar, above n 149, at 163.

152 *Hussainara Khatoon v State of Bihar* (1980) 1 SCC 81.

153 Constitution of India 1950, art 39A.

154 *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161.

155 At [2].

156 World Bank *India: Achievements and Challenges in Reducing Poverty* (World Bank South Asia Region, Report No 16483-IN, 27 May 1997) at 4.

157 Ghosh, above n 150, at 90.

158 At 89.

159 At 95.

160 At 91.

Overall, the Indian experience with ESCR is one of judicial excess creating questionable long-term value. The courts have undoubtedly overreached into the domain of the legislature, leading to the eventual trivialisation of the PIL jurisdiction by private interests and insignificant claims. As the other jurisdictions discussed have not encountered similar problems, it is possible to surmise that enacting ESCR as fundamental rights may result in the courts taking a more conservative, conventional approach to their interpretation and application. However, the wildly different social and cultural context of the Indian experience has almost certainly been a factor in the limited success enjoyed by ESCR in India. It is important to be mindful of this when trying to ascertain the best model for ESCR protection in New Zealand.

## **Finland**

Finland has an innovative and complex system for protecting ESCR. It is an example of a highly developed jurisdiction committed to ESCR protection through a human rights framework.

### *1 Constitutional Status*

Finland has a supreme constitution that incorporates the protection of human rights as one of its main purposes.<sup>161</sup>

A range of ESCR are included in ch 2 of the Constitution, which sets out “[b]asic rights and liberties”.<sup>162</sup> This chapter also contains CPR and has the effect of placing both sets of rights on the same pedestal.

One commentator has said that the Finnish Constitution provides for a series of minimum levels of ESCR to which legislation must conform, whilst the exact content of the rights is left for case law to develop.<sup>163</sup>

### *2 Justiciability*

Finland has a well-rounded process for ensuring that ESCR are protected, involving the courts, Parliament and independent review bodies. Broadly, the protection apparatus is directed at maintaining parliamentary supremacy, such that the courts will not need to exercise their power to disregard inconsistent statutes.<sup>164</sup>

Finland has both a Supreme Court and a Supreme Administrative Court. The latter has final jurisdiction over public law matters.<sup>165</sup> It is this Court that deals with the bulk of ESCR litigation. The Constitution provides both Courts with limited jurisdiction to supervise the constitutionality of ordinary and inferior legislation.<sup>166</sup> Where primary legislation is in “evident

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161 Constitution of Finland 1999, s 1.

162 Chapter 2.

163 Opie, above n 34, at 149.

164 At 130–131.

165 At 123.

166 Constitution of Finland, s 99.

conflict" with the Constitution, the Courts must give primacy to the Constitution in that particular case.<sup>167</sup> Similarly, the Courts must not apply subordinate legislation that is inconsistent with the Constitution or any other primary legislation.<sup>168</sup> The power to find legislation inapplicable on constitutional grounds is very rarely exercised and it is envisioned as somewhat of a last resort.<sup>169</sup>

Three non-judicial bodies are also responsible for the protection of ESCR: the Constitutional Law Committee (CLC), the Chancellor of Justice and the Parliamentary Ombudsman.

The CLC is comprised of members of Parliament and has the task of reviewing Bills referred to it by Parliament or the President. The CLC's opinions constitute authoritative interpretations of constitutional rights. They are seen as legally binding by commentators and accorded considerable weight by the courts.<sup>170</sup> The CLC's opinions are also accepted as the most authoritative statement of the constitutionality of Bills and provisions.<sup>171</sup>

The Chancellor of Justice and the Parliamentary Ombudsman both have powers to ensure that public authorities comply with the law. They also receive and review complaints from citizens.<sup>172</sup> The Finnish Government refers to these two positions as the "supreme supervisors of legality" within the national monitoring system.<sup>173</sup> Both offices submit annual reports to Parliament detailing their views on the protection of fundamental rights.<sup>174</sup>

#### (a) Supreme Court Jurisprudence

The history of ESCR jurisprudence in Finland suggests that the Supreme Court is willing to critique government policy with regard to ESCR protection and award damages when Finland breaches a constitutional duty.<sup>175</sup>

The Supreme Administrative Court is also willing to critique the protection of ESCR, as demonstrated in a case where the Court read the guarantee of health and medical services as imposing an obligation on Finland to provide the "necessary aids for medical rehabilitation".<sup>176</sup> This development of the right to healthcare occurred in "accordance with [the plaintiff's] medically assessed needs".<sup>177</sup> The Court placed the burden of proof on the public authority to prove that it lacked the necessary resources to provide for the realisation of the plaintiff's right to healthcare. The public authority could not prove this, thus the resource limitation argument failed.

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167 Section 106.

168 Section 107.

169 Ministry for Foreign Affairs of Finland, above n 101, at 94–95.

170 Jaakko Husa "Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective" (2000) 48 *Am J Comp L* 345 at 365.

171 At 365.

172 Constitution of Finland, ss 108–109.

173 Ministry for Foreign Affairs of Finland, above n 101, at 93.

174 At 93.

175 KKO 1997:141 (Yearbook of the Supreme Court 1997 No 141) as cited in Scheinin, above n 100, at 245.

176 Supreme Administrative Court, 27 November 2000, No 3118 as cited in Scheinin, above n 100, at 246.

177 Scheinin, above n 100, at 246.

The right to indispensable subsistence and care provided for by s 19(1) of the Constitution has also been the subject of litigation. One case involved a student who was declined financial benefits by a local government on the assumption that the student would be able to get a student loan from the bank.<sup>178</sup> The Court's decision in this case essentially required the local government body to make the decision again with cognisance of the "actual circumstances of the student."<sup>179</sup>

## (b) CLC Opinions

CLC opinions have been highly influential in the protection of ESCR in Finland.

A Bill referred to the CLC in 2000 sought to establish a zoning system for school admission. The CLC held that such a system would be unconstitutional as it would infringe the constitutional rights to education and equality. Once the opinion was given, the Bill did not proceed any further.<sup>180</sup>

A 1995 opinion concerning amendments to sickness insurance legislation stated that if the amendments would result in certain categories of people falling outside of the scheme then the amendment would be unconstitutional.<sup>181</sup> This vindicated the constitutional rights to basic subsistence and healthcare.<sup>182</sup>

These two opinions protected ESCR by way of a discrimination analysis. Both opinions found that legislation would be unconstitutional if it excluded certain classes of people from accessing rights provided to other groups.

The CLC has also indicated that it will protect a minimum core level of ESCR for citizens. For instance, the CLC reviewed a Bill that proposed significant reductions to a childcare allowance payable to parents. It held that the Bill was constitutional because the families caring for children would continue to have adequate state support once the Bill was passed.<sup>183</sup>

The CLC adopted similar reasoning when reviewing a proposal to abolish some of the support available to children under the pension system. The CLC found that the measures were constitutionally appropriate because other state provisions would continue to provide a minimum level of support even after the measures were enacted.<sup>184</sup>

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178 (1 June 1999) No 368/3 (Administrative Court of Häme) as cited in Scheinin, above n 100, at 247.

179 Opie, above n 34, at 136.

180 At 136.

181 Martin Scheinin "Constitutionalism and Approaches to Rights in Nordic Countries" in Joakim Nergelius (ed) *Constitutionalism: New Challenges. European Law from a Nordic Perspective* (Martinus Nijhoff Publishers, Leiden, 2008) 135 at 144 as cited in Opie, above n 34, at 136.

182 Constitution of Finland, s 19.

183 Catarina Krause "Constitutional Protection against Retrogressive Social Security Legislation in Finland – an Examination of the Practice of the Constitutional Law Committee" in Martin Scheinin (ed) *Welfare State and Constitutionalism* (Nordic Council of Ministers, Copenhagen, 2001) 287 at 334–335 as cited in Opie, above n 34, at 137.

184 Opie, above n 34, at 137.

### 3 Outcomes

As social and economic standards in Finland are typically high, it is rather difficult to discern the influence of ESCR in the Constitution.<sup>185</sup>

However, references by courts to ESCR in the course of judgments have “substantially increased” since their introduction in the codified Constitution of Finland.<sup>186</sup> This suggests that formalising the status of ESCR in constitutional documents will, at the very least, encourage the judiciary to regularly consider them.

The Finnish Government has an encouraging focus on furthering ESCR, evidenced by its efforts to ensure children universally enjoy the right to education by 2015.<sup>187</sup> Nevertheless, it is difficult to isolate the cause from the effect; that is, whether the Government’s focus is the result of the strong legal protections afforded to ESCR or whether the strong focus enabled the legal protection scheme to be established. Regardless, a 2009 Government report makes it clear that ESCR are a key focus for Finland, ensuring that ESCR are closely monitored and furthered.<sup>188</sup>

## VIII MODEL FOR NEW ZEALAND

Finally, I examine how the above discussion fits in the New Zealand context. Using the above analysis of other jurisdictions, this Part demonstrates how we can realistically achieve more effective legal protection of ESCR in New Zealand.

Sir Edmund Thomas advocated for a distinctly non-legal solution to the issues posed by increasing poverty and falling social standards. Sir Edmund believes that a popular movement demanding higher social standards as rights is the most realistic method for advancing and recognising ESCR as legitimate human rights.<sup>189</sup> Sir Edmund located the struggle for ESCR recognition in the context of the neo-liberal capitalist economic order. He argued that “it is probably unrealistic to expect the legislature to enact legislation providing effective recognition of substantive rights”.<sup>190</sup> With respect, I advocate a more optimistic model for the furtherance of ESCR.

There have been growing calls for further recognition of ESCR in New Zealand, notably from the New Zealand Law Society,<sup>191</sup> and the United Nations Committee on Economic, Social and Cultural Rights.<sup>192</sup> The

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185 Scheinin, above n 100, at 241.

186 Ministry for Foreign Affairs of Finland, above n 101, at 95.

187 At 55.

188 At 73.

189 EW Thomas “Reducing Inequality: A Strategy for a Cause” (Bruce Jesson Lecture 2013, University of Auckland, 30 October 2013) at 19.

190 At 18.

191 New Zealand Law Society, above n 36, at [21].

192 *Consideration of reports submitted by States parties under articles 16 and 17 of the Covenant: New Zealand E/C 12/NZL/CO/3* (2012) at 2.

Constitutional Advisory Panel also recommended exploring the inclusion of ESCR in the Bill of Rights Act.<sup>193</sup> I suggest that the time has come in New Zealand for ESCR to be recognised as legally enforceable human rights. The best method to achieve such recognition is through the inclusion of ESCR in the Bill of Rights Act. Together with the addition of further rights to the Bill of Rights Act, I advocate introducing a body similar to Finland's CLC. This committee would review Bills for consistency with the Bill of Rights Act's standards prior to their passage into law and would also provide statements on the content of rights.

### **Constitutional Law Committee**

The New Zealand version of the CLC (NZCLC) could assume, and expand, the review role currently occupied by the Attorney-General under s 7 of NZBORA.<sup>194</sup>

The NZCLC could be composed of a cross-party collection of members of Parliament and constitutional law experts such as legal practitioners, members of the Human Rights Commission and public law academics. This composition seeks to balance the political concerns of Members of Parliament with the legal and constitutional concerns held by those involved in the law. As a last point on composition, it would be advantageous to have a wide pool of suitable appointees so that the composition of the NZCLC would not remain static. This would ensure that members would not become entrenched into factions or become too highly specialised, thus losing the wider perspective on social issues that made them suitable for appointment in the first place. Maintaining a dynamic committee membership would assure the public and the legislature that balanced and up-to-date assessments are being made.

The NZCLC under this model would provide detailed reports not only on whether individual pieces of legislation are consistent with fundamental rights in the Bill of Rights Act but also on the appropriate parameters of those rights. This envisions a function similar to those of the CESCER in its capacity to produce general comments and the Finnish CLC, which enunciates limits on the content of rights in its reviews of legislation. The NZCLC would be well placed to make such judgments as its members would supply a wealth of knowledge and experience in the legal and public policy fields and could consider rights protection in a holistic way not open to the courts. The NZCLC would also be able to research independently and effectively consider the fiscal impacts of court involvement in the area of ESCR. Having an independent body perform this role would safeguard human rights from the political preferences of the executive government. It would also address concerns that the courts cannot consider the full wealth of information necessary to determine the content of rights.<sup>195</sup>

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193 Constitutional Advisory Panel, above n 1, at 48.

194 Bill of Rights Act, s 7, which requires the Attorney-General to "report to Parliament where [a] Bill appears to be inconsistent with [the] Bill of Rights".

195 Palmer, above n 65, at [28].

An independent committee in this mould would remove pressure from the legislature, executive and judiciary in the area of human rights legislation and litigation by providing an informed source of comment on human rights issues. Such a body would also be less readily subject to claims of political partisanship or judicial activism.

## ESCR Inclusion

Including ESCR in the Bill of Rights Act would require a relatively simple process. The rights would be entered into the Bill of Rights Act on equal footing with the pre-existing CPR. The wording of the rights, and which rights are chosen for codification, could be based on the Covenant, to which New Zealand is already a party. Reference to the Covenant could also be inserted into the preamble of the Act, in the same way as the ICCPR is currently mentioned.

## Role of the Courts

The courts would likely be subjected to intense scrutiny due to traditional concerns about both the separation of powers and the inadequacy of courts to deal with social concerns, as mentioned in Part VI above.

### 1 Judicial Process

In a technical sense, the framework for assessing human rights claims set out in *R v Hansen* would likely be used in ESCR cases.<sup>196</sup>

The most troublesome facet of the *Hansen* test would be a court’s ability to assess the s 5 “justified limitation” test with regard to ESCR. The test to determine whether a limitation on a right is justified was developed in *Hansen*,<sup>197</sup> and has since been affirmed in both *Ministry of Health v Atkinson*,<sup>198</sup> and *Child Poverty Action Group*.<sup>199</sup> The most problematic aspect of the test in ESCR cases will likely be the inquiry into whether the limiting measure impairs the right “no more than is reasonably necessary” to achieve the measure’s purpose.<sup>200</sup> This is known as the minimum impairment requirement.<sup>201</sup> This inquiry may be problematic because it involves the court making determinations on social and economic policy decisions made by the executive and the legislature.

It is therefore important to consider how a court could deal with the minimal impairment requirement. This is an area the courts have traditionally approached deferentially.<sup>202</sup> But this is no longer necessarily so: the Court of Appeal affirmed in *Atkinson* that deference is not absolute and

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196 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [92].

197 At [104].

198 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [143].

199 *Child Poverty Action Group*, above n 73, at [76].

200 *Hansen*, above n 196, at [104].

201 At [120]–[121] and [126] per Tipping J and [217] per McGrath J.

202 *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) at 231.



must be balanced against the duty to review implicit in s 5 of the Bill of Rights Act. This is consistent with the views of David Mullan, who posits that the presence of s 5 significantly diminishes the “traditional deep cleavage between political and legal”.<sup>203</sup> The Court in *Atkinson* allowed the executive to choose from a range of reasonable alternatives that impair the impugned right as little as reasonably necessary.<sup>204</sup> This standard means that even if there is an alternative avenue that would have impaired the right less, the executive’s choice may still be within the range of reasonable options.<sup>205</sup> The Court’s approach was consolidated in *Child Poverty Action Group*, which reaffirmed that the standard is whether the approach taken fell within a range of reasonable alternatives.<sup>206</sup>

The Courts’ analysis in both cases relied on a combination of independent expert evidence and assessment of the executive’s decision-making process. In *Atkinson*, the Court held that the Crown’s choice of policy was unreasonable on the basis of a wildly varied costing model that estimated the cost of paying parent caregivers at between \$17 million and \$593 million,<sup>207</sup> coupled with an apparent lack of effort to verify and narrow that estimate.<sup>208</sup> Conversely, in *Child Poverty Action Group*, the Court found for the Crown after assessing the substantial amount of evidence, including independent evidence, presented by the Crown in support of the policy. The Court also noted the Crown’s conscientious decision-making process, which involved research, consultation and consideration of varied options to achieve the policy goal.<sup>209</sup> Thus, the current test apparently requires the Crown to choose a reasonable measure to implement a policy, and then justify that choice by presenting research of its efficacy, as well as evidence of a sound decision-making process.

The approach to, and rigour of, the review described above would translate well to ESCR cases. In order to satisfy the minimal impairment requirement, the Crown need only prove that any policy that limits a right comes within a range of reasonable options. It is widely expected that the Government will have reasoned justifications, supported by wide ranging research and evidence, for any policy decisions made. Enabling the courts to review government policy in this way will enforce these expectations and encourage the Government to use logical, transparent arguments when formulating policy.

Modern courts are no longer strangers to reviewing policy. The increasing presence of interveners in litigation, along with the ability to utilise the research facilities on hand, such as judges’ clerks and information available on the Internet, means that judges are now more able than ever to assess broad social and economic policy.<sup>210</sup>

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203 David Mullan “Judicial Review of the Executive – Principled Exasperation” (2010) 8 NZJPIL 145 at 164.

204 *Atkinson*, above n 198, at [151].

205 At [154].

206 *Child Poverty Action Group*, above n 73, at [102].

207 *Atkinson*, above n 198, at [170].

208 At [171].

209 *Child Poverty Action Group*, above n 73, at [129].

210 Mullan, above n 203, at 165.

## 2 Determining the Content of Rights

The first part of the *Hansen* test is to determine whether a policy or enactment has prima facie breached a right in the Bill of Rights Act. This would require courts to determine the content of the ESCR included in that Act.

On the face of it, this is a daunting task for the courts as judges form an elite group in society, the type for whom social struggles will not often be an immediate concern. However, there are a number of reasons why determining the content of these rights in individual cases would not be an insurmountable challenge. The CESCR general comments mentioned earlier in this article contain both general and specific statements on the parameters of the ESCR codified in the Covenant. They are the result of the work of a full time team of 18 specialist members. These comments would be highly useful to a New Zealand court seeking to determine the limits of our own ESCR.

The proposed model also creates the NZCLC, for which a function would to give general guidelines to Parliament and the courts concerning permissible limits on ESCR. This process will further provide content to these rights.

Finally, the courts would develop the content of the ESCR through the common law in the same way that our jurisprudence on civil and political rights has developed over time. Case law has, over time, similarly clarified the nature of the current rights in the Bill of Rights Act.

A clear example of such development is in the cases dealing with a quasi right to protest. These cases developed the ambit of the freedom of expression and association, especially after these rights were codified in the Bill of Rights Act. The protection given to protest began as a relatively weak standard; “unlawful protest” was held to be that which was “likely to cause annoyance” in *Melser v Police*.<sup>211</sup> It was developed into a more robust standard in *Morse v Police*, where the majority of the Supreme Court defined unlawful protest as that which inhibits the use or enjoyment of a public space to such an extent that it is beyond what other reasonable people could be expected to tolerate in a democratic society.<sup>212</sup> This type of development would be the inevitable result of the inclusion of ESCR as justiciable rights.

### Effect on the Legislature and Executive

An important aspect of the inclusion of ESCR in the Bill of Rights Act would be the likely effect on the legislature and executive.

The current protection mechanisms for human rights at the legislative stage are limited. The principal mechanism is the Attorney-General’s review under s 7 of the Bill of Rights Act, whereby the Attorney-

211 *Melser v Police* [1967] NZLR 437 (CA) at 443 per North P.

212 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [2].

General identifies Bills that are inconsistent with the rights contained in the Bill of Rights Act. This mechanism has been of questionable influence: as at 2009, over 90 per cent of Government-introduced Bills subjected to a s 7 review were enacted without amendment.<sup>213</sup> The consequence of the NZCLC publishing thorough and well-researched opinions would dramatically increase the strength of review at the legislative stage. The NZCLC's independence from the political process would add to the legitimacy of the opinions given. This increased focus on human rights compliance would create stronger legislation that is in line with New Zealand's international obligations.

Including ESCR in the Bill of Rights Act would require Parliament to be explicit when it intends to infringe ESCR. This has already occurred in New Zealand for CPR. The codification of CPR resulted in court dicta to the effect that if Parliament intends to breach these rights, it must do so explicitly, not by a "side wind".<sup>214</sup> Requiring Parliament to be explicit would lead to greater public awareness of issues surrounding the limitation of fundamental rights, therefore increasing public pressure for protecting those rights.<sup>215</sup> The heightened scrutiny of Parliament's actions, and corresponding recognition of the importance of ESCR, would further the protection of human rights in New Zealand and arguably make it less likely for the courts to have to consider inconsistent legislation in the first place.

Finally, including ESCR in the Bill of Rights Act would further enable citizens and interest groups to pressure the legislature to respect their rights by providing concrete statutory statements on which to base political claims and movements. This would provide a legitimate avenue for the kind of popular movement advocated by Sir Edmund as the key to reversing the decline of New Zealand's social standard statistics.<sup>216</sup>

## IX CONCLUSION

In conclusion, this article supports the introduction of ESCR into the Bill of Rights Act as a way of furthering human rights protection in New Zealand whilst also providing tools for citizens to fight against the social ills of poverty and deprivation.

I have endeavoured to show that the key arguments often presented against the inclusion of ESCR as justiciable rights are not the all-conquering rebuttals they claim to be. Accordingly, I have proposed a possible model for protecting ESCR in New Zealand.

The arguments for justiciable ESCR presented in this article are by no means exhaustive. But this article contributes to the growing movement

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213 Andrew Geddis "The Comparative Irrelevance of the NZBORA to Legislative Practice" (2009) 23 NZULR 465 at 479.

214 *R v Pora* [2001] 2 NZLR 37 (CA) at [51].

215 Peter W Hogg and Allison A Bushell "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35 Osgoode Hall LJ 75 at 79.

216 Thomas, above n 189, at 19.

towards recognising ESCR as fundamental rights. The same caveat can be applied to my model. It is a framework on which more consultation is needed before it could be implemented in the real world.

However, this is ultimately an appeal for the protection of human rights and the use of human rights jurisprudence to improve lives. These are lofty and idealistic goals but it is the contention of this article that the law must work to constantly improve the average standard of living or risk becoming disconnected from the society that it governs.

Finally, it is worth mentioning the words of Colin Aikman, a member of the New Zealand delegation involved in the drafting of the original Universal Declaration of Human Rights in 1948. Aikman affirmed that New Zealand believed that the civil right of personal freedom could never be complete unless "it is related to the social and economic rights of the common man".<sup>217</sup> The struggle to recognise ESCR is therefore a historic one, which New Zealand was strongly committed to. New Zealand would do well to become strongly committed to it once again.

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<sup>217</sup> Colin Aikman "New Zealand and the Origins of the Universal Declaration" (1999) 29 VUWLR 1 at 5.