Economic, Social and Cultural Rights in New Zealand: Their Current Legal Status and the Need for Change

by

Joss Brian Opie

A thesis submitted in conformity with the requirements for the degree of Master of Laws

Faculty of Law
University of Toronto

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Abstract

In this thesis I examine the status of the rights recognised in the International Covenant on Economic, Social and Cultural Rights in New Zealand’s domestic law. I contrast that status with the constitutional guarantees that Brazil, South Africa and Finland provide for these rights, and critique the principal objections made in New Zealand and elsewhere against them. I argue that greater domestic legal protection of economic, social and cultural rights is necessary and propose that they be incorporated into the New Zealand Bill of Rights Act 1990.
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Preface

The central issues that I address in this thesis are the legal status of economic, social and cultural rights [ESCR] in New Zealand, whether that status should be enhanced, and if so, what some of the options might be.

In Chapter 1, I define ESCR as the rights and obligations set out in the International Covenant on Economic, Social and Cultural Rights. I then describe and analyse those rights and obligations. Chapter 2 focuses on the legal status of ESCR in New Zealand, the reasons why ESCR, unlike civil and political rights [CPR], are not affirmed in the New Zealand Bill of Rights Act 1990, and some of the effects of this intentional omission. In Chapters 3, 4 and 5, I explore the differing approaches to ESCR of Brazil, South Africa and Finland. Prior to undertaking that comparative analysis, I explain its purpose in more detail and why I decided to focus on these three countries. Chapter 6 is a critique of the principal objections that have been made against ESCR as human and justiciable rights.

In Chapter 7, I return to the status of ESCR in New Zealand. Based on the results of my analysis in the previous chapters, and with reference to the regressive effects that reforms undertaken in New Zealand in the 1980s and 1990s had on ESCR, I argue that these rights require greater protection in New Zealand’s domestic law; and that the justifications for denying them such protection are weak. My principal recommendation is that ESCR be affirmed in the New Zealand Bill of Rights Act 1990, and I provide a version of the Act which I have amended to include a range of ESCR.
Chapter 1
Economic, Social and Cultural Rights in the ICESCR

1 INTRODUCTION

In this chapter, I explore the rights and obligations set out in the *International Covenant on Economic, Social and Cultural Rights* [ICESCR or the Covenant].¹ In Part I, I locate the ICESCR as part of the International Bill of Rights. I emphasise the interdependence and indivisibility of ESCR and the CPR set out in *International Covenant on Civil and Political Rights* [ICCPR],² and the equal importance of each in achieving the common objective of the Covenants: free human beings enjoying freedom from fear and want. In Part II, I list the rights the ICESCR recognises and explain who holds rights under the Covenant. I then describe and analyse the obligations the ICESCR imposes. At the end of the chapter, and for ease of reference, I provide a summary of the rights and obligations discussed in Part II in table form.

My focus in Part II is on the overarching obligations that the ICESCR establishes in respect of the rights it enunciates, as opposed to the individualised (and differing) elements or components of each of those rights.³ The principal reason for this is, as I explain in Chapter 2, while New Zealand legislation does protect or deal with some aspects of the rights recognised in the Covenant, it does not reflect the majority of the ICESCR’s obligations. Given the greater novelty of these obligations and their significance, a closer analysis of them is important.⁴

In analysing the Covenant’s ESCR, I rely principally on the text of the Covenant and on the interpretations of that text by the United Nations Committee on Economic, Social and Cultural Rights

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³ While in Part II of this Chapter and also in other chapters of this thesis I refer to the content of particular rights in more detail, a comprehensive discussion of the content of all the rights in the ICESCR is beyond the scope of this thesis. Readers interested in obtaining more information about specific rights may consult, in particular, the relatively full General Comments of the United Nations Committee on Economic, Social and Cultural Rights on the majority of Covenant’s rights.

⁴ Of course, obligations such as progressive realisation must also create a corresponding right to the performance of that obligation. Therefore, the Covenant must include not only, for example, a right to social security (which imposes a series of obligations on States parties), but also a right to progressive realisation. Accordingly, such obligations could also be referred to as rights. However, because the Covenant expresses these matters as obligations rather than rights, I have retained that distinction.
in its General Comments. I also refer to the Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights [the Limburg Principles], the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights [the Maastricht Guidelines], and various academic texts. The interpretations of the ICESCR advanced by the CESCR, the Limburg Principles, and the Maastricht Guidelines are not binding on the States parties to the ICESCR, and they are not universally accepted. However, given the CESCR’s status as an expert body, and as the organisation which engages with all State parties to the ICESCR, reviews their reports, and provides commentary on them, its views can be considered authoritative. The Limburg Principles and the Maastricht Guidelines are also entitled to weight, as they are the product of consensus amongst international law experts.

2 PART I: INDIVISIBILITY AND INTERDEPENDENCE

The ICESCR is part of the International Bill of Human Rights, together with the ICCPR, the Universal Declaration of Human Rights and the two Optional Protocols to the ICCPR. Together, the ICESCR and

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5 The CESCR was established to assist the United Nations Economic and Social Council in its monitoring of State party compliance with ICESCR obligations: see Philip Alston “Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights” (1987) 9:3 Human Rights Quarterly 332.

6 Limburg Principles on the Implementation of the International Covenant on Economic Social and Cultural Rights, (Maastricht, 2-6 June 1986) ["Limburg Principles”]. The Limburg Principles were the result of a meeting of international law experts in Maastricht between 2 and 6 June 1986. The purpose of the meeting was (para. (i)) “to consider the nature and scope of the obligations of State parties” to the ICESCR.

7 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, (Maastricht, 22-26 January 1997) [“Maastricht Guidelines”] were the result of a meeting of international law experts in Maastricht on the 10th anniversary of the Limburg Principles. The purpose of the meeting, as stated in the Introduction to the Guidelines, was “to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and responses and remedies.”


10 In this regard, see Craven, supra note 8 at 4, who states that the CESCR “in its position as the primary supervisory body, acts as ‘a clearing centre’ for the divergent interpretations of the Covenant offered by States parties and is best placed for establishing the common agreement of States as to interpretation of the Covenant. Its views, therefore, may be said to have considerable legal weight and indeed may ultimately serve to direct and shape the practice of States in applying the Covenant, such that the agreement of States is developed over time.”

11 Office of the High Commissioner for Human Rights, Fact Sheet No.2 (Rev.1): The International Bill of Human Rights, (Geneva, United Nations, 1996), online: Office of the High Commissioner for Human Rights <http://www.ohchr.org> [“Fact Sheet No.2”]. For a comprehensive analysis of the ICESCR’s origins (including the ideological conflict between the former Soviet and western States which led to the division of the International Bill of Rights into two instruments which became the ICCPR and the ICESCR) see Craven, supra note 8.
ICCPR set out the fundamental rights affirmed by the international community as inherent in every person, which each State party is bound to respect and observe.

The preambles to the ICESCR and the ICCPR state the purpose of each Covenant and are in almost the same terms as one another. Both refer to “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family” as the “foundation of freedom, justice and peace in the world.” Both recognise that “these rights derive from the inherent dignity of the human person;” and refer to “the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.”

In the fourth paragraph of each preamble, the wording differs very slightly to reflect the different focus that each Covenant has (the ICESCR on ESCR; the ICCPR on CPR). The fourth paragraph of the ICESCR preamble states: “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights, […]”. Accordingly, this paragraph records the recognition of State parties to the Covenants that the realisation of ESCR and CPR is interlinked; or in other words, that the realisation of each depends upon the realisation of the other.

2.1 Rhetoric or reality?

In their article “Human Rights and Social Policy in New Zealand”, Geiringer and Palmer state that “despite the rhetoric of ‘indivisibility’, the International Bill of Rights emphasises the distinction between these two categories [ESCR and CPR] and places markedly different obligations on member states with respect to the protection of each (compare ICESCR Article 2(1) and ICCPR Article 2(1)).”

There are important differences between the ICESCR and the ICCPR. For example, unlike the ICESCR, all of the rights recognised in the ICCPR must be respected and ensured immediately following ratification, whereas most of the rights in the ICESCR are subject to progressive realisation. Further,

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12 The fourth paragraph of the preamble to the ICCPR states: “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”

13 In 1950, the United Nations General Assembly declared “the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent”. See Fact Sheet No.2, supra note 11. The Maastricht Guidelines, supra note 7 at para 4 affirm: “it is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.”

14 Claudia Geiringer and Matthew Palmer, “Human Rights and Social Policy in New Zealand” (2007) 30 Social Policy Journal of New Zealand 12 at 19. See also Dennis and Stewart, supra note 9 at 476, who state at 476 that “[t]he essential terms of the Covenants differ markedly.”
article 2(3) of the *ICCPR* expressly provides that States parties must ensure that there are effective remedies for violation of the rights it recognises, and that such remedies are enforced when granted. There is no equivalent provision in the *ICESCR*.

Also, the complaint mechanisms under the *ICCPR* have historically been more numerous and developed. Article 41 of the *ICCPR* establishes an inter-state communications procedure which allows a State party to submit a communication to the United Nations Human Rights Committee [HRC], alleging that another State party who has accepted the HRC’s jurisdiction under the inter-state procedure is not complying with the *ICCPR*. In addition, the *Optional Protocol to the International Covenant on Civil and Political Rights* [15 *ICCPR Optional Protocol*] gives the HRC jurisdiction to receive individual communications alleging violations of the *ICCPR* by States parties who have accepted the HRC’s jurisdiction in that regard. In contrast, there is no inter-state communications procedure within the *ICESCR* itself, and for the majority of the *ICESCR*’s existence, there has not been any individual communications procedure.

As a result, the treatment of ESCR and CPR can seem unequal. In particular, it can appear that while the majority of states have accepted obligations to make CPR justiciable16 in their national jurisdictions, and many of them have accepted the HRC’s jurisdiction under the *ICCPR Optional Protocol*, they have not been prepared to do the same for ESCR. In this sense, the CPR recognised in the *ICCPR* seem to have been prioritised over ESCR, and the affirmations of interdependence and indivisibility can appear hollow.

However, while the *ICCPR* does impose different obligations on States parties than those set out in the *ICESCR*, the differences are not as substantial as they may seem at first sight. Also, state practice in relation to ESCR is not uniform. Various states recognise ESCR as justiciable rights both domestically and internationally.

Even though State parties do not have to achieve full realisation of all of the rights in the *ICESCR* immediately, as I explain below there are a series of obligations which must be immediately and continuously complied with in full. These include the obligation not to discriminate, to take steps towards full realisation, and not to go backwards unjustifiably (see also Table 1 at the end of this chapter). In addition, the CESCR has stated that the *ICESCR* should be interpreted in light of article 8 of the Universal Declaration of Human Rights, which provides that “everyone has the right to an effective remedy by the competent national tribunals for acts violating fundamental rights granted to him by the constitution or by law”.17 As I discuss in more detail below, on that basis, and relying on the undertaking by States parties in article 2(1) of the *ICESCR* to realise ESCR by “all appropriate means, including

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16 In the sense of being capable of being pled in, and upheld by, domestic courts.
particularly the adoption of legislative measures”, the CESC has considered that victims of ESCR violations “should have access to effective judicial or other appropriate remedies at both national and international levels.”\textsuperscript{18}

There is also growing recognition internationally that ESCR have been neglected, and measures are being taken to rectify this. For example, the \textit{Optional Protocol to the International Covenant on Economic, Social and Cultural Rights [Optional Protocol]} was opened for signature on 24 September 2009. It establishes an individual and group communications procedure, an inter-state communications procedure, and an inquiry procedure for \textit{ICESCR} rights, in relation to those States parties that accept the CESC’s competence to act under those procedures.\textsuperscript{19} Although the \textit{Optional Protocol} is not yet in force, its completion demonstrates a move by members of the international community to increase the extent to which ESCR are enforceable at the international level.

At a national level, relatively recent incorporation of certain ESCR as fully enforceable rights into national constitutions in countries such as Brazil, South Africa and Finland evidences the commitment of a range of states to enhance the legal status of ESCR in domestic law. Many other state constitutions, such as those of Spain and Portugal, also include particular ESCR.\textsuperscript{20}

\textsuperscript{18}See CESC, \textit{General Comment 12}, 20th Sess. E/C.12/1999/5 (1999) at para. 32 [“\textit{General Comment 12}”]. Against this, Dennis and Stewart (\textit{supra} note 9 at 492) argue that “[a] necessary corollary to the violationist approach is that the Covenant requires a remedy for any violation, notwithstanding clear negotiating history to the contrary.” On the other hand, Geiringer and Palmer (\textit{supra} note 14 at 28) support the CESC’s reliance on art. 8 of the UDHR, and contend that the \textit{ICESCR} should be interpreted in light of “the legal maxim that where there is a right, there is a remedy.” Finally, see Malcolm Langford and Jeff King, \textit{supra} note 9 at 481, who state that “to date, there has been no formal objection to the Committee’s General Comments, unlike the Human Rights Committee.”

\textsuperscript{19}The \textit{Optional Protocol to the International Covenant on Economic, Social and Cultural Rights 10 December 2008, Doc.A/63/435; C.N.869.2009.TREATIES-34 (not currently in force) [“\textit{Optional Protocol}”]. As at 1 August 2010, 33 states had signed the \textit{Optional Protocol}, and Ecuador and Mongolia had ratified it. In accordance with art. 18(1) of the \textit{Optional Protocol}, it enters into force three months after the date of the deposit of the tenth instrument of ratification or accession. Following its entry into force, the CESC will have jurisdiction to receive and consider communications from individuals or groups of individuals (under the jurisdiction of a State party to the \textit{ICESCR} and to the \textit{Optional Protocol}) claiming to be victims of a violation of any of the rights set out in the \textit{ICESCR} (see arts. 1 and 2). Art. 10 establishes an inter-state communication procedure. Finally, art. 11 sets out an inquiry procedure, according to which the CESC may carry out an inquiry if it receives “reliable information indicating grave or systematic violations by a State party” of any of the \textit{ICESCR} rights, provided that the State party concerned has accepted the CESC’s competence in this respect.

\textsuperscript{20}See, for example, the right to education in art. 27 of the \textit{Constitución de España} (29 December 1978) and the right to social security in art. 63 of the \textit{Constituição da República Portuguesa} (25 April 1976). See also Zachary Elkins, Tom Ginsburg, and James Melton, \textit{The Endurance of National Constitutions} (New York: Cambridge University Press, 2009) at 28. With reference to their database which includes data on every national constitution written since 1789, the authors state: “As is well-known, the menu of ‘required’ rights has expanded dramatically since the days when the negative rights enshrined by the U.S founders seemed complete. Second and third generation rights, the positive rights, are now included in international covenants as well as most national constitutions.” \textsuperscript{[emphasis added]}. However, the authors do not provide any information on the extent to which such rights are justiciable in the national constitutions to which they refer. See further Part I of Chapter 7 of this thesis.
Moreover, while there are differences between the affirmations of some states regarding the indivisibility and interdependence of CPR and ESCR and the willingness of those states to provide ESCR with the same status that CPR enjoy, these differences do not undermine the central components of the indivisibility and interdependence argument. These are that there are many linkages and crossovers between ESCR and CPR, and therefore the two categories cannot be neatly delineated. The realisation of both sets of rights is essential for achieving freedom from fear and want and the creation and maintenance of a society within which a person can live a dignified life. Finally, the matters and values referred to as ESCR are of such significance that their full recognition as human rights, and as equal rights alongside CPR, is justified.

3 PART II: RIGHTS, RIGHTS-HOLDERS, AND OBLIGATIONS

In this Part, I set out the rights included in the ICESCR and explain who is entitled to those rights. I then analyse the principal obligations the Covenant imposes on States parties. These are the obligations to guarantee certain rights immediately and to realise other rights progressively; not to retrogress or limit rights unjustifiably; to give the Covenant rights appropriate legislative recognition; and to respect, protect

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21 See, for example, CESCR, General Comment 11, 20th Sess. E/C.12/1999/4 (1999) at para. 2 [“General Comment 11”], which states: “The right to education [...] has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective the realization of those rights as well. In this respect, the right to education epitomises the indivisibility and interdependence of all human rights.” The ICCPR (arts. 8 and 22) and the ICESCR (arts. 6-8) are both concerned with aspects of the right to work and freedom of association. Note finally Geiringer and Palmer’s discussion of the linkages between the ICCPR and ICESCR (supra note 14 at 18-19), and their conclusion that “CP rights and ESC rights are not watertight categories” (supra note 14 at 37).

22 See also Resolution 543 of the United Nations General Assembly (Preparation of two Draft International Covenants on Human Rights, GA Res. 543 (VI), UNGA, 6th Sess., 375th Mtg. (1952)). The resolution states: “The General Assembly [...] 1. Requests the Economic and Social Council to ask the Commission on Human Rights to draft two Covenants on Human Rights, to be submitted simultaneously for the consideration of the General Assembly at its seventh session, one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two Covenants simultaneously and open them at the same time for signature, the two Covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible [...].”

23 These fundamental connections and linkages are encapsulated in a statement that Benjamin Jealous, the current president of the National Association for the Advancement of Colored People (the oldest and largest civil rights organisation in the United States), made during a 2009 interview with the BBC: <http://www.bbc.co.uk/worldservice/documentaries/2009/09/090909_ben_jealous.shtml>. Talking about his own generation (he is 37 years old), Mr Jealous stated: “We came of age to find ourselves the most murdered generation in this country, the most incarcerated generation on the planet and there’s a whole host of problems that surround that, whether it is lack of access to healthcare, whether it’s discrimination in the job market, it is still easier in this country for a white male with a criminal record to get a job than a black man with none, because at this point, the beginning of the second century of the NAACP, we have to be clear to the country, we have to be clear to the world, that the fight is about now, it is about the future, it is about good jobs, it is about good schools, it’s about an economy that works for everybody, it’s good health care, and those fights are by their nature human rights fights.”

24 I use the term “retrogression” throughout this thesis as that is the term which the CESCR commonly employs. “Regression” would however appear to be an equally suitable term.
and fulfil the rights. They also include the obligations to take certain measures in respect of private individuals and organisations; to monitor the realisation of the rights; to carry out consultation; and to take special measures in favour of disadvantaged individuals.

I also argue that the ICESCR does not oblige States parties to provide for individuals who enjoy fully realised ESCR, and I offer some examples of the actions or omissions which would constitute violations of the Covenant. Finally, I refer to the CESCR’s position that the ICESCR is politically neutral. I argue that while the Covenant does not require the use of a particular type of economic system for its implementation, it does embody and prioritise a set of values which are political.

3.1 ICESCR rights

The rights set out in the ICESCR are the right to freedom from discrimination in the exercise of the rights set out in the Covenant; the equal right of men and women to enjoy the Covenant rights; the right to work; certain trade union rights; the right to social security; the right to an adequate standard of living; the right to the enjoyment of the highest attainable standard of physical and mental health; the right to education; and the right “to take part in cultural life”, “to enjoy the benefits of scientific progress and its applications”, and “to benefit from the protection of the moral and material interests arising from any scientific, literary or artistic production” of which one is the author. In addition, in article 10, the States parties recognise that special protection and assistance “should be accorded” to the family and to mothers who have recently given birth; and that “special measures of protection and assistance “should be taken on behalf of” children and young persons.

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25 Art. 2(2) of the Covenant. Discrimination is prohibited on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Note that art. 2(2) does not refer to a right to be free from discrimination, but rather an undertaking by States parties that the Covenant rights will be exercised without discrimination. However, it seems clear enough that as well as imposing an obligation on State parties, art. 2(2) also affirms an individual right.

26 Art. 3 of the Covenant.

27 Art. 6 and 7 of the ICESCR. This right includes a right “of everyone to the opportunity to gain his living by work which he freely choose or accepts”, and a corresponding obligation on State parties to safeguard this right (i.e. provide protection against unfair deprivations of work, such as unjustifiable dismissal); a right to “the enjoyment of just and favourable conditions of work” such as fair wages, and remuneration sufficient to provide all workers with “a decent living for themselves and their families”; safe and healthy working conditions, and paid holidays. As the CESCR states in General Comment 18, 35th Sess., E/C.12/GC/18 (2006) at para. 6 (“General Comment 18”), the right does not include “an absolute and unconditional right to obtain employment.”

28 Art. 8.

29 Art. 9.

30 Art. 11. This includes “a right to adequate food, clothing and housing, and to the continuous improvement of living conditions.”

31 Art. 12.

32 Art. 13. This right includes an obligation on State parties to provide free primary education, and to introduce progressively free secondary and tertiary education.

33 Art. 15.
3.2 ICESCR right-holders

Unlike the ICCPR, which expressly provides that each State party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction”\(^{34}\) the rights the ICCPR recognises, the ICESCR does not generally define its right-holders. However, provisions of the ICESCR do refer to certain right-holders, such as “men and women”, and “everyone.”\(^{35}\) Accordingly, while the language of the ICCPR and the ICESCR is different, it appears that the right-holders under the ICESCR include “everyone” within a State party’s territory and subject to its jurisdiction.\(^ {36}\)

In addition, a number of the ICESCR’s articles refer to international assistance and co-operation,\(^ {37}\) as does article 14 of the Optional Protocol. In various General Comments, the CESCR has stated that States parties “should” take action such as providing aid to countries that require it in order to realise the recognised rights, as well as refraining from action which would interfere with the enjoyment of those rights in other states. The CESCR has also referred to the “international obligations” of States parties under the Covenant,\(^ {38}\) and its view would appear to be that such obligations are owed to other states and also to individuals within those states.\(^ {39}\)

The CESCR has not stated that a State failure to comply with an international obligation under the Covenant is or should be actionable by an individual (whether within or outside the jurisdiction of the State party allegedly in breach of such an obligation), and the Optional Protocol does not provide for such an individual claim. However, a State party could theoretically make this type of claim in accordance with the inter-state communication procedure set out in article 10 of the Optional Protocol (when the Optional Protocol comes into force).

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\(^{34}\) ICCPR, art. 2(1).

\(^{35}\) See arts. 3, 6, 7, and 9.

\(^{36}\) The Optional Protocol (supra note 19) reinforces this interpretation (even though it is not yet in force), as it provides for the submission of communications by individuals or groups of individuals “under the jurisdiction of a State Party” (see art. 2 of the Optional Protocol).

\(^{37}\) See arts. 2(1), 11, 15(4), 22 and 23.


\(^{39}\) In General Comment 8, supra note 38, the CESC states at para. 7: “Just as the international community insists that any targeted State must respect the civil and political rights of its citizens, so too must that State and the international community itself do everything possible to protect at least the core content of the economic, social and cultural rights of the affected peoples of that State.” See also para. 13.
3.3 Immediate obligations and progressive realisation: article 2(1) of the ICESCR

In this section, I first explain the distinction the Covenant makes between “recognized” rights and other rights, and deferrable and immediate obligations. I then discuss “progressive realisation” and the meaning of “maximum available resources”. First, however, it is worthwhile setting out in full the article which provides most of these distinctions and concepts, and is perhaps the Covenant’s central provision: article 2(1). The article states:

“Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

3.3.1 Rights to be achieved progressively v. immediate rights and obligations

Article 2(1), therefore, obliges State parties to take steps aimed at progressively achieving full realisation of the “recognized” rights. The use of the word “recognized” is significant. This is because while most of the rights in the Covenant are expressed as being recognised by State parties (e.g. article 9 states that “The States Parties to the present Covenant recognize the right of everyone to social security” and article 11(1) states that “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living”), this does not apply to all rights or obligations.

Rather, there are a series of rights which States parties affirm, “undertake to guarantee” “undertake to ensure” or “undertake to respect”. These rights are the right of self-determination in article 1; the article 2(2) guarantee of non-discrimination; the undertaking in article 2(3) “to ensure the equal right of men and women to the enjoyment” of the rights set out in the Covenant; the undertaking to ensure the trade union rights set out in article 8; the undertaking to have respect for the liberty of parents and legal

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40 The “recognized” rights are the right to work (art. 6); the right to the enjoyment of just and favourable conditions of work (art. 7); the right to social security (art. 9); the right of everyone to an adequate standard of living (art. 11); the right to the enjoyment of the highest attainable standard of physical and mental health (art. 12); the right to education (art. 13); and the right to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and “to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author” (art. 15). The matters set out in art. 10 would also appear to fall within this category of rights.

41 Art. 1(1) states that: “All peoples have the rights of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

42 Art. 2(2) provides: “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
guardians to choose schools for their children which conform to those parents’ or guardians’ convictions in article 13(3); the undertaking in article 14 by States parties who have not been able to secure free compulsory primary education; and the undertaking “to respect the freedom indispensable for scientific research and creative activity” in article 15(3). In article 2(1) itself, each State party “undertakes to take steps” with respect to the matters set out in that article.

Craven argues that a reading of Covenant which takes into account these differences in expression leads to the conclusion that article 2(1) should only apply to recognised rights. The consequence of this interpretation, which I consider to be correct, is that Covenant rights and obligations which are not “recognized” are not subject to article 2(1). Therefore, they must be immediately guaranteed in full, as opposed to progressively realised. The same must apply to the undertaking by States parties “to take steps” in regard to the matters set out in article 2(1).

The CESCR has essentially adopted this interpretation of the Covenant. In its General Comment 3, the CESCR refers to the undertaking not to discriminate in article 2(2), and the undertaking to take steps in article 2(1). The CESCR goes on to state:

“While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations [referring to the obligation of non-discrimination and the obligation to take steps].”

3.3.2 Progressive realisation

The shorthand term for “achieving progressively the full realisation” of the recognised rights is “progressive realization”. The use of this concept in the ICESCR reflects, according to Craven, “the belief held during the drafting of the Covenant that the implementation of [ESCR] could only be

43 State parties also undertake, under art. 16 of the Covenant, to submit reports on their implementation of the Covenant.
44 Craven, supra note 8 at 134. Craven refers to such an interpretation as “strict”, but in my view it is simply consistent with the Covenant’s text. Dennis and Stewart (supra note 9 at n. 158) note that there is support for this interpretation in the negotiating record for the Covenant.
45 General Comment 3, supra note 38 at para. 1. In this regard, see also paras. 21 and 22 of the Limburg Principles, supra note 6.
46 General Comment 3, supra note 38 at para. 9.
undertaken progressively, as full and immediate realization of all the rights was beyond the resources of many States.”

While states do not have to achieve full realisation of the recognised rights immediately, they must “move as expeditiously and effectively as possible towards that goal.” The steps taken “should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.” In choosing how to give effect to a Covenant right, “[e]very state has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances.” However, this margin of discretion does not relieve a State party from its obligation to take targeted steps towards full realisation. Instead, it is a recognition that there will not necessarily be one right way to implement a particular right, and what is appropriate for one state may not be for another.

3.3.3 To the maximum of available resources

Under article 2(1), each State party is required to realise progressively the recognised rights “to the maximum of its available resources”. In a statement regarding this obligation, the CESCR interprets “available resources” to include not only those existing within a State party, but also resources on offer from the international community. In considering an alleged failure to take steps to the maximum of available resources, the CESCR states that it would take into account matters such as the degree to which the state has taken targeted steps aimed at the realisation of ESCR, and “where several policy options are available, whether the State party adopted the option that least restricts Covenant rights”. Further, if a State party were to rely on resource constraints to justify a retrogressive measure, the CESCR would consider matters such as whether the alleged breach affected a core obligation (discussed below), the

47 Craven, supra note 8 at 26.  
48 General Comment 3, supra note 38 at para. 9. In para. 9, the CESCR also states: “The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d’être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question.” See also the Maastricht Guidelines, supra note 7 at para. 8.  
49 Ibid. at para. 2. See also the Limburg Principles, supra note 6, paras. 16 and 21.  
50 General Comment 14, supra note 38 at para. 53. See also, for example, General Comment 18, supra note 27 at para. 37.  
52 Ibid. at para. 5.  
53 Ibid. at para. 8.
country’s current economic situation, and whether the state had sought cooperation or assistance, or had rejected “offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.” The CESCR also states that it would respect the margin of discretion that States parties have under the Covenant.

Accordingly, while a State party has a considerable degree of latitude in determining the amount of resources to devote to ESCR, it does not enjoy an absolute discretion. In making decisions about how to allocate resources, States parties must act in good faith, in a non-discriminatory manner, and in accordance with their obligation to take focused steps which advance the realisation of the recognised rights. This means that a State party must be able to justify any decision to remove, reduce or not increase funding for initiatives related to such realisation (i.e. it bears the burden of proof whenever there is a prima facie case that the state is not meeting its obligations of progressive realisation).

### 3.4 Minimum core obligations

In General Comment 3, the CESCR states that each State party has “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”. This obligation is not subject to progressive realisation, meaning that each State party must meet its minimum core obligation(s) immediately, rather than simply taking steps to do so. A failure to provide essential foodstuffs, essential primary health care, basic shelter and housing, or basic education would constitute a prima facie violation of the Covenant.

Although minimum core obligations are not subject to progressive realisation, a State party may justify a failure to meet them on the basis of insufficient resources. However, in General Comment 3 the CESCR considers that resource limitations would only provide a legitimate justification for such a failure where the State party in question can “demonstrate that every effort has been made to use all the resources that...
are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”

Also, even where a State party can demonstrate that resources are inadequate, it must still “strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.”

3.4.1 Prima facie violation, or violation?

In General Comments 14 and 15, the CESCR apparently modifies the position it took in General Comment 3 regarding the issue of resource constraints and core obligations, stating that non-compliance with such obligations cannot be justified “under any circumstances whatsoever”. However, in General Comment 19, the CESCR reverts back to the position it adopted in General Comment 3, at least in respect of the right to social security, and reasserts this position in its statement on maximum available resources.

The CESCR’s earlier interpretation is to be preferred. If a State party, acting in good faith, can demonstrate that it has applied its maximum available resources to meeting its core obligations, then it must have discharged its burden. This must be so even if the end result is that not all of the core obligations are in fact met.

3.5 Full realisation

Full realisation of the recognised rights is the Covenant’s ultimate objective. The CESCR, however, has largely avoided stating what it would consider to be full realisation of a particular right, or it has done so in general terms or incompletely.

For example, in General Comment 12, the CESCR states that “the right to adequate food is realized when every man, woman and child, alone or in community with others, [has] physical and economic access at all times to adequate food or means for its procurement.” In General Comment 18, the CESCR states in relation to the right to work that “State parties must therefore adopt, as quickly as possible, measures

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61 General Comment 3, supra note 38 at para. 10. See also the Limburg Principles, supra note 6 at para. 25, which state: “State parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.”
62 General Comment 3, supra note 38 at para. 11.
63 See, for example, General Comment 14, supra note 38 at para. 47; and General Comment 15, supra note 38 at para. 40. See also the Maastricht Guidelines, supra note 7 at para. 9, which state that “minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties”; and para 10, which states that “resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.”
65 See Maximum Available Resources Statement, supra note 51 at para. 6.
66 See also Langford and King’s comments on this issue (supra note 9 at 492-493).
67 General Comment 12, supra note 18 at para. 6.
aiming at achieving full employment”. However, the CESCR then goes on to discuss the necessity of prohibiting forced or compulsory labour and discrimination in employment, demonstrating that full employment alone would not constitute full realisation of the right to work.

In General Comment 19, the CESCR affirms that “the right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.” Also, in this General Comment and in other General Comments, the CESCR enumerates relatively fluid “features” of particular rights (such as availability, accessibility, acceptability and adaptability, which I refer to again below), the existence of which it considers to be necessary for the effective exercise of those rights. However, the CESCR does not state in any of these Comments whether it considers that the presence or fulfilment of all such features (or of the matters listed in the quote above in relation to social security) would constitute full realisation.

Part of what appears to be the CESCR’s difficulty in defining full realisation definitively or in more specific terms (or is the reason for its reluctance to do so) is that any definition would have to be applicable on an ongoing basis to the very diverse circumstances of the 160 states that are currently parties to the ICESCR. Establishing universal and specific definitions of full realisation for all the Covenant’s rights could be extremely complicated.

Therefore, while the text of the Covenant and the CESCR’s General Comments may be used to define full realisation at a global and general level, specific definitions of full realisation are likely to depend on national circumstances. For example, at a general level it may be said that the right to adequate housing is fully realised when the elements of adequacy set out in General Comment 4 are realised (e.g. all individuals under a State party’s jurisdiction are, at a minimum, able to obtain security of tenure, and to reside in housing which is affordable, habitable, and accessible to all on a non-discriminatory basis). However, while the quantitative calculation of what constitutes affordable housing within a specific jurisdiction may take into account the CESCR’s statement that costs associated with housing “should be at such a level that the attainment of satisfaction of other basic needs are not threatened or

68 General Comment 18, supra note 27 at para. 19.
69 General Comment 19, supra note 64 at para. 2.
70 Ibid. at para 10-27.
71 See for example General Comment 13, supra note 60 at para. 6 and General Comment 18, supra note 27 at para 12.
72 As at 28 July 2010.
compromised\textsuperscript{73}, the final determination of “affordability” will depend on prevailing economic conditions within that jurisdiction.

While there is a degree of uncertainty in this, in terms of what a State party’s obligations are under the Covenant with regard to full realisation, it is difficult to see how such uncertainty creates any problems for States parties. If a State party considered this lack of absolute definition to be a problem, it would be open for that State to define (perhaps in consultation with the CESCR) what it deems to constitute full realisation for each of the recognised rights. Such definitions would not be binding on other States parties, or on the CESCR, but would be useful tools for the State in determining what it had to do to meet its obligations under the Covenant.

It would be likely, however, that such definitions would need to be modified over time. This is because fixed or perpetual definitions of full realisation would be inconsistent with the well-known principle that human rights treaties are living instruments. Instead, a dynamic understanding of the concept is that what constitutes full realisation of a recognised right may well change over time, together with beliefs about human well-being and the conditions of and possibilities for human existence (e.g. what constitutes “just and favourable conditions of work”, an adequate standard of living, or the highest attainable standard of physical and mental health).

Finally, a State party that achieves full realisation of one or all of the recognised rights will continue to have duties under the Covenant. Principal amongst these will be the duties not to retrogress unjustifiably, and not to introduce unjustifiable limitations on the Covenant rights. I now discuss these duties.

### 3.6 Retrogressive measures and limitations: articles 2(1) 4, 5  and 8

The \textit{ICESCR} obliges States parties not to take unjustifiable retrogressive measures deliberately (i.e. measures which reduce the extent to which a recognised right is enjoyed within the state’s jurisdiction), and otherwise not to limit unjustifiably the enjoyment of a right set out in the Covenant. Subject to justifiable retrogression and maximum available resources, and until full realisation is achieved, State parties are required to improve “conditions over time without backward movement of any kind-in what may be described as a form of ‘ratchet effect’.”\textsuperscript{74}

\begin{footnotes}
\item[73] CESCR, \textit{General Comment 4}, 6th Sess., E/1992/23 (1991) at para. 8(c) [“\textit{General Comment 4}”].
\item[74] Craven, \textit{supra} note 8 at 131.
\end{footnotes}
The prohibition against unjustifiable retrogressive measures and other limitations, derived from article 2(1) and the limitations provision of the Covenant, article 4, is critically important. Without it, a state could postpone indefinitely the goal of full realisation of the Covenant rights (i.e. by taking one step forwards, and two steps backwards), arbitrarily reduce the level at which ESCR are enjoyed in that state’s jurisdiction, or limit rights in a way which renders them meaningless.

3.6.1 The relationship between article 2(1) and article 4 of the ICESCR

An issue of interpretation, however, arises in considering whether a retrogression is a “limitation” in terms of article 4, and therefore whether article 4 establishes the conditions that any retrogression must meet to be justifiable (i.e. any retrogression must be determined by law, be compatible with the nature of the rights it affects, and be for the purpose of promoting the general welfare in a democratic society). Clearly, a State may limit a right without the limitation being retrogressive. For example, limiting the extent that non-nationals enjoyed the right to health relative to nationals would not be retrogressive, unless non-nationals previously enjoyed that right equally with nationals. On the other hand, any retrogressive measure would also appear to be a limitation, as it would reduce the extent to which a particular right had been enjoyed.

The CESCR, however, appears to consider that retrogressive measures and limitations are distinct, while the Limburg Principles and the Maastricht Guidelines take a different view. Two scholars, Alston and Quinn, advance further possible interpretations. In an attempt to resolve this issue, I first describe the CESCR’s interpretation and that proposed by the Limburg Principles and the Maastricht Guidelines. Second, I consider Alston and Quinn’s analysis. Third, I propose a way forward.

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75 Art. 4 provides: “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

76 The Limburg Principles, supra note 6 at para. 48 interpret “determined by law” to require that “[n]o limitation on the exercise of economic, social and cultural rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.” See also paras 49-51.

77 The Limburg Principles, supra note 6 at para. 56 interpret “compatible with the nature of these rights” to require that “a limitation shall not be interpreted or applied so as to jeopardize the essence of the right concerned.”

78 The Limburg Principles, supra note 6 at para. 52 state that “promoting the general welfare” means “furthering the well-being of the people as a whole.”

79 The Limburg Principles, supra note 6 at paras. 53 and 54 affirm that the words “in a democratic society” impose “a further restriction on the application of limitations” and that “the burden is upon a State imposing limitations to demonstrate that the limitations do not impair the democratic functioning of the society.” For a detailed analysis of the meaning of all of art. 4’s conditions, see Alston and Quinn, supra note 56 at 194-206.

80 Alston and Quinn, supra note 56.
3.6.1.1 The CESCR’s interpretation

In General Comment 3, the CESCR states that “any deliberately retrogressive measures [...] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.” However, the CESCR does not make any reference to article 4.

In General Comment 19, the CESCR expands on this formulation. According to the CESCR, if a State party adopts any deliberately retrogressive measure (in this case, in relation to the right to social security), it has the burden of proving that the measure was “introduced after the most careful consideration of all alternatives and that [it is] duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party.” The CESCR also states that it would:

“look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.”

Once again, however, the CESCR does not refer to article 4.

In contrast, when the CESCR considers the permissible limitations in respect of particular rights, it does expressly refer to article 4. For example, in analysing the limitations to which the right in art. 15(1)(c) (to moral and material interests in one’s intellectual property) may be subject, the CESCR states that such limitations “must be determined by law in a manner compatible with the nature of these rights, must pursue a legitimate aim, and must be strictly necessary for the promotion of the general welfare in a democratic society, in accordance with article 4 of the Covenant.” The CESCR also considers that limitations must be proportionate, “meaning that the least restrictive measures must be adopted when several types of limitations may be imposed.”

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81 See also General Comment 3, supra note 38 at para. 9.
82 General Comment 19, supra note 64 at para. 42.
83 Ibid.
84 General Comment 17, 35th Sess. E/C.12/GC/17 (2006) at para. 22 [“General Comment 17”].
85 Ibid. at para. 23. Note also that the CESCR states at para. 24 that in certain circumstances, the imposition of limitations “for the use of scientific, literary or artistic productions in the public interest” could require the payment of compensation.
Accordingly, the CESCR appears to understand retrogressions as being in a different category from article 4 limitations, and therefore as not subject to the article 4 requirements. Although the test the CESCR has implied for determining the justifiability of retrogressions is similar to that set down in article 4, there is at least one important omission: the CESCR’s test does not require that the retrogressive measure be determined by law.

3.6.1.2 The Limburg Principles and the Maastricht Guidelines

The Limburg Principles, on the other hand, state that a State party will be in violation of the ICESCR if it limits a recognised right “other than in accordance with the Covenant” or “it deliberately retards or halts the progressive realisation of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure.” Therefore, the Limburg Principles apparently consider that retrogressions must come within article 4 to be justified, unless they are caused by a lack of available resources or force majeure.

The Maastricht Guidelines repeat the formulation set out in the Limburg Principles, but also somewhat confusingly add that a State party may violate the Covenant by adopting “any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed”, without stating specifically whether or not such a measure could be justified.

3.6.1.3 Alston and Quinn’s analysis

In their article, Alston and Quinn seek to interpret article 4 in light of the Covenant’s travaux préparatoires. First, they state that in a preliminary debate, the Covenant’s drafters saw article 4 as “dealing with limitations other than those that could be imposed under Article 2(1) on the grounds of limited resource availability”, and that the debate on article 4 “focussed on the need for measures to harmonize the relationship between the enjoyment of particular rights and the legitimate interests of the community.”

“… the permissive function of the limitations clause is to allow states to impose limitations where: (1) an unlimited interpretation of a right would lead to absurd results and would deny a state the necessary authority to enact detailed regulatory provisions; and (2) the various rights would otherwise clash with each other.”

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86 See also, for example, General Comment 14, supra note 38 at paras. 28-29 where the CESCR refers to “limitations” on the right to health (once again stating that such limitations “must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available”), and para. 48, where the CESCR refers to retrogressive measures.

87 Limburg Principles, supra note 6 at para. 72.

88 Maastricht Guidelines, supra note 7 at paras. 14(e) and (f).

89 Alston and Quinn, supra note 56 at 194. See also at 205.

90 Ibid. at 197.
other or with the legitimate interests of the state. Since the limitations clause does not purport to deal with limitations required by inadequate resource availability, and since it is difficult to see how such rights as those dealing with food, health care, housing, and clothing are readily susceptible to limitations on the aforementioned grounds, the question of the extent of the applicability of the limitations clause remains uncertain. In principle, however, it applies equally to all of the rights with the very important qualification that account must be taken of the compatibility of any proposed limitation with the nature of the rights in question. Thus, despite the misgivings of many delegates as to the possibility of limiting the enjoyment of rights such as the rights to food, health care, and housing for reasons other than resource scarcity, the limitations clause is applicable to all of the rights contained in Part III of the Covenant.”

Subsequently, however, Alston and Quinn state that the debates in the General Assembly’s Third Committee on the Covenant did not directly address the relationship between article 2(1) and article 4 (and seemingly consider that the preliminary debate referred to above does not resolve the issue).\(^91\) They therefore turn to the travaux préparatoires of the Commission on Human Rights (the body responsible for drafting the Covenant), and state that those in favour of article 4 considered that article 2 should only “relate to the general level of attainment of rights and should not be invoked by States as grounds for imposing numerous limitations on them. Article 2 did not indicate when limitations could be legitimate and it was necessary to state clearly that limitations would only be permissible under certain circumstances and in certain conditions.”\(^92\) Then, referring to a “resource-motivated reduction in the level of enjoyment/attainment of a particular right”, Alston and Quinn state:\(^93\)

“If, however, any such reduction is characterized as a limitation then it would need to be justified on the grounds that it was ‘solely for the purpose of promoting the general welfare’. While that requirement might not be too difficult for a government to fulfill, the need to make such a case on each occasion might have a salutary impact. Equally important, it would be necessary for the reduction to be determined by law (which would imply a prior evaluation by a legislative body) and to be adjudged compatible with the nature of the right in question. Such an interpretation is appealing on policy grounds and would seem to be entirely consistent with the aim of the drafters of ensuring that ‘States would not be free to limit the rights arbitrarily in any matter they might choose.’”

This latter discussion indicates that the purpose of article 4 is to recognise that there may be legitimate reasons for retrogressive measures and limitations other than resource scarcity, but also to ensure that all retrogressive measures and limitations meet the same criteria for legitimacy.

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\(^91\) See also in this regard Craven, who states (supra note 8 at 21) that the Third Committee adopted arts. 3 to 5 of the Covenant after “minimal discussion.”

\(^92\) Alston and Quinn, supra note 56 at 205.

3.6.1.4 A way forward

In my view, the Covenant properly interpreted requires all retrogressive measures and limitations which affect the Covenant rights (other than the rights in article 8(1)(a) and 8(1)(c))\textsuperscript{94} to be justified according to the article 4 conditions. This includes retrogressions which arise as the result of resource constraints.

A plain reading of article 4 supports this interpretation. Article 4 records the recognition of State parties that “the enjoyment of those rights provided by the State in conformity with the present Covenant” may only be subject to limitations where the conditions of article 4 are met. There is also no reason for interpreting a retrogression as something other than a limitation.

Further, the tests the CESCR has stated for determining the justifiability of retrogressions will be generally relevant to analysing compliance with article 4. For example, whether or not a State party has considered carefully all alternative options to a retrogressive measure will be relevant to determining whether the measure is proportionate.

However, as I now discuss, while a State party may rely on resource constraints to justify limitations to recognised rights, the same will not normally apply to limitations to guaranteed rights. In addition, while article 4 applies to any decision a State party makes to reduce the level of enjoyment of a recognised right, it does not apply to decision-making about whether or not to realise a right further.

3.6.1.4.1 The relevance of resource limitations to justification under article 4

Article 2(1) only obliges progressive realisation of recognised rights to the maximum of available resources. Therefore, where a retrogressive measure affects a recognised right, resource limitations may be relevant in determining the justifiability of the measure.

Resource limitations will not, on the other hand, generally be relevant to the justification of any limitation to guaranteed rights, such as the right to enjoy ESCR without discrimination on the prohibited grounds. For example, to the extent that a State party has to reduce the enjoyment of recognised rights because of resource constraints, the ICESCR requires it to do so in a non-discriminatory manner (although in some cases differentiation between citizens and non-citizens may be permissible).

If a State implements a retrogressive measure because there is genuinely a lack of available resources, and the measure is determined by law, it would seem likely that the article 4 requirements would be satisfied.

\textsuperscript{94} Limitations or retrogressions affecting the rights in article 8(1)(a) and 8(1)(c) are excluded from the ambit of article 4 because those rights have their own specific limitations provisions (discussed below).
However, the State should still be required to demonstrate that the measure meets the remaining article 4 conditions (e.g. that the measure is the least restrictive option available). The imposition of such conditions is consistent with ensuring that the ability to justify retrogression due to limited resources is tightly constrained, and is therefore prevented from being used as a mechanism by States parties seeking to escape or dilute their obligation of progressive realisation.

3.6.1.4.2 Non-application of article 4 to progressive realisation

Article 4 does not, however, apply to decision-making by States parties about how or whether to progressively realise a right beyond its current level of realisation. Strictly speaking, whenever a state decides not to take steps (including expenditure) to realise a particular right further, it is limiting that right. However, it would seem inconsistent with the more open-ended obligation of progressive realisation to the maximum of available resources to subject every decision by States related to the ongoing development of rights to the article 4 standards (and article 4 refers to “the enjoyment of those rights provided by the State in conformity with the present Covenant”, as opposed simply to referring to the rights set out in the Covenant). It may have been this issue that influenced the preliminary debate on article 4 that Alston and Quinn refer to, and the understanding that article 4 would not affect resource-related limitations to progressive realisation. My interpretation takes this understanding into account, but prioritises the concern of the Commission on Human Rights referred to above.

3.6.2 Article 8

Articles 8(1)(a) and (c) include specific limitations clauses that apply to certain trade union rights and the right to strike. Accordingly, article 4 does not apply to these rights, and any limitation or retrogression which affects them must be justified according to the conditions set out in the relevant articles.

Article 8(1)(d), on the other hand, records an undertaking by States parties to ensure “the right to strike, provided that it is exercised in conformity with the laws of the particular country”; and article 8(2) permits lawful restrictions on the exercise of trade union rights by members of the armed forces, the

95 Art. 8(1)(a) and (c) provide “1. The States parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others[.]; (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others[.]”

96 For a detailed analysis of the art. 8 limitations, including art. 8(3), see Alston and Quinn, supra note 56 at 209-216.
police, or the state administration. Such restrictions must also be subject to article 4, and particularly its requirement that any limitation of a right be compatible with the nature of that right. For example, although a particular law in a State party regarding the right to strike could be duly promulgated in terms of that state’s domestic law, it could not be legitimate under the Covenant if the law restricted the right in a way that rendered it meaningless.

3.6.3 Article 5

Article 5 also acts as a limitations provision of sorts. Article 5(1) states the important principle that the Covenant may not be interpreted in a way which would permit an act aimed at the destruction of any of the rights set out in the Covenant, or an act aimed at the limitation of those rights to a greater extent than that provided for in the Covenant. Article 5(2) provides that the Covenant may not be used to undermine fundamental human rights already recognised within a particular country on the basis that the Covenant does not recognise such rights, or recognises them to a lesser extent.

3.7 Legislative measures and remedies

3.7.1 Recognised rights

State parties are not obliged to incorporate the ICESCR directly in their domestic legal order, or give it any particular status in domestic law. Further, according to Craven “the reference to legislative action in article 2(1), although indicating a preferred method of implementation, did not alter the fundamental principle of State discretion in the choice of means to undertake its obligations under the Covenant.”

In its General Comments, however, the CESCR focuses on the reference in article 2(1) to “all appropriate means”. Relying on these words, it considers that the Covenant’s rights and obligations must be given appropriate recognition within domestic law, and there must be appropriate mechanisms for ensuring state accountability. As part of meeting their obligation of good faith, State parties should also ensure that ICESCR obligations are taken into account in administrative decision-making.

97 Art. 8(2) provides: “This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.”
98 See also Alston and Quinn, supra note 56 at 206-209.
99 Art. 2(1) and General Comment 9, supra note 17 at para. 5.
100 Craven, supra note 8 at 125.
101 General Comment 9, supra note 17 at para. 2. See also the Limburg Principles, supra note 6 at para. 19 and the Maastricht Guidelines, supra note 7 at paras. 22 and 23.
102 General Comment 9, supra note 17 at 9.
In relation to remedies, the CESCR’s view is that the victims of a violation of any of the protected rights “should have access to effective judicial or other appropriate remedies”\textsuperscript{103} including reparation. The “right to an effective remedy need not be interpreted as always requiring a judicial remedy”, as administrative remedies may be adequate.\textsuperscript{104} However, “a State party seeking to justify its failure to provide any domestic legal remedies for violations of [ESCR] would need to show either that such remedies are not ‘appropriate means’ within the terms of article 2, paragraph 1, of the [ICESCR] or that, in view of the other means used, they are unnecessary.”\textsuperscript{105}

The CESCR has also stated that “in many instances legislation is highly desirable and in some cases may even be indispensable”.\textsuperscript{106} In subsequent General Comments, the CESCR has elaborated on this point, and provided examples of certain rights or elements of those rights which it considers cannot be adequately protected in the absence of legislation. These include the right not to be arbitrarily evicted from one’s home (an element of the right to housing);\textsuperscript{107} the intellectual property rights recognised in article 15(1)(c) of the Covenant;\textsuperscript{108} and the right to work (which the CESCR considers must be protected by at least the legislative prohibition of forced or compulsory labour).\textsuperscript{109} Generally, “whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”\textsuperscript{110}

Further, while states have a discretion as to how they recognise ESCR in national law, “the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party”.\textsuperscript{111} In deciding on how (or whether) to give the Covenant effect in domestic law, a State party should take account “of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Where the means used to give effect to the Covenant […] differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this […]”.\textsuperscript{112} This is because:\textsuperscript{113}

\textsuperscript{103} See, for example, General Comment 12, supra note 18 at para. 32; General Comment 14, supra note 38 at para. 59; and General Comment 19, supra note 64 at para. 77.
\textsuperscript{104} General Comment 9, supra note 17 at para. 9.
\textsuperscript{105} Ibid. at para. 3. See also the Maximum Available Resources Statement, supra note 51 at para. 3.
\textsuperscript{106} General Comment 3, supra note 38 at para. 3.
\textsuperscript{107} CESCR, General Comment 7, 16th Sess., E/1998/22 (1997) at para. 9 [“General Comment 7”].
\textsuperscript{108} General Comment 17, supra note 84 at para. 51.
\textsuperscript{109} General Comment 18, supra note 27 at para. 25.
\textsuperscript{110} General Comment 9, supra note 17 at para. 9.
\textsuperscript{111} Ibid. at para. 5. See also General Comment 3, supra note 38 at para. 5, where the CESCR “notes, for example, that the enjoyment of the rights recognized, without discrimination will often be appropriately promoted, in part, through the provision of judicial or other effective remedies.”
\textsuperscript{112} General Comment 9, supra note 17 at para. 7.
\textsuperscript{113} Ibid. at para. 10.
“The adoption of a rigid classification of economic, social and cultural rights which puts them, by
definition, beyond the reach of the courts would [...] be arbitrary and incompatible with the principle that
the two sets of human rights are indivisible and interdependent. It would also drastically curtail the
capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”

The CESCR’s analysis must be correct. While there is no absolute requirement in the Covenant to adopt
legislation in respect of the recognised rights, there is an obligation to progressively achieve full
realisation by all appropriate means. Where legislation would appear to be an appropriate means for, for
example, protecting a particular right or an element of that right, a State party acting in good faith should
give due consideration to enacting legislation.\(^{114}\) Further, if a State party subsequently decides not to
enact such legislation, it should have a reasonable justification for that decision.

It also logically flows from the obligation of progressive realisation, and the corresponding obligation not
to take deliberate and unjustifiable retrogressive steps, that if a State party puts in place judicial remedies
or protects any of the recognised rights through legislation, it may not remove such remedies or protection
without meeting the article 4 standards for justification.\(^{115}\)

Finally, the reference to “all appropriate means” including but not limited to legislative measures makes it
plain that a State party’s obligation in respect of a particular recognised right is not fulfilled simply by
enactment of legislation. The state will also need to take whatever other measures are appropriate to
realise each right.

### 3.7.2 Guaranteed rights

The situation is different in relation to rights which are not subject to article 2(1), and which State parties
have undertaken to guarantee or to ensure (such as freedom from discrimination or the equal right of men
and women to enjoy ESCR). In such relation to such rights, there must be an unqualified obligation to
legislate and to provide judicial remedies in cases of breach. A State party who fails to take such steps
can hardly be said to be fulfilling its guarantee.\(^{116}\)

\(^{114}\) Art. 6 of the \textit{ICESCR}, regarding the right to work, provides that State parties will take “appropriate steps to
safeguard this right.” This wording supports an argument that there is a heightened obligation to legislate in respect
of this right.

\(^{115}\) See the Maastricht Guidelines, \textit{supra} note 7 at para. 14(a).

\(^{116}\) The CESCR has essentially endorsed this position. In \textit{General Comment 9}, \textit{supra} note 17 at para. 9 the CESCR
states “there are some obligations, such as (but by no means limited to) those concerning non-discrimination, in
relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the
requirements of the Covenant.” In \textit{General Comment 20, 42nd Sess., E/C.12/GC/20} (2009) [“\textit{General Comment 20}”], the CESCR
strengthened its earlier statement by stating at para 37 that “[a]doption of legislation to address
discrimination is indispensable in complying with article 2, paragraph 2”. See also \textit{General Comment 20} at para. 40.
3.8 Obligations to respect, protect and fulfil, and essential features of rights

3.8.1 Respect, protect and fulfil

In addition to the obligations set out above, the CESCR has affirmed that, as is the case with any other human right, State parties are obliged to respect, protect and fulfil the rights enunciated in the *ICESCR*. The obligation to fulfil is comprised of two additional elements: an obligation to facilitate and an obligation to provide.

The obligation to respect requires State parties not to interfere unjustifiably\(^{117}\) with the enjoyment of any ESCR (e.g. a State party who arbitrarily evicts an individual violates that individual’s right to housing). The obligation to protect requires that State parties protect individuals against third party violations of their ESCR (e.g. a State party failure to ensure that employers meet health and safety standards may constitute a violation of the right to work). The obligation to fulfil requires State parties to take action intended to improve people’s access to the resources (whether material, institutional, legal or otherwise) they require to realise their ESCR (facilitation); and to provide such resources directly where individuals or groups cannot, for reasons beyond their control, realise their ESCR without such assistance (provision).\(^{118}\)

The extent of the obligation to provide in relation to any specific right is, however, delimited by the Covenant’s text. For example, under article 13(2) (the right to education) State parties recognise that primary education “shall be compulsory and available free to all”, whereas free secondary and higher education is to be progressively introduced. Further, while State parties recognise that secondary education “shall be made generally available accessible to all by every appropriate means”, higher education is to be made equally accessible, but “on the basis of capacity.” Accordingly, the nature of the

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\(^{117}\) I note that many of the CESCR’s statements regarding the obligation to respect do not include this qualification. For example, in relation to the right to adequate food, the CESCR states in *General Comment 12, supra* note 18 at para. 15 that “the obligation to respect existing access to adequate food requires State parties not to take any measures that result in preventing such access.” [emphasis in original] In relation to the right to education, the CESCR states in *General Comment 13, supra* note 60 at para. 47 that “[t]he obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education.” However, a State party must be permitted to limit a person’s enjoyment of a particular right where such a limitation does not constitute a breach of the Covenant (e.g. is not discriminatory) and otherwise comes within the Covenant’s limitations provisions. For example, in some circumstances a school must be able to suspend a student (provided that the suspension is procedurally and substantively fair) where the student’s behaviour is interfering with the education of other students. Such an action could negatively impact upon the suspended student’s right to education, but it would be difficult to argue that because of this, no school should have the power to suspend a student.

\(^{118}\) See, for example, *General Comment 12, supra* note 18 at para. 15; *General Comment 13, supra* note 60 at para. 46; and *General Comment 14, supra* note 38 at para. 33.
obligation to provide the right to education differs in relation to primary, secondary and higher education.\textsuperscript{119}

More generally, the obligations of State parties to respect, protect and fulfil the recognised rights would appear to be subject to maximum available resources. However, it would be reasonable to expect a State party to adopt appropriate measures at least in relation to the obligations to respect and protect recognised rights soon after ratification of the Covenant (if such measures are not already in place). Both of these obligations are likely to be less resource-intensive than the obligation to fulfil.

\subsection*{3.8.2 Essential features}

In various General Comments, the CESCR has also introduced what it refers to as the “essential features” of rights, which it considers that States parties must respect, protect and fulfil. These features are availability, accessibility, acceptability, adaptability, and quality. For example, in relation to the right to education, “availability”, “accessibility” and “acceptability” require amongst other things that there must be a system of schools which delivers educational programmes of a reasonable quality, and which is accessible to all on a non-discriminatory basis. However, the precise content of these features varies from right to right, and each feature does not necessarily apply to every right.\textsuperscript{120}

\subsection*{3.9 Measures in respect of non-state actors}

The ICESCR only binds States parties to it. Private individuals and organisations have no direct obligations under it, even though their acts can significantly affect the extent to which ESCR are enjoyed (e.g. a private employer who discriminates against employees on the grounds of race affects the ability of those employees to enjoy their ESCR).

Because of this, and because of a tendency in State parties to privatisate the delivery of services relevant to ESCR which the state had formerly delivered, the CESCR has emphasised the need for States parties to regulate the private sector so that ESCR are not compromised. Such regulation might include laws

\textsuperscript{119} See General Comment 13, supra note 60 at paras. 46-48. See also the Maastricht Guidelines, supra note 7 at para. 6, which state: “State parties must take “appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation” of ESCR. At para. 7, the Maastricht Guidelines also affirm that the ICESCR imposes obligations of conduct (e.g. the taking of steps to realise a particular right) and obligations of result (i.e. the achievement of a specific standard).

\textsuperscript{120} See, for example, General Comment 12, supra note 18 at paras. 12-13 (referring to availability, accessibility and acceptability); General Comment 13, supra note 60 at para. 50 (referring to availability, accessibility, acceptability and adaptability); and General Comment 18, supra note 27 at para. 12 (referring to availability, accessibility, acceptability and quality).
prohibiting discrimination, codes of conduct for the private sector (e.g. relevant to the right to adequate food), and laws restraining third parties from interfering with rights (e.g. from denying equal access to adequate water, or polluting water supplies).

The fact that private individuals and organisations can affect (both positively and negatively) the progressive realisation and enjoyment of ESCR demonstrates that the adoption of legislative measures to respect, protect and fulfil ESCR will often be an appropriate means to progressively realise ESCR and to protect gains already made. Each State party must create a framework which is conducive to such realisation and which prohibits actions or omissions which violate the Covenant. Therefore, a State party cannot justify a failure to meet its obligations under Covenant on the basis that as a matter of national law or policy, it is not responsible for the action or omission in question (e.g. attempting to justify a lack of non-discriminatory access to adequate water on the basis that national water supplies are largely or completely controlled by a private company).

3.10 Monitoring

In General Comment 1, the CESCR states: “the essential first step towards promoting the realisation of economic and social and cultural rights is diagnosis and knowledge of the existing situation.” The CESCR points out that state reports under the Covenant “provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards realisation of the obligations contained in the Covenant”, and invites each State party to identify benchmarks or standards against which its progress can be assessed. It further notes that global benchmarks may be of limited use, “whereas national or other more specific benchmarks can provide an extremely valuable indication of progress.”

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121 See, for example, CESCR, General Comment 5, 11th Sess., E/1995/22(SUPP) (1994) at para. 11 (“General Comment 5”) regarding persons with disabilities, and General Comment 14, supra note 38 at para. 26, regarding the right to health.
122 General Comment 12, supra note 18 at para. 20.
123 General Comment 15, supra note 38 at para. 23.
124 See also the Maastricht Guidelines, supra note 7 at para. 18, which state: “The obligation to protect includes the State’s responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-State actors.”
126 Ibid. at para. 6.
127 Ibid.
In later General Comments, the CESCR emphasises the importance of national indicators and benchmarks\(^{128}\) for recognised rights, stating that States parties should identify them.\(^{129}\) It also states that data should be disaggregated by the prohibited grounds of discrimination, so that de facto discrimination can be identified.\(^{130}\)

Essentially, therefore, the CESCR has interpreted the Covenant to include an implicit and immediately applicable obligation on States parties to monitor ESCR realisation in their jurisdictions.\(^{131}\) This obligation is entirely consistent with States parties’ express obligations under the Covenant, and indeed is of critical importance to the performance of those obligations. Without having a clear understanding of the level to which ESCR are exercised or enjoyed within its jurisdiction, it will be very difficult, if not impossible, for a State party to make informed decisions about the steps it needs to take to progressively realise ESCR.

### 3.10.1 Establishing baselines

Comprehensive information about the status of ESCR within a State party jurisdiction is not only critical for determining what the state needs to do to move forward, but also for determining whether any particular action by the state constitutes a retrogressive step. In this regard, the state reporting mechanism under the Covenant assumes even greater importance.\(^{132}\) If done properly,\(^{133}\) and with reference to national indicators, the state report should be able to identify baselines which represent the average levels at which the recognised rights have been realised within that state (e.g. what constitutes adequate housing and the number of people with and without adequate housing). Further, so that a State party’s progress can be properly evaluated, a state report should include a comparative analysis of the average level of realisation of each right in the previous and current reporting periods.

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\(^{128}\) In “What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement” (2001) 23 Human Rights Quarterly 1062-1097 at 1066, Maria Green states that there are various definitions for “indicator” currently being used in human rights literature. Her definition for the term is as follows: “A Human Rights Indicator is a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation.” Green further defines “benchmarks” at 1081 as “goals or targets that are specific to the individual circumstances of each country.”

\(^{129}\) See, for example, General Comment 14, supra note 38 at para. 57.

\(^{130}\) General Comment 13, supra note 60 at para. 8.

\(^{131}\) General Comment 4, supra note 73 at para. 13.

\(^{132}\) Art. 16(1) of the ICESCR provides: “The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.”

\(^{133}\) In other words, in accordance with the CESCR’s Guidelines on Treaty-Specific Documents to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/2008/2 (2009).
3.11 Consultation and participation

A fundamental requirement of progressive realisation, effective monitoring, and indeed good governance is understanding what people need to realise ESCR to a greater extent, and the problems that people face in exercising or seeking to access those rights. The CESCR recognises this in a number of General Comments, and states that State parties should carry out regular consultation in relation to ESCR. Further, it considers that individuals and groups have a right to participate on an informed basis in the formulation and implementation of policies or other measures which affect them.134

3.12 Special measures

In the CESCR’s view, the undertaking by States parties in article 2(2) to guarantee that ESCR will be exercised without discrimination does not prohibit “special measures” in favour of disadvantaged individuals or groups.135 In fact, according to the CESCR, in some cases State parties are obliged to adopt such measures to fulfil their obligations under the Covenant.136 Such measures must, however, be reasonable, objective and proportional, and must not be continued once the disadvantage at which they are aimed has been resolved.137

This does not mean that an individual under the jurisdiction of a State party is entitled to state assistance to assist him or her to achieve, for example, the same standard of living as every other person within that state, or that the State party must redistribute all the wealth within its jurisdiction equally. Instead, each individual is entitled not to be discriminated against in the exercise of the recognised rights, and is entitled to satisfaction of the minimum essential levels of each of the recognised rights unless resource constraints prevent this.

It follows that once baselines have been established which represent the average level of realisation of each of the recognised rights within a State party, that state should, within maximum available resources, adopt special measures to bring any individual who does not already enjoy the recognised rights to that...
level up to the baseline (insofar as that is within the state’s control). Such individuals should receive priority attention, and their needs should be prioritised over further progressive realisation for the rest of the population. If this does not occur, it is likely that these individuals will be left further and further behind as progressive realisation continues.

Such special measures, provided they are reasonable and proportionate, cannot contravene the prohibition against discrimination in article 2(2). This is because they can only be legitimate under the Covenant where the individuals that they are aimed at are not enjoying the recognised rights up to the baseline. Therefore, any other person cannot be disadvantaged by such measures, or any disadvantage is justifiable.

3.12.1 An obligation of direct provision?

While State parties have an obligation to provide special measures in the circumstances discussed above, they do not necessarily have an obligation to provide directly the resources an individual requires to enjoy the recognised right up to the baseline. While such special measures could include direct provision, and the decision of whether direct provision should or should not occur is subject to review by the CESCR, the decision is ultimately for the state. This is because while in some cases direct provision may well be the only rational option open to the state (e.g. following the failure of a series of measures not including direct provision to resolve disadvantage), this will not always be the case.

3.13 Individuals enjoying baseline realisation and beyond

Within any State party, there are likely to be individuals enjoying realisation of the recognised rights up to the baseline, and also individuals whose recognised rights are already fully realised. The obligation of States parties in respect of the former is to continue progressive realisation. In respect of those whose rights are fully realised, States parties do not need to take any action other than ensuring that their rights are respected and protected. For example, a State party may assume that a person who is living in luxurious accommodation has fully realised his or her right to adequate housing, and therefore there is no obligation to assist that person to improve his or her living conditions. The state must, however, still respect that person’s right by not, for example, unlawfully confiscating that person’s property from them. The state is also required to protect that person from unlawful interference by third parties.

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138 If, for example, a responsible adult refused to take an entitlement to social security, or to health services, it is difficult to see how a State party could be (absent special circumstances) held responsible for this.

“If this right were a positive right it would verge on absurdity. It would raise the spectacle of wealthy entrepreneurs claiming that the government must ensure the continuous improvement of their living conditions, irrespective of the success of their own business activities. It also apparently means that the government must insure every person against a fall, or even stagnation, in their living standards, thereby removing one of the major incentives to self-improvement.”

Craven, however, points out that the reason for inserting the phrase “continuous improvement of living conditions” was to give the right to an adequate standard of living a “dynamic character.”\footnote{140 Craven, supra note 8 at 294.} Therefore, the purpose of the phrase is to ensure that States parties continue to modify their definition of adequacy over time: clearly, what might constitute adequate food, clothing and housing in 1970 will not necessarily be the same as what constitutes adequate housing in 2010. This means that the right to continuous improvement is tied to, and limited by, the right to an adequate standard of living. It is not a stand-alone right, which everyone is entitled to demand regardless of the circumstances in which they live. Interpreted this way, the phrase does not lead to absurdity, but rather is consistent with the Covenant’s overall objectives.

The Covenant does, however, require States parties to provide certain levels of social insurance to all persons within their jurisdiction. If, for example, a wealthy person were to become bankrupt, he or she would be entitled to rely upon the state for assistance to the maximum of that state’s available resources, both in respect of satisfying his or her minimum essential levels of ESCR, and in bringing him or her back up to the baseline. There appears little reason to think that such social insurance would remove incentives for self-improvement. It is reasonable to assume that most people would, if they could, live beyond the baseline (including beyond full realisation of the right to an adequate standard of living). Under the Covenant, achieving such elevated standards of living is entirely the responsibility of the individual.

Understanding this also resolves a concern that Craven raises in respect of article 11, which is that it may not in fact create an individual right, “if it is conceded that only the poor have a right to the ‘continuous
improvement of living conditions’.”141 The correct interpretation is that all individuals within the jurisdiction of a State party have rights under the Covenant, but individuals living at or above the baseline, or who have fully realised their ESCR, have less active rights than individuals below the baseline. Put another way, an individual who enjoys fully realised ESCR may be seen as holding latent rights, which may be triggered if that individual ceases to enjoy the rights at that level.

This is no different from, for example, an individual who is presently able to exercise his or her rights to freedom of expression. That individual would not have a present claim against the state for breach, as there has been none, and therefore the state owes nothing to the individual. However, were a breach to occur sometime in the future, the individual could then rely on his or her right to bring a claim. This obviously does not mean that for as long as the individual enjoys his or her right to freedom of expression, the individual does not have that right. Instead, it means that the individual has no reason to look to the state for anything for as long as that enjoyment continues. The same logic must apply to the enjoyment of ESCR.

3.14 Violations

A State party may violate its obligations under the Covenant by action and through omission. According to the Maastricht Guidelines, violations through “acts of commission” include “the formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed”; “the adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realisation of economic, social and cultural rights for the most vulnerable groups”; and the adoption of unjustifiable and deliberately retrogressive measures.142

Violations by omission include failing to take appropriate steps to progressively realise the recognised rights; failing “to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant”; failing to monitor ESCR realisation adequately; and failing to “implement without delay a right which [the state] is required by the Covenant to provide immediately.”143 The CESCR’s General

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141 Ibid. at 295. The apparent concern that a right cannot be a right if it does not apply to all persons, no matter their individual characteristics or status, appears somewhat misplaced. For example, art. 6(5) of the ICCPR provides that: “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age”, thus bestowing an right on all persons below 18 years of age which does not apply to all other persons. The fact that this right is qualified or limited to a particular group of persons does not prevent it from being a human right. See also art. 27 of the ICCPR (minority rights) and arts. 10(2) and (3) of the ICESCR (regarding protection for mothers and children).

142 Maastricht Guidelines, supra note 7 at para. 14.

143 Maastricht Guidelines, supra note 7 at para. 15.
Comments also provide examples of actions or omissions which the CESCR considers to be inconsistent with particular Covenant rights and obligations.\textsuperscript{144}

### 3.15 The Politics of the ICESCR

In its General Comment 3, the CESCR states that “in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach.”\textsuperscript{145} Rather, “the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems […].”\textsuperscript{146} The CESCR does, however, qualify that the Covenant requires each State party to be democratic and respectful of all human rights.

The CESCR’s understanding is reflected in General Comment 4 on the right to adequate housing, where the CESCR states:\textsuperscript{147}

> “Measures designed to satisfy a State party’s obligation in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate. While in some states public financing of housing might most usefully be spent on direct construction of new housing, in most cases, experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing. The promotion by State parties of ‘enabling strategies’, combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged. In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the maximum of available resources.”

Accordingly, the ICESCR does not make the use of a certain economic system mandatory, and does not require or even envisage that the state will always provide directly all of the resources required to realise ESCR.

However, the Covenant is predicated on the basis that if the rights are not realisable fully or in part by other means, such as through reliance on market forces, the state is required to meet the shortfall to the maximum of its available resources. Further, because the state is ultimately responsible for compliance with the Covenant, it must maintain a central role. Once again, this central role does not necessarily

\textsuperscript{144} See, for example, \textit{General Comment 12}, supra note 18 at para. 19; \textit{General Comment 13}, supra note 60 at paras. 59; \textit{General Comment 14}, supra note 38 at paras. 50 to 52; and \textit{General Comment 19}, supra note 64 at paras. 64 and 65.

\textsuperscript{145} \textit{General Comment 3}, supra note 38 at para 8.

\textsuperscript{146} Ibid.

\textsuperscript{147} \textit{General Comment 4}, supra note 73 at para 14.
require the state to engage in direct provision, but it does mean that as discussed above the state is obliged to monitor the realisation of the ESCR, and intervene where necessary to correct failures or imbalances.

In addition, despite the Covenant’s degree of neutrality in respect of the type of system that must be used for the realisation of ESCR, the Covenant is political in that it promotes and makes legally binding a certain set of values and posits as an ideal a certain type of society. However, in this it is no different from the ICCPR, any other national constitution, or the New Zealand Bill of Rights Act 1990.

In any case, through its ratification of the Covenant, New Zealand has affirmed the Covenant’s values and accepted as binding upon it the obligations the Covenant imposes. So has the majority of the international community: 160 states including New Zealand are currently parties to the Covenant. The considerable degree of adhesion to the Covenant demonstrates the wide acceptance of its values and objectives.

4 CONCLUSION

The ICESCR and the ICCPR are the major instruments in the legal framework established by the international community to achieve the objective of free human beings enjoying freedom from fear and want. In obtaining that objective, the realisation of the rights and obligations of the ICESCR is as important as the fulfilment of those set out in the ICCPR.

Each State party to the ICESCR must organise the state apparatus and regulate the areas within its jurisdiction in a way which ensures compliance with the state’s obligation to perform its duties under the Covenant in good faith. The Covenant rights do not have in every case an absolute priority over other rights or demands on the state. However, neither are they subordinate. Consistent with the obligation to take steps to realise the recognised rights progressively, with other Covenant obligations and guarantees, and most importantly, with the nature of ESCR as human rights, they must be accorded a certain priority. The Covenant is flexible, but only in some respects, and even then its flexibility has limits.

148 See Phillip Alston, “Making Economic and Social Rights Count: A Strategy for the Future” (1997) The Political Quarterly 188 at 190, who states: “In fact, there are two principal causes of the overall neglect of economic and social rights. The first is a deep and abiding ideological resistance to these rights. For good reason, those who are entirely committed to an undiluted free market ideology have profound difficulties with economic and social rights (even though the extent to which direct governmental interference or action is required in order to ensure respect for economic and social rights is frequently overstated). […] For, like civil and political rights, these rights do not constitute a neutral set of beliefs: they are ideological, in the sense of representing fundamental values which are being promoted intrinsically for their own sake.”

<table>
<thead>
<tr>
<th>Right</th>
<th>State party obligation</th>
<th>Subject to progressive realisation?</th>
<th>Subject to maximum available resources?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Self-determination (Art. 1)</td>
<td>Respect, protect and fulfil right</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Right to have State take steps to progressively realise recognised rights (Art. 2(1))</td>
<td>Take steps to progressively realise recognised rights</td>
<td>No</td>
<td>Yes (in terms of the actual steps taken)</td>
</tr>
<tr>
<td>Right to freedom from discrimination on listed grounds in exercise of Covenant rights (Art. 2(2))</td>
<td>Guarantee right</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Equal right of men and women to enjoyment of Covenant rights (Art. 3)</td>
<td>Ensure right</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Right to enjoy Covenant rights free from unjustifiable limitation or retrogression (Art. 4)</td>
<td>Not limit rights or implement retrogressive measures unless article 4 conditions are met</td>
<td>No</td>
<td>No in respect of immediately applicable rights; relevant factor in respect of recognised rights</td>
</tr>
<tr>
<td>Right</td>
<td>State party obligation</td>
<td>Subject to progressive realisation?</td>
<td>Subject to maximum available resources?</td>
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<tr>
<td>Right to work and to enjoy just and favourable conditions of work (Arts. 6 and 7)</td>
<td>Respect, protect and fulfil right by all appropriate means (including steps expressly listed in art. 6(2))</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to form and join trade unions of one’s choice (Art. 8(1)(a))</td>
<td>Ensure right (listed limitations permissible)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Right of trade unions to establish national federations or confederations, and right of confederations to form or join international trade union organisations (Art. 8(1)(b))</td>
<td>Ensure right (article 4 limitations permissible)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Right of trade unions to function freely (Art. 8(1)(c))</td>
<td>Ensure right (listed limitations permissible)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Right to strike (Art. 8(1)(d))</td>
<td>Ensure right (article 4 limitations permissible)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Right to social security (Art. 9)</td>
<td>Respect, protect and fulfil right by all</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right</td>
<td>State party obligation</td>
<td>Subject to progressive realisation?</td>
<td>Subject to maximum available resources?</td>
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<tr>
<td>Right to protection and assistance (family) (Art. 10(1))</td>
<td>Respect, protect and fulfil right by all appropriate means</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to special protection (mothers) (Art. 10(2))</td>
<td>Respect, protect and fulfil right by all appropriate means</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to special measures of protection and assistance (children and young persons) (Art. 10(3))</td>
<td>Respect, protect and fulfil right by all appropriate means</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to an adequate standard of living, including adequate food, clothing and housing (Art. 11)</td>
<td>Respect, protect and fulfil right by all appropriate means (including steps expressly listed in art. 11(2))</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to the enjoyment of the highest attainable standard of physical and mental health (Art. 12)</td>
<td>Respect, protect and fulfil right by all appropriate means (including steps expressly listed in art. 12(2))</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to education (Art. 13)</td>
<td>Respect, protect and fulfil right by all</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right</td>
<td>State party obligation</td>
<td>Subject to progressive realisation?</td>
<td>Subject to maximum available resources?</td>
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<tr>
<td>Right of parents and legal guardians to choose schools for their children, and to ensure religious and moral education of children in accordance with their convictions (Art. 13(2))</td>
<td>Respect and protect right (subject to art. 13(3) conditions, such as conformity with minimum educational standards)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Right to have state work out and adopt a detailed plan of action for the progressive implementation of free compulsory education, where such education has not been secured (Art. 14)</td>
<td>Where applicable, work out and adopt detailed plan of action</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Right to take part in cultural life (Art. 15(1)(a))</td>
<td>Respect, protect and fulfil right by all appropriate means (including steps expressly listed in art art. 15(2))</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right</td>
<td>State party obligation</td>
<td>Subject to progressive realisation?</td>
<td>Subject to maximum available resources?</td>
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</tr>
<tr>
<td>Right to enjoy the benefits of scientific progress and its applications (Art. 15(1)(b))</td>
<td>Respect, protect and fulfil right by all appropriate means (including steps expressly listed in art 15(2))</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to benefit from the protection of the moral and material interests arising from any scientific, literary or artistic production of which one is the author (Art. 15(1)(c))</td>
<td>Respect, protect and fulfil right by all appropriate means (including steps expressly listed in art 15(2))</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to the freedom indispensible for scientific research and creative activity (Art. 15(3))</td>
<td>Respect and protect right</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Submit state reports in conformity with Covenant regarding the measures adopted and the progress made in achieving the observance of the Covenant rights (Art. 16)</td>
<td>Submit state reports in conformity with Covenant regarding the measures adopted and the progress made in achieving the observance of the Covenant rights (Art. 16)</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>Right</strong></td>
<td><strong>State party obligation</strong></td>
<td><strong>Subject to progressive realisation?</strong></td>
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<tr>
<td>Right to minimum essential levels of the recognised rights</td>
<td>Satisfy minimum essential levels</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to full realisation of the recognised rights</td>
<td>Achieve full realisation by all appropriate means</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Right to have state monitor the extent of realisation of the Covenant rights</td>
<td>Monitor extent of realisation of the Covenant rights</td>
<td>No</td>
<td>Yes (extent of monitoring may be affected by maximum available resources)</td>
</tr>
<tr>
<td>Right to consultation and informed participation in respect of ESCR</td>
<td>Consult regarding ESCR, and ensure that people can participate on an informed basis in the design and implementation of measures that may affect their ESCR</td>
<td>No</td>
<td>Yes (extent of consultation may be affected by maximum available resources)</td>
</tr>
<tr>
<td>Right to special measures if enjoyment of ESCR is below baseline</td>
<td>Implement special measures in good faith, aimed at bringing disadvantaged individuals up to the baseline</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>
Chapter 2
ESCR in New Zealand

1 INTRODUCTION

The purpose of this chapter is to examine the legal status ESCR have in New Zealand domestic law. I begin Part I by summarising the relationship between international treaties and the domestic legal system. I then describe the recognition given to CPR in the New Zealand Bill of Rights Act 1990 [NZBORA]¹ and the Human Rights Act 1993 [HRA]² (which is almost exclusively concerned with discrimination) and the beneficial effects that have flowed from this. I note that ESCR are generally not included in the NZBORA, and explain the reasons for this.

In Part II, I concentrate on the recognition that ESCR do have in domestic law, noting the significant omissions and some of the effects of ESCR’s considerably lesser status. In Part III, I refer to New Zealand jurisprudence to analyse in greater depth the effects of this lesser status; and to demonstrate that unlike the ICCPR, the ICESCR is largely irrelevant to domestic law and litigation. In Part IV, I review the New Zealand government’s position on ESCR, as well as referring to the views of academics, the New Zealand Human Rights Commission, and members of civil society.

2 PART I: INTERNATIONAL TREATIES, DOMESTIC LAW AND CPR RECOGNITION

2.1 New Zealand: a dualist system

Because New Zealand has ratified the ICESCR and the ICCPR, as a matter of international law each Covenant is binding upon New Zealand, and the state must carry out its obligations under each Covenant in good faith.³ However, under New Zealand domestic law an international treaty to which the state is a party does not become part of the domestic legal system until it is incorporated by an Act of Parliament.⁴ Until such time, while the treaty may be used as an aid in statutory interpretation,⁵ or may be a relevant

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¹ (N.Z), 1990/109.
² (N.Z.), 1993/82.
⁴ See Ashby v. Minister of Immigration [1981] 1 N.Z.L.R 222 at 229 (C.A.), Richardson J (as he then was) [“Ashby v. Minister of Immigration”].
⁵ Ibid. at 229, Richardson J (as he then was): “…even though treaty obligations not implemented by legislation are not part of our domestic law, the Courts in interpreting legislation will do their best conformably with the subject-matter and the policy of the legislation to see that their decisions are consistent with our international
consideration in administrative decision-making, an individual cannot enforce his or her rights under the treaty in the domestic courts. Further, even when Parliament chooses to give domestic effect to rights recognised in an international treaty by passing legislation, it is not obliged as a matter of New Zealand law to incorporate all such rights, or to incorporate them in the same terms as they are recognised in the treaty.

Accordingly, as a matter of domestic law, Parliament has absolute discretion to decide whether, and in what terms, individuals under its jurisdiction will have the benefit of the rights enunciated in the ICESCR and ICCPR.

2.2 Effect given to CPR in the domestic legal system

Unlike the United States of America, for example, New Zealand does not have a supreme law constitution which entrenches a range of CPR. However, Parliament has, to a certain extent, given domestic effect to many of the CPR recognised in the ICCPR through the NZBORA and HRA. For example, under the NZBORA everyone has the right not to be deprived of life; the right not to be subjected to torture or cruel treatment; the right to freedom of association; the right to freedom from discrimination on the grounds set out in the HRA; the right to be secure against unreasonable search or seizure; the right not to be arbitrarily arrested or detained; and the right to minimum standards of criminal procedure. Further, the obligations...But if the terms of the domestic legislation are clear and unambiguous they must be given effect in our Courts whether or not they carry out New Zealand’s international obligations. See for example Tavita v. Minister of Immigration [1994] 2 N.Z.L.R 257, 266 (C.A.) where Cooke P (as he then was) stated: “In Ashby v. Minister of Immigration [...] there were recognitions in this Court that some international obligations are so manifestly important that no reasonable Minister could fail to take them into account [...] Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights law norms or obligations, the executive is necessarily free to ignore them.” Note however Ashby v. Minister of Immigration, supra note 4 at 225, where Cooke P states: “Was the Minister bound in law to give specific consideration to the [International Convention on the Elimination of All Forms of Racial Discrimination] in exercising his statutory discretion? As emphasised in the CREEDNZ case, it is only when a statute expressly or by implication identifies a consideration as one to which regard must be had that the Courts can interfere for failure to take it into account. The mere fact that the consideration is one that could properly or reasonably be taken into account is not enough.”

While the NZBORA affirms a relatively wide variety of civil and political rights, the HRA is almost solely concerned with discrimination (although it does also make unlawful conduct such as sexual and racial harassment, the incitement of racial disharmony, and victimisation).

Section 8 of the NZBORA. Compare art. 6 of the ICCPR.

Section 9 of the NZBORA. Compare art. 7 of the ICCPR.

Section 17 of the NZBORA. Compare art. 22 of the ICCPR.

Section 19 of the NZBORA. The prohibited grounds of discrimination are set out in section 21 of the HRA. Those grounds are sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation. Compare art. 2(1) of the ICCPR.

Section 21 of the NZBORA. Compare art. 17 of the ICCPR.

Section 22 of the NZBORA. Compare art. 9(1) of the ICCPR.

Section 25 of the NZBORA. Compare art. 9(3) of the ICCPR.
affirmation of New Zealand’s commitment to the ICCPR in the preamble to the NZBORA means that the ICCPR is directly relevant in interpreting the scope of the rights set out in the NZBORA.\textsuperscript{15}

Neither the NZBORA nor the HRA is supreme law. Accordingly, while both statutes can be used to invalidate exercises of public power or inferior legislation such as regulations, neither statute can be used to strike down other Acts of Parliament.\textsuperscript{16} However, despite this lack of a supreme law status, both statutes play an important role in the domestic legal system by making the rights they recognise influential and, within the limits referred to, justiciable.

2.2.1 Influence on formulation and interpretation of legislation

The rights in the NZBORA and the HRA are expressly considered during the legislative process. The Cabinet Manual (an authoritative guide for the conduct of executive government in New Zealand)\textsuperscript{17} states that when a Minister seeks to include a bill in the legislative programme of government, he or she must draw attention to any aspects of the bill that may have implications for, or affect the rights in the NZBORA, the HRA, or “international obligations.”\textsuperscript{18} Further, when a bill is submitted to the Cabinet Legislation Committee\textsuperscript{19} for approval for introduction to the House of Representatives, the Minister responsible must confirm that amongst other matters the bill complies with (or does not contravene) the rights in the NZBORA and the HRA, and “international obligations.”\textsuperscript{20}

\textsuperscript{15}See, for example, \textit{R v. Hansen} [2007] 3 N.Z.L.R 1 (S.C.) at paras. 11-13, Elias C.J. [“\textit{R v. Hansen}”].

\textsuperscript{16}Section 4 of the NZBORA provides: “Other enactments not affected
No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) Decline to apply any provision of the enactment—
by reason only that the provision is inconsistent with any provision of this Bill of Rights.” See also section 21B of the HRA.

\textsuperscript{17}N.Z., Cabinet Office, \textit{Cabinet Manual} 2008 (Wellington, Department of the Prime Minister and Cabinet, 2008) at xv [“\textit{Cabinet Manual}”]. “Cabinet” is the central decision-making body of executive government, or “the forum in which Ministers [including the Prime Minister] collectively consider, debate, and decide on the key issues facing the nation.” (see \textit{Cabinet Manual} at xv). It is an informal institution in the sense that it is not established by legislation, but rather by convention.

\textsuperscript{18}\textit{Cabinet Manual, supra} note 17 at paras. 7.60(b) and 7.61. Attention must also be drawn to any implications for or effects on, amongst other matters, the principles of the Treaty of Waitangi and the principles in the \textit{Privacy Act 1993} (N.Z.), 1993/28: see paras. 7.60(a) and (c).

\textsuperscript{19}The Cabinet Manual (\textit{supra} note 17 at para. 7.50) explains that the role of the Cabinet Legislation Committee is to examine “all draft bills before they are approved for introduction, to ensure that their policy content has been approved by the appropriate Cabinet committee and that the relevant requirements (as set out in the Cabinet Manual, the CabGuide, and any applicable circulars) have been satisfied.” The membership of the Cabinet Legislation Committee is primarily comprised of Ministers.

\textsuperscript{20}\textit{Ibid.} at para. 7.61.
The Cabinet Manual does not list the “international obligations” which must be considered. While New Zealand’s international obligations include those imposed by the ICESCR, there is little evidence that proposed legislation is analysed for compliance with ESCR not included in the NZBORA or the HRA.\(^{21}\)

Section 7 of the NZBORA also provides an additional check. The section imposes a duty on the Attorney-General to report to Parliament where a Bill appears to be inconsistent with the NZBORA. The existence of this duty means that the Ministry of Justice or the Crown Law Office screens all proposed legislation for NZBORA consistency.\(^{22}\)

Further, section 6 of the NZBORA provides that legislation must be interpreted consistently with the NZBORA where possible. This means that the rights in the NZBORA are relevant to statutory interpretation. Where there are two meanings of a particular provision open, the interpretation most consistent with the NZBORA must be chosen.

Accordingly, the issue of NZBORA and HRA consistency is one which is squarely before government in carrying out its law-making functions, and is also an issue which the courts are required to consider on a regular basis.

### 2.2.2 Justiciability

Under the NZBORA, the remedies courts may award for breach of the affirmed rights include damages.\(^{23}\) Further, the courts may declare not only that public action is inconsistent with the NZBORA, but also indicate that an ordinary enactment is inconsistent. Such an indication does not require Parliament to remedy the inconsistency nor give rise to a right to relief, but may be seen as imposing an obligation (of a political or moral nature) on Parliament to reconsider the legislation in question and justify any decision not to rectify it.\(^{24}\)

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\(^{21}\) See Claudia Geiringer and Matthew Palmer, “Human Rights and Social Policy in New Zealand” (2007) 30 Social Policy Journal of New Zealand 12 at 33. The authors state: “By requiring legislative proposals to confirm compliance with ‘international obligations’, [this mechanism] does have the potential to facilitate consideration of ESC rights. Again, although further study is required, we suspect that this mechanism is not routinely used to analyse the implications of legislative proposals for ESC rights.”

\(^{22}\) Cabinet Manual, supra note 17 at para. 7.62.

\(^{23}\) See Simpson v. Attorney-General [1994] 3 N.Z.L.R 667 (C.A.) and Taunoa and Ors v. Attorney-General and Anor [2007] NZSC 70. There is no express remedies provision in the NZBORA. However, the courts have found they have an implicit jurisdiction to grant “appropriate and effective remedies where rights have been infringed” (see the discussion of this jurisdiction in, for example, Taunoa at para. 106).

\(^{24}\) See, for example, R v. Hansen, supra note 15 at para. 259, where McGrath J. states: “As a result, it is to be expected that New Zealand courts from time to time will be constitutionally bound, applying s 4 of the Bill of Rights, to give effect to legislation which they have concluded is not capable of being read consistently with the Bill of Rights. In such instances it is the constitutional responsibility of the Court to indicate in its judgment that it has relied on s 4 of the Bill of Rights to uphold an inconsistent provision in another statute. Other branches of the government are under no obligation to change the law to remedy the inconsistency, but it may be expected that there
Under the HRA, proceedings may be brought before the Human Rights Review Tribunal [HRRT][25] alleging that a public act, omission, or enactment (i.e. legislation) is inconsistent with the right to freedom from discrimination affirmed by the NZBORA. If the HRRT finds an inconsistency, it may grant various remedies, including damages (other than when the inconsistency arises as a result of an enactment).[26] In the case of an enactment, the HRRT may only make a declaration of inconsistency.[27] Such a declaration does not bind the government, but the declaration must be reported to Parliament, along with advice regarding how the government intends to respond to the declaration.[28]

Proceedings may also be brought before the HRRT against a private party, alleging that that party has discriminated in a manner contrary to the HRA (e.g. for refusal to provide goods and services by reason of any of the prohibited grounds of discrimination).[29] Where an allegation of unlawful discrimination is made by an employee against his or her employer, the employee has the option of choosing whether to pursue the complaint under the HRA or under the personal grievance provisions of the Employment Relations Act 2000.[30]

2.2.3 Beneficial effects of the domestic recognition of CPR

The features of the NZBORA and the HRA discussed above, and the incorporation of those statutes into the law-making process, has led to them having a significant role in New Zealand law and government. Various commentators consider that the NZBORA has had not only an important impact in CPR cases, statutory interpretation and law-making, but also in policy, the administration of criminal justice, and the protection of rights such as free speech.[31] Indeed, Sir Geoffrey Palmer, the architect of the NZBORA and

will be a reconsideration by them of the inconsistent legislation.” See also Moonen v. Film and Literature Board of Review [2000] 2 N.Z.L.R 9 at 17 (C.A.) where Tipping J stated: “That purpose [of section 5 of the NZBORA] necessarily involves the Court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum.”

The HRRT is a first-instance, semi-judicial tribunal continued by section 93 of the HRA. Before proceedings can be brought before the HRRT, a complaint must first be made to the Human Rights Commission. The Commission may assist the parties to the complaint to resolve the complaint informally by, for example, making available dispute resolution services (see sections 76 to 83 of the HRA).

26 Section 92I of the HRA.
27 Section 92J of the HRA.
28 Section 92K of the HRA.
29 Section 92B of the HRA.
30 Section 79A of the HRA.
current president of the New Zealand Law Commission, contends that the statute has been “a set of navigation lights for the whole process of government to observe”, and that it has led to more principled governance in New Zealand.\(^{32}\)

In addition, the justiciability of the free-standing rights in the *NZBORA* and *HRA* has allowed the judiciary to apply the rights in concrete cases, and at the same time explain what those rights mean in the New Zealand context and how they apply to that context. This has undoubtedly led to a greater understanding of those rights in New Zealand, and has given them a relatively high profile. More generally, the incorporation of a good deal of the *ICCPR* into New Zealand domestic law has led to many of the *ICCPR* rights becoming not just international rights, but also New Zealand rights, normatively developed in and for the New Zealand context.

2.3 The reasons for not including ESCR in the *NZBORA*

With the exception of the rights to freedom from discrimination and freedom of association, and certain rights of ethnic, religious and linguistic minorities,\(^{33}\) the *NZBORA* does not affirm ESCR (and as stated above the *HRA* essentially only deals with discrimination). Further, these rights were included in the *NZBORA* only because they are also civil and political rights. Generally, as the following brief history of the *NZBORA* demonstrates, the intention was to exclude ESCR from the *NZBORA*.

The *NZBORA* was enacted in 1990, five years after Sir Geoffrey (then the Minister of Justice and Attorney-General) presented a document entitled *A Bill of Rights for New Zealand: a White Paper*\(^{34}\) to Parliament. In the *White Paper*, which included a draft Bill, the recently elected Labour government explained what it considered the Bill would do, and why New Zealand needed it.

The central reasons advanced for the Bill were that fundamental rights and freedoms were insufficiently protected in New Zealand, particularly because of the lack of a written constitution and of a second House

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\(^{32}\) *Sir Geoffrey, BOR 15 Years On*, supra note 31 at 14.  

\(^{33}\) S. 20 of the *NZBORA* provides: “A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.” S. 20 is in essentially the same terms as art. 27 of the *ICCPR*. There is no directly equivalent right in the *ICESCR*, but the rights set out in s. 20 of the *NZBORA* and art. 27 of the *ICCPR* may be seen as subsets of the much wider right recognised in art. 15(1)(a) of the Covenant: the right of everyone to take part in cultural life.  

of Parliament (the latter being a concern principally because the “First Past the Post” electoral system then in place meant that the executive almost invariably controlled the legislature). It was argued that the Bill would guarantee fundamental rights and freedoms, restrain the abuse of governmental power, and provide remedies for breach. The Bill would also educate New Zealanders about fundamental freedoms, and be a source of inspiration.\(^{35}\) As proposed, the Bill was to have supreme law status,\(^{36}\) and courts would have had the power under it to strike down legislation.\(^{37}\)

The Bill did not include ESCR (other than the rights to freedom from discrimination and freedom of association, and the minority rights referred to above). The reasons offered for this were that while the Bill should “capture and protect the continuing essence of our constitutional and political system”, it should not “attempt to capture (or more accurately to impose) a temporarily popular view of policy.”\(^{38}\) While CPR were seen as being largely “value-free”, ESCR were apparently considered to be an attempt to “freeze into a special constitutional status substantive economic and social policies.”\(^{39}\)

Further, the CPR in the Bill were said to be “principally negative rights in that they impose a duty on the State to refrain from infringing them”, as opposed to imposing “positive obligations on the State to do something.” Accordingly, courts would be able to enforce these rights. The positive nature of ESCR, on the other hand, meant that such rights were unenforceable, and this was “one reason why the Bill of Rights does not contain guarantees of economic, social, or cultural rights.”\(^{40}\) ESCR were instead “given effect to through other legislative and administrative action.”\(^{41}\)

After its presentation in Parliament, the Bill was referred to a Parliamentary committee, the Justice and Law Reform Select Committee. The committee carried out public consultation on the Bill, and made various recommendations on its content. In its 1988 final report, the committee stated that a significant majority of the submissions it had received on the Bill were opposed to it being enacted as supreme law,

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35 *White Paper, supra* note 34 at 5. In relation to the educative role of the Bill, the *White Paper* states at para. 9.1: “Citizens will have a readily accessible set of principles by which to measure the performance of the Government and to exert an influence on policy-making. An awareness of basic human rights and fundamental freedoms amongst citizens and a desire to uphold them is as powerful a weapon as any against any Government which seeks to infringe them.”

36 The Bill would have provided for amendments supported by a 75% majority in Parliament or by a majority in a national referendum.

37 *White Paper, supra* note 34 at 5.


39 *Ibid.*, at para. 4.14. This quote is taken from the *White Paper’s* discussion regarding the Bill’s role in “enhancing accountable and democratic government.” There is no express reference to ESCR in this section, but taken with the earlier characterisation of ESCR as imposing “a temporary popular view of policy”, the contrast being made in this section appears to be between CPR, which are defined as value-free with respect to economic and social policy, and ESCR, which are defined as attempting to lock in certain policies. Para 4.14 is also cited in para. 4.28 as being one of the paragraphs of the *White Paper* that provides the reasons for not including “economic rights” in the Bill.


on the basis that this would transfer too much power to unelected judges.\footnote{N.Z., “Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand” 1988 (Bill Dillon, Chair) at 3.}\footnote{Ibid. at 4. The ESCR the committee suggested could be included were (with reference to the Covenant and the Universal Declaration of Human Rights, amongst other instruments) the right to an adequate standard of living, including food, housing and health care, the right to work, the right to education, the right to own property, and the right to participate in the cultural life of the community (at 10).} Accordingly, while the committee supported the concept of a Bill of Rights, it recommended that the Bill be enacted as an ordinary statute.

The committee further stated:\footnote{Ibid. at 10. Although the excerpt from the committee’s report quoted above seems to suggest that the ESCR it recommended be included in the Bill would have an equal status to CPR, other sections from the report indicate otherwise. For example, in discussing what became the interpretative direction in s. 6 of the \textit{NZBORA} (that legislation must be interpreted consistently with the \textit{NZBORA} where possible), the committee only stated that “[t]he Bill could include a provision […] directing that the interpretation of an enactment consistent with the \textit{civil and political rights} in the bill is to be preferred […]” [emphasis added]. The same distinction is made in the committee’s reference to the responsibility of the Attorney-General (now set out in s. 7 of the \textit{NZBORA}) to report on bills inconsistent with the \textit{NZBORA}: once again, there is an express reference to civil and political rights only. This is despite the fact that the committee recommended (at 5) that a reference to social and economic rights be included in the preamble to the Bill. However, the committee also recommended (at 11) that a “Parliamentary select committee” be established “to examine bill of rights matters.” It envisaged this select committee having jurisdiction to review and report to Parliament not only bills but also enactments that it considered to be inconsistent “with \textit{any of the rights in the bill}” (i.e. either CPR or ESCR) [emphasis added]. The select committee would have had jurisdiction to carry out its review powers in respect of enactments either at “its own initiative or on receipt of a written complaint from a member of the public.” It is not clear whether the committee considered that the courts would have jurisdiction to adjudicate upon cases alleging ESCR breach.}43

“\textit{F}undamental social and economic rights […] are obviously as important to New Zealanders as the civil and political rights in the White Paper draft […]}. However, there are great difficulties in dealing with such rights in a judicially enforceable supreme law such as the White Paper draft. With a bill that is not judicially enforceable there are much fewer problems […]}. In appendix A the Committee suggests that some of these major specified rights could be included. It is recognised that effective exercise of civil and political rights depends on securing an adequate standard of living, housing, health care and education.”

It is not entirely clear, however, what status the committee envisaged ESCR as having in the Bill. It appears that the committee considered that such rights would be more in the nature of directive principles, or that while ESCR could be justiciable to some degree, they would not have the same status as CPR.\footnote{Ibid. at 10. Although the excerpt from the committee’s report quoted above seems to suggest that the ESCR it recommended be included in the Bill would have an equal status to CPR, other sections from the report indicate otherwise. For example, in discussing what became the interpretative direction in s. 6 of the \textit{NZBORA} (that legislation must be interpreted consistently with the \textit{NZBORA} where possible), the committee only stated that “[t]he Bill could include a provision […] directing that the interpretation of an enactment consistent with the \textit{civil and political rights} in the bill is to be preferred […]” [emphasis added]. The same distinction is made in the committee’s reference to the responsibility of the Attorney-General (now set out in s. 7 of the \textit{NZBORA}) to report on bills inconsistent with the \textit{NZBORA}: once again, there is an express reference to civil and political rights only. This is despite the fact that the committee recommended (at 5) that a reference to social and economic rights be included in the preamble to the Bill. However, the committee also recommended (at 11) that a “Parliamentary select committee” be established “to examine bill of rights matters.” It envisaged this select committee having jurisdiction to review and report to Parliament not only bills but also enactments that it considered to be inconsistent “with \textit{any of the rights in the bill}” (i.e. either CPR or ESCR) [emphasis added]. The select committee would have had jurisdiction to carry out its review powers in respect of enactments either at “its own initiative or on receipt of a written complaint from a member of the public.” It is not clear whether the committee considered that the courts would have jurisdiction to adjudicate upon cases alleging ESCR breach.\footnote{Ibid. at 10. Although the excerpt from the committee’s report quoted above seems to suggest that the ESCR it recommended be included in the Bill would have an equal status to CPR, other sections from the report indicate otherwise. For example, in discussing what became the interpretative direction in s. 6 of the \textit{NZBORA} (that legislation must be interpreted consistently with the \textit{NZBORA} where possible), the committee only stated that “[t]he Bill could include a provision […] directing that the interpretation of an enactment consistent with the \textit{civil and political rights} in the bill is to be preferred […]” [emphasis added]. The same distinction is made in the committee’s reference to the responsibility of the Attorney-General (now set out in s. 7 of the \textit{NZBORA}) to report on bills inconsistent with the \textit{NZBORA}: once again, there is an express reference to civil and political rights only. This is despite the fact that the committee recommended (at 5) that a reference to social and economic rights be included in the preamble to the Bill. However, the committee also recommended (at 11) that a “Parliamentary select committee” be established “to examine bill of rights matters.” It envisaged this select committee having jurisdiction to review and report to Parliament not only bills but also enactments that it considered to be inconsistent “with \textit{any of the rights in the bill}” (i.e. either CPR or ESCR) [emphasis added]. The select committee would have had jurisdiction to carry out its review powers in respect of enactments either at “its own initiative or on receipt of a written complaint from a member of the public.” It is not clear whether the committee considered that the courts would have jurisdiction to adjudicate upon cases alleging ESCR breach.}
ESCR apparently were not. Sir Geoffrey also stated that the non-inclusion of ESCR did not mean that such rights were less important, but simply “that they should be protected in a different way.”

In 1992, after his retirement from Parliament, Sir Geoffrey published a book entitled *New Zealand’s Constitution in Crisis: Reforming Our Political System*. In that book, Sir Geoffrey stated that caucus had vigorously debated the committee’s recommendation on ESCR. Sir Geoffrey further stated:

“I successfully opposed such matters being included in the legislation because it would suggest such matters may be capable of judicial resolution. To broaden a Bill of Rights so that it encompassed such broad policy questions would have made it unmanageable in my view and opened it up to ridicule. It also seemed to me that to state as fundamental rights matters which it was not within the power of government to deliver would cause expectations to rise, only to be dashed. I do not doubt it should be the aim of the political system to deliver such things as far as practicable. I cannot see that in areas of policy quasi-legal guarantees help in the delivery.”

Much later (in a paper he delivered in 2006), Sir Geoffrey referred to an argument that had been made in favour of extending the NZBORA to include ESCR. He stated that South Africa was the principal model for such an approach, described some of the ways in which ESCR are recognised under the South African constitution, and noted two of the South African Constitutional Court’s leading ESCR judgments. Referring to those judgments as “bold”, Sir Geoffrey argued that such “judicial encroachment” into the prerogatives of the executive and legislature would be unacceptable in New Zealand, and that New Zealand’s judges did not have the requisite “background or capacities” to adjudicate on “social policy”. He considered that such issues were “best left to politics.”

### 3 PART II: ESCR IN NEW ZEALAND

While the majority of ESCR are not included in the NZBORA or the HRA, New Zealand legislation does protect or give effect to aspects of ESCR in various ways.

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48 Sir Geoffrey, BOR 15 Years On, supra note 31 at paras. 28-29.
51 Sir Geoffrey, BOR 15 Years On, supra note 31 at paras. 28-29.
For example, the *Minimum Wage Act 1983*,\(^{52}\) the *Health and Safety in Employment Act 1992 [HSEA]*,\(^{53}\) the *Employment Relations Act 2000 [ERA]*,\(^{54}\) and the *Holidays Act 2003*\(^{55}\) protect the right to work and the right to the enjoyment of just and favourable conditions of work. Statutes such as the *Housing Corporation Act 1974*,\(^{56}\) the *Housing Restructuring and Tenancy Matters Act 1992*\(^{57}\) and the *Social Security Act 1964*\(^{58}\) are relevant to the right to an adequate standard of living (including the right to adequate housing) and the right to social security. In the same way, legislation such as the *New Zealand Public Health and Disability Act 2000*\(^{59}\) and the *Injury Prevention, Rehabilitation, and Compensation Act 2001 [IPRCA]*\(^{60}\) promote ESCR such as the right to health.

Many of the rights or entitlements that those and other statutes establish are justiciable in New Zealand courts. For example, an employee who alleges that he or she has been unjustifiably dismissed, disadvantaged or discriminated against may sue in specialist employment tribunals\(^{61}\) (or under the *HRA* in relation to discrimination, as discussed above). A person who alleges that he or she has not received an entitlement under the *IPRCA* in relation to, for example, a personal injury may appeal to the District Court.\(^{62}\) In addition, the jurisdiction of the HRRT referred to above in respect of the right to freedom from discrimination provides an indirect route for litigating ESCR.\(^{63}\)

Judicial review of the exercise of a statutory power may also be sought. This means that, for example, the exercise of a discretion affecting certain ESCR may be subject to judicial review on mainly procedural grounds (although as discussed below, the effectiveness of this remedy in protecting ESCR will depend considerably on the extent to which the statute bestowing the relevant power recognises or protects those rights).


\(^{54}\) *Employment Relations Act 2000* (N.Z), 2000/24 [“ERA”].


\(^{56}\) *Housing Corporation Act 1974* (N.Z), 1974/19.


\(^{58}\) *Social Security Act* (N.Z), 1964/36.


\(^{60}\) *Injury Prevention, Rehabilitation, and Compensation Act 2001* (N.Z), 2001/49 [“IPRCA”].

\(^{61}\) *ERA*, supra note 54, Part 9.

\(^{62}\) *IPRCA*, supra note 60, Part 5. This right of appeal arises after a less formal review process of a decision to decline a claim for an entitlement has been conducted.

\(^{63}\) See *Child Poverty Action Group Incorporated v. Attorney-General* (16 December 2008) 41/05 (HRRT). In these proceedings, the CPAG sought a declaration that tax credits provided for by legislation discriminated on employment and family status grounds against people on income tested benefits (who are ineligible for the credits). While this case could be characterised as simply concerning a civil and political right, being the right to freedom from discrimination, it also concerns ESCR, such as the right to social security, the right to an adequate standard of living, and of course the Covenant’s own prohibition of discrimination. The HRRT held that the tax credit was discriminatory but justifiable in all the circumstances. The decision is under appeal.
Criminal liability may also exist in some circumstances. For example, criminal proceedings may be brought under the *HSEA* against not only employers, but also officers, directors, agents, or managers of bodies corporate and Crown organisations for failure to comply with the health and safety obligations the *HSEA* establishes.\(^64\) Many other examples of the ways in which aspects of ESCR are justiciable in New Zealand law could be given.\(^65\)

However, New Zealand domestic law does not recognise any of the *ICESCR*’s principal obligations. National law does not oblige the state to realise ESCR progressively or to fulfil minimum core obligations. Neither does it prohibit deliberately unjustifiable retrogressive measures in respect of ESCR or other unjustifiable limitations (other than limitations concerning the right to freedom from discrimination and of association, and the affirmed rights of ethnic, religious and linguistic minorities, and then only to the extent provided for in the *NZBORA*). Also, because (with the exception of the three rights just mentioned) ESCR are not included in the *NZBORA* or the *HRA*, in New Zealand domestic law there are no general, free-standing ESCR as enunciated in the *ICESCR* or in modified terms.

Consequently, whether a certain law, policy or other public action has violated an individual’s rights under the *ICESCR* is justiciable domestically to a significantly lesser extent than alleged breaches of an individual’s rights under the *ICCPR* (as incorporated in the *NZBORA* and the *HRA*).\(^66\) As Geiringer and Palmer state, “it is clear that as a general proposition, ESC rights currently receive substantially less judicial protection in New Zealand than do CP rights.”\(^67\)

It also follows that because ESCR are not generally included in the *NZBORA* or the *HRA*, they have less of an effect on statutory interpretation, law-making, and policy than they otherwise would. Although the reference to “international obligations” in the Cabinet Manual does provide scope for ESCR to be considered during the legislative process, as stated above it appears unlikely that this occurs to any extent. Also, because the *NZBORA* does not affirm ESCR, those rights fall outside of the review that the Attorney-General conducts of each Bill, in order to carry out his or her duty under section 7 of the *NZBORA*.

\(^{64}\) See, for example, ss. 49, 50, and 56 of the *HSEA*, *supra* note 53.

\(^{65}\) See also Geiringer and Palmer, *supra* note 21 at 36, who state: “[t]he New Zealand statute books contain countless examples of the courts and/or quasi-judicial bodies being expressly empowered to protect and enforce specific aspects of ESC rights.” See further New Zealand’s third periodic report under the *ICESCR* at paras. 22-27 (ECOSOC, *Third periodic reports by States parties under articles 16 and 17 of the Covenant: NEW ZEALAND*, E/C.12/NZL/3 (2009) [“Third Periodic Report”]).

\(^{66}\) See also Geiringer and Palmer, *ibid.* at 36, who state that “[w]hat the New Zealand courts lack is the ability to test state and/or private action against broad ESC rights protections.”

\(^{67}\) *Ibid.* at 37.
Therefore, while the *NZBORA* and also the *HRA* may contribute to more principled government where issues related to CPR are concerned, they do not and cannot make the same contribution to most ESCR-related issues. While minimum national standards were set for CPR, the same was not considered appropriate for ESCR.

Of course, these differences naturally follow from the government’s decision not to enact most ESCR as free-standing rights. In Part III, I discuss some of the consequences of the government’s decision with reference to New Zealand jurisprudence, and in particular to two cases: *Attorney-General v. Daniels*,68 concerning the right to education, and *Lawson v. Housing New Zealand*,69 concerning the right to adequate housing. These cases, and others to which I refer in Part III, demonstrate that the Covenant has little or no relevance to domestic litigation. They also show that, consistent with the government’s intention, even in apparently serious cases alleged breaches of ESCR will often not be subject to judicial review, or will only be subject to a very limited review. In my view, they evidence a significant gap in domestic protection for ESCR, incompatible with New Zealand’s recognition of ESCR as fundamental rights and as belonging to all within its jurisdiction.

4 PART III: THE IRRELEVANCY OF THE COVENANT AND THE LIMITED SCOPE FOR JUDICIAL REVIEW

4.1 Attorney-General v. Daniels (High Court and Court of Appeal)

In this case, 15 parents of special needs children sought judicial review of decisions to introduce and implement a government programme, Special Education 2000 [SE 2000] and of related decisions by the Minister of Education to disestablish certain special needs educational facilities (special classes, units and services). The 15 parents were essentially a representative group, and there were many others who had wished to join their application.70

Rather than continuing to fund the special facilities, the policy of SE 2000 was to provide resources for the education of special needs students in conventional schools (i.e. to mainstream such students). The government considered that this was a more equitable approach, as under the previous system special

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69 *Lawson v. Housing New Zealand and the Minister of Housing and the Minister of Finance* (29 October 1996) M.538/94 (H.C.) [“Lawson, unreported judgment”] and *Lawson v. Housing New Zealand* [1997] 2 N.Z.L.R 474 (H.C.). [“Lawson v. HNZ”]. I refer to both the unreported and reported judgments, as the reported judgment omits sections of the original judgment relevant to my analysis.
70 *Daniels, H.C.*, supra note 68 at para. 3.
needs students in some locations were unable to access these special facilities. The intention of SE 2000 was that resources (such as funds and specialist support) for special needs students would be available to conventional schools, and those students’ needs would then be met at their local school or other school of their parents’ choice.

The disestablishment of the special facilities resulted in disestablishment of 1166.01 teaching positions or FTTEs (Full-time Teacher Equivalent), which were to be replaced with up to 1728 FTTEs (an overall increase of almost 50%), to be allocated on the basis of need. Overall, funding for special education was increased.

The parents alleged that the education their children were receiving under SE 2000 was inadequate, including that their children were not receiving adequate support in conventional schools. They also alleged that the Minister’s disestablishment decision was illegal. Their case was based upon the right to free primary and secondary education in section 3 of the Education Act 1989 [the 1989 Act] and the guarantee under section 8 of the 1989 Act that special needs students have the same rights to enrol and receive education as students without such needs. Also relevant were the procedures regarding the enrolment of students in special education under section 9 of the 1989 Act, and section 98 of the Education Act 1964 [the 1964 Act]. The latter section gives the Minister of Education the power to disestablish any special facility, provided that the Minister is satisfied that “sufficient provision” of the services that the facility provided is made by any other school or class in or reasonably near to the same locality.

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71 Education Act 1989 (N.Z), 1989/80. Section 3 provides: “Right to free primary and secondary education Except as provided in this Act or the Private Schools Conditional Integration Act 1975, every person who is not a foreign student is entitled to free enrolment and free education at any State school during the period beginning on the person's fifth birthday and ending on 1 January after the person’s 19th birthday.”

72 Section 8 provides: “Equal rights to primary and secondary education (1) Except as provided in this Part, people who have special educational needs (whether because of disability or otherwise) have the same rights to enrol and receive education at State schools as people who do not.” […]

73 Section 9 provides: “Special education (1) If satisfied that a person under 21 should have special education, the Secretary shall— (a) agree with the person's parents that the person should be enrolled, or direct them to enrol the person, at a particular State school, special school, special class, or special clinic; or (b) agree with the person's parents that the person should have, or direct them to ensure that the person has, education or help from a special service […] (4) No person shall be or continue to be enrolled at a special school, special class, or special clinic, or have or continue to have education or help from a special service, except pursuant to an agreement or direction under subsection (1). […]”

74 Education Act 1964 (N.Z), 1964/135.

75 Section 98 provides: Special schools and classes (1) Having regard to the provision of special education in any locality or localities, the Minister may— (a) Establish any special school; […]
The parents further alleged that SE 2000 unlawfully discriminated against their children, in breach of the *NZBORA* and *HRA*. At the heart of the discrimination allegation was the contention that the mainstreaming policy of SE 2000, which sought to treat special needs students similarly to students without such needs, was unlawful because it failed to accommodate those who required different (and special) treatment to fulfil their right to education.

The Crown (i.e. the government) contended that the establishment and implementation of SE 2000 was lawful and overall constituted a significant improvement for special needs students. The Crown also submitted that the issue about the adequacy of the education provided was not justiciable.

### 4.1.1 The High Court judgment

The trial judge, Baragwanath J, found that there had been some positive aspects of SE 2000 as regards to equity in special education. However, as the judge pointed out, the case was not about students who may have benefited from the policy, but those who alleged that they had been adversely affected by it.

The preliminary issues for the judge included the justiciability of the claim that provision for special education was inadequate, and the nature of the rights set out in the Education Acts. In regard to the justiciability issue, the judge rejected the Crown’s submissions, holding that it was the “Court’s responsibility to ensure that the adequacy of the education does not fall below a certain minimum level.” Baragwanath J further considered that “the question whether education is clearly unsuitable for a child is well capable of determination by a Court assisted by appropriate expert evidence.”

In regard to the nature of the rights, Baragwanath J began with the reference in section 8 of the 1989 Act to the “same rights” of those requiring special education. The judge interpreted those rights as relating to the rights conferred by section 3 on all those who do not require special education. Accordingly, it was necessary to determine the nature of the section 3 rights.

In the judge’s view, section 3 conferred a general entitlement to suitable, regular and systematic education. Section 8 then conferred on special needs students a right to equality with other students. Read together, the judge considered that sections 3 and 8 required “an individual focus on every special needs student to ensure that each receives an education that is [a] not clearly unsuitable (and in that

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(2) The Minister may likewise disestablish any special school, class, clinic, or service established under subsection (1)...if he considers that sufficient provision is made by another similarly established special school, class, clinic, or service, or by any other school or class in or reasonably near to the same locality: […].”

76 *Daniels, H.C., supra* note 68 at paras. 35, 37 and 38.
77 *Ibid.* at para. 73.
specific sense is ‘suitable’), and [b] is regular and systematic.”81 The judge further found that the combination of section 9 of the 1989 Act and section 98 of the 1964 Act placed a non-delegable responsibility on the Secretary of Education, the Minister of Education, and the Ministry of Education to ensure that each special needs student was adequately catered for.82

4.1.1.1 A right to education

Accordingly, the trial judge found that the 1989 Act and the 1964 Act read together created a free-standing and general right to an adequate education. At a minimum, this right bestowed on each child an entitlement to an individual focus on his or her learning needs, and the provision of extra assistance where required (and in relation to a special needs child, in proportion to the extent of the child’s disability).83 Where a special needs child could be adequately catered for in the mainstream school system, the Crown’s duty would be discharged. Where it could not be, the Crown had a duty pursuant to section 9 to provide special education.84 It was for the Crown to monitor the standard of education received by each special needs student.

The Crown also had a duty, in respect of special needs children, not to disestablish special facilities without determining that adequate alternative resources existed (whether in mainstream schools or otherwise), capable of delivering the standard of education required to fulfil each child’s right to education.85

Having so interpreted the law, the judge applied it to the facts. In his analysis, Baragwanath J referred in particular to an independent report on SE 2000. This report found that under SE 2000 many special needs children were not receiving the support they required to participate in and benefit from school life as much as other children; some schools who had developed good programmes for special needs children had become overloaded; some parents had found it difficult to find mainstream schools which would accept their child; and that generally government had not ensured satisfactory provision for special needs children at a local level. Further, earlier in the judgment, the judge also recorded that the original scheme the Minister had proposed and adopted had been inadequate, and there had been a need for significant additional funding to ameliorate its effect.86 On the basis of these deficiencies, and recording that the independent report required “a conclusion both of failure to meet minimum standards and of unequal

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81 Ibid. at para. 77.
82 Ibid. at para. 81.
83 Ibid. at para. 140.
84 Ibid. at paras. 139 and 152.
85 Ibid. at para 140.
86 Ibid. at para 37.
treatment”, the judge found a breach of the right to education in all situations where adequate education for special needs students could not be provided in mainstream schools.\(^{87}\)

The judge further found that there had been no attempt, at the time the decision was made to implement SE 2000 and disestablish the special facilities, to determine whether there was sufficient alternative provision at other schools in the same localities. Rather, it had simply been assumed (without a solid factual basis for the assumption) that sufficient provision could be made, through local schools applying for resources under SE 2000.\(^{88}\) The judge considered that this was insufficient to comply with the requirements of section 98(2) regarding disestablishment decisions.

**4.1.1.2 Discrimination**

In relation to the allegation of discrimination, Baragwanath J found that the right to freedom from discrimination in the NZBORA and HRA was only concerned with the “failure to treat the same” and not “the failure to treat differently.”\(^{89}\) The judge also considered that it was not for the Court to seek “equality of results” through the provisions of the NZBORA and the HRA.\(^{90}\) Therefore, SE 2000 did not breach the right to freedom from discrimination in those statutes.

**4.1.1.3 No reference to ICESCR**

In reaching his conclusion on discrimination (and indeed in the entire judgment), the trial judge made no reference to the right of education in the ICESCR or to the guarantee of non-discrimination in the exercise of that right (referring rather to the references to equality in the preambles of the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination). Neither did the judge make any reference to the CESCR’s General Comment on the right to education, which emphasises that education must be accessible to all on a non-discriminatory basis, especially vulnerable groups, in law and in fact;\(^{91}\) that education must be adaptable, so that it can respond to students’ needs;\(^{92}\) and which discusses the permissibility of special measures to bring about de facto equality for disadvantaged groups and the obligation to take measures to address any de facto discrimination.\(^{93}\)

Apparently, Baragwanath J was also unaware of the CESCR’s General Comment 5 on persons with disabilities. This General Comment refers to the obligation of States parties “to take positive action to

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\(^{87}\) *Ibid.* at para. 143.

\(^{88}\) *Ibid.* at para. 144.


\(^{90}\) *Ibid.* at para. 94.


\(^{92}\) *Ibid.* at para. 6(d).

\(^{93}\) *Ibid.* at paras 32, 37 and 59.
reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities.‖ It also defines “disability-based discrimination” as including “any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social and cultural rights.” Finally, the General Comment affirms that: “States should ensure that teachers are trained to educate children with disabilities within regular schools and that the necessary equipment and support are available to bring persons with disabilities up to the same level of education as their non-disabled peers.”

As set out above, however, the trial judge found that the 1989 Act required that the specific needs of each special needs student be identified and provided for in diverse ways, so as to realise each student’s right to an education suitable for that student. That meant a right to different treatment where required. Accordingly, through the 1989 Act the trial judge essentially reached the same position he could have reached by interpreting the right to freedom of discrimination in the NZBORA and HRA in accordance with the ICESCR.

4.1.2 The Court of Appeal judgment

The Crown appealed the trial judge’s ruling to the Court of Appeal, and the parents cross-appealed on the finding regarding discrimination.

4.1.2.1 Discrimination

The Court of Appeal opened its judgment by recording that although the parties had filed extensive written submissions on the discrimination issue, there had not been time during the hearing to receive oral submissions. Therefore, the Court declined to consider Baragwanath J’s finding about the proper interpretation of discrimination in New Zealand’s principal human rights legislation.

4.1.2.2 Scope of sections 8 and 9

After considering the history of special education provision in New Zealand, the Court of Appeal focused on the relationship between sections 8 and 9 of the 1989 Act. The court considered that the reference in

95 Ibid. at para. 15.
96 Ibid. at para. 35.
97 At para. 141 of his judgment, Baragwanath J stated: “The Crown does not commit unlawful discrimination by providing the same educational services to all students, but doing so will contravene the Education Acts to the extent that differential treatment is required to promote equality between disabled and other children.” (Daniels, H.C., supra note 68).
section 8 to “the same rights” to enrol and receive education in state schools, “except as provided in this Part”, was a reference to section 9. In the Court’s opinion, this qualified any equal right. Accordingly, those who the Secretary of Education was satisfied should have special education under section 9 had a right to that special education, rather than a right to an education under section 8.\(^98\) Section 8 therefore only covered those students with special educational needs who were nonetheless in a position to enrol and receive education in a mainstream school.\(^99\)

The Court of Appeal then found that section 9 only applied to a limited number of SE 2000 programmes, including those being provided through special schools; while section 8 applied to initiatives for children with special educational needs attending local schools (in other words, section 9 did not apply to all programmes being conducted under SE 2000).\(^100\) This led to the Court’s finding that on the basis of the evidence before it and in relation to the programmes which did fall under section 9, no breach of the section had been demonstrated.

### 4.1.2.3 Nature of the right to education

The Court of Appeal held that through the Education Acts Parliament had conferred certain rights (in the plural) to education. These rights included, for example, the right to free enrolment and free education in state schools (section 3); the right of a student to natural justice in the making of any decision to suspend or expel that student (section 13(c) of the 1989 Act); certain priority rights relating to enrolment (section 11F of the 1989 Act); or the right of an individual to the steps set out in section 9, if the Secretary of Education was satisfied that the individual should have special education (e.g. an agreement between the Secretary and the individual’s parents that individual should be enrolled in a special education facility, or a direction by the Secretary to that effect). A school could also be subject to legal proceedings for matters such as failing to employ registered teachers or failing to be open during specified periods. In the Court’s view, these rights and obligations could be the subject of judicial proceedings.\(^101\)

However, the Court overruled the trial judge’s finding that there was a general and freestanding right to education under sections 3 and 8 of the 1989 Act, in the terms stated by the judge. It found that other statutory requirements (such as those going to minimum days and hours) met the “regular and systematic” element of the right as interpreted by Baragwanath J, and that the “not clearly unsuitable” element was too uncertain and therefore not suitable for judicial enforcement. The Court of Appeal concluded that the rights in the Education Acts are only “essentially those specifically established by and under the

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\(^{98}\) Daniels, C.A., supra note 68 at para. 47.

\(^{99}\) Ibid. at para. 54.

\(^{100}\) Ibid. at para. 56.

\(^{101}\) Ibid. at para. 81.
legislation which, to recall the [trial] Judge’s formulation, do in themselves provide for regularity and system and are designed to ensure appropriate quality. 102

Somewhat confusingly, the Court of Appeal did not say expressly whether it considered that sections 3 and 8 provided for anything more than a right to “free enrolment and free education”. Instead, the Court limited itself to stating that there was no basis in the case before it for a finding of any violation of either of those sections. 103

4.1.2.4 Disestablishment decision

The Court of Appeal upheld the finding that the Minister's decision to disestablish the special facilities was invalid. However, this was for a procedural rather than a substantive reason. The evidence before the court showed that prior to the disestablishment decision there had been no locality by locality examination to determine that sufficient alternative provision was available in each locality. Because section 98(2) of the 1989 Act required such an examination, the Minister’s decision was flawed. However, in making its finding on this issue, the Court of Appeal expressly stated that it was not for the Court “to examine the sufficiency of the [alternative] service.” 104 The Court of Appeal also drew attention to the fact that the word used was in section 98(2) was “sufficient” rather than “equal”, implicitly finding that any alternative provision did not have to be equal to that provided by the disestablished facilities. 105

4.1.2.5 Reference to ICESCR in judgment

Unlike the trial judge, the Court of Appeal did refer to the ICESCR in its judgment. However, it did not do so in any substantive way, but rather merely noted that the ICESCR constituted international recognition of the state’s obligation in respect of education. Further, while recording that the state’s provision of education was subject to external review, including international review, the only express reference the Court of Appeal made to an international body was to the OECD.

4.1.2.6 Analysis of the Court of Appeal’s judgment

4.1.2.6.1 No affirmation of substantive equality

At the heart of the Court of Appeal’s finding was that the issue of the adequacy or suitability of the education afforded to an individual is not justiciable in a general way under the Education Acts. That

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102 Ibid. at para. 83.
103 Ibid. at para. 97.
104 Ibid. at para. 111.
105 Ibid. at para. 103.
meant that the Court had no role in determining the principal issue that led to the 15 parents bringing the application for review: namely, whether the education being afforded to the parents’ children under SE 2000 (including support services) was adequate, in the sense of providing a means for those children to receive an education commensurate with that afforded to children who did not have special needs.

On its face, section 8 of the 1989 Act provides that special needs children being educated in state schools have the same rights to an education as children who do not have special needs. As interpreted by the trial judge, section 8 affirms a basic right and a basic principle of equality between such special needs children and other children; a right which is recognised in the ICESCR and in the CESCR’s General Comments referred to above.

This right was also reflected in two policy statements referred to in the Court of Appeal and the High Court’s judgments: the 1993 statement of national education goals, which established as a goal “success in their learning for those with special needs by ensuring that they are identified and receive appropriate support”;¹⁰⁶ and certain guidelines of the Ministry of Education, reprinted in 1999, which affirmed that: “Young children and students with special education needs have the same rights to a high quality education as people of the same age who do not have special education needs.”¹⁰⁷

However, while Baragwanath J’s judgment sought to protect and promote this right, the Court of Appeal had (at least on the case before it) nothing to say about it.

### 4.1.2.6.2 Insufficient evidence and uncertainty?

At various points in its judgment, the Court of Appeal implied that there was a lack of evidence before it about the particular circumstances of specific children and the exact nature of the alleged failures of particular educational regimes in respect of those children.¹⁰⁸ In doing this, the Court seemed to suggest that had there been more specific evidence, or had there been grounds to bring a different type of case (e.g. evidence that the Secretary of Education had completely failed to consider information under section 9 plainly relevant to whether or not a particular child should have special education), then perhaps a breach of certain rights could have been established.

However, the Court did not explain why the uncontested independent report that Baragwanath J referred to was not sufficient evidence of important failures of SE 2000, and therefore demonstrative of unequal and prejudicial treatment (even if by omission rather than ill-will) of a highly disadvantaged group. Indeed, in the case before the court, there seemed to be no doubt the aspects of SE 2000 had been

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¹⁰⁶ Daniels, C.A., supra note 68 at para. 72.
¹⁰⁷ Daniels, H.C., supra note 68 at para. 78.
¹⁰⁸ Daniels, C.A., supra note 68 at paras. 1, 9, 10 and 67.
inadequate. Apart from the independent report, it was also uncontested that the government had taken various measures to correct deficient aspects of the policy after its implementation.

Because of this, rather than being the result of any lack of specific evidence, the Court’s decision appears to be more influenced by what seemed to be its opinion that the legislation provided no standard (or no jurisdiction) for any judicial assessment of adequacy, and the standard set by the trial judge was too uncertain. However, although alleging that Baragwanath’s J’s “not clearly unsuitable” standard presented “grave difficulty for judicial supervision”, the Court did not say why such uncertainty or difficulty could not be resolved through hearing expert evidence, as Baragwanath J did. Moreover, the standard of education (including support services) provided to the special needs children before the introduction of SE 2000 would have provided a clear point of reference, along with expert evidence, for determining the suitability or otherwise of the SE 2000 initiatives.

4.1.2.6.3 Quality guaranteed?

Seemingly for the purpose of showing that a judicially enforceable right in the terms stated by the trial judge was unnecessary, and bolstering its point that the system was designed to ensure appropriate quality, the Court referred to various mechanisms which it apparently saw as being related to ensuring quality (such as the legislation’s requirements concerning curricula and national administration, and the existence of the Education Review Office and its role in reviewing the performance of state schools). It also noted that changes had been made following the independent report relied on in the High Court, and that a survey conducted in 2002 showed overall satisfaction.

In doing this, the Court of Appeal seemed to miss the clear point that the trial judge made, which was that the case was not about students who had benefited from SE 2000, but was about children who allegedly had not (and were found not to have by the High Court). The Court of Appeal also seemed to miss the point that the hearing in the High Court had not been set down for 2 years after proceedings were issued, by consent, to allow the government to consider the parents’ arguments. After that time, the parents were still unsatisfied (the trial judge found with reason), and proceeded with the hearing in 2001. Even after the High Court judgment, the parties were still unable to reconcile their differences, and the matter had to be heard by the Court of Appeal in late 2002. Clearly, therefore, the quality mechanisms in the Education Acts to which the Court of Appeal referred did not resolve the parents’ seemingly justifiable concerns about the adequacy of education provided to their special needs children.

\[109 \text{Ibid. at para 82.}\]
4.1.2.6.4 No consideration of alleged discrimination

Finally, the Court of Appeal could have considered whether, even if the Education Acts did not provide the parents’ children with any general right such as that proposed by the trial judge, the right to freedom from discrimination in the NZBORA and the HRA did. However, the Court simply sidestepped that issue, and in so doing, apparently endorsed the trial judge’s finding. Apparently, therefore, it is enough under the NZBORA and the HRA if the state treats all individuals the same in relation to education, even if such treatment effectively means unequal and prejudicial treatment of a highly disadvantaged group (particularly when judged against the standard set by former, more positive treatment). Of course, the trial judge had resolved this issue by formulating the right to a suitable education, but the Court of Appeal negated such a right.

4.1.2.6.5 The result

The result of the proceedings was, therefore, that the special needs children had suffered no damage recognisable at law. The only legal defect was the procedural error in making the disestablishment decision. This was despite the fact that there was evidence that SE 2000 led to inadequate resources being provided to the children; led to a decrease in the quality of education being afforded those children; and consequently negatively and significantly affected those children’s internationally recognised (and domestically affirmed, at least as a matter of policy) right to an education of equal quality to that enjoyed by children without disabilities.

Ultimately, the parties settled the proceedings. Importantly, however, the Court of Appeal’s judgment is authority that New Zealand law regarding education and discrimination does not prevent the executive from implementing policy which apparently contravenes basic equality and non-discrimination rights, recognised internationally through the right to education in the ICESCR and the ICESCR’s prohibition of discrimination.

4.1.2.7 The ICESCR: an irrelevancy

As noted above, apparently neither the High Court nor the Court of Appeal considered the ICESCR (or the CESC’s General Comments on education and disabled persons) as relevant to their judgments.

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110 In New Zealand’s Third Periodic Report (supra note 65), the government advised that the case settled following the Court of Appeal’s judgment. Para. 608 of the report states: “Key actions following the settlement of the case included [a] Nationwide consultation and information sharing with parents and educators on the availability of special education support. Feedback from parents and educators was gathered on priorities for action which then formed a programme of work for the ministry. [b] A further key outcome was that no special education class or facility would be closed without consultation with the school community and a plan for support for any students with disabilities who may be affected by closure.”
These omissions are surprising. Both Courts should have interpreted the Education Acts (and also the NZBORA and the HRA, although the Court of Appeal did not consider those Acts) with specific reference to the ICESCR’s right to education, the guarantee of non-discrimination in the enjoyment of that right, and the prohibition against unjustifiable retrogressive measures. They should also have endeavoured to make their interpretations of the domestic legislation consistent with New Zealand’s international obligations so far as that was possible.\(^{111}\)

By way of example, such an approach could have led to or at least supported a broader and at the same time more protective interpretation of the meaning of discrimination in the NZBORA and the HRA. It would have also given strength to the trial judge’s finding that there is a relatively narrow role for the judiciary in reviewing the suitability of the education provided to a particular student, given the importance of the right at stake; and added weight to the interpretation of “sufficient provision” in section 98(2) as meaning sufficient to provide an education equal to that enjoyed by students without special needs.

Finally, if the correct interpretation of New Zealand law is in fact that it does not protect special needs children’s right to substantive equality, an express statement to that effect; and an identification of the apparent inconsistency with such a result and New Zealand’s obligations under the ICESCR by the Court of Appeal (at that time New Zealand’s highest court), would have been significant.

4.1.2.8 The “right” result?

Overall, however, the Court of Appeal’s interpretation of the Education Acts, and decision to decline to consider the issue of discrimination, seem to reflect correctly the intention of the legislature with regard to ESCR. As already discussed, Parliament has generally not wished to empower courts to engage in the type of review Baragwanath J undertook, and has not sought to make the ICESCR relevant in any substantive sense to executive decision-making.

\(^{111}\) See Ashby v. Minister of Immigration, supra note 4. See also CESCR, General Comment 9, 19th Sess. E/C.12/1998/24 (1998) at paras. 14 and 15, where the CESCR states: “14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations. 15. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. […] Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.”
4.2 Lawson v. Housing New Zealand

In this case, Mrs. Lawson, a state housing tenant, sought judicial review of a series of decisions relating to or resulting from the government’s transfer of state houses to a company, Housing New Zealand [HNZ], and the increase of the rent for those houses from subsidised rates to market rents.

4.2.1 The state housing reforms and their reasons

Prior to the reforms, the rent subsidies for state house tenants were on average three times more than the assistance available to low-income private sector tenants. The government considered this situation to be inequitable. Further, it was concerned that tenants currently in state houses could remain in those houses even if their financial situation improved. This was an issue because there was a significant waiting list for state houses, and on that list were people classified as being in “serious housing need” (i.e. living in substandard or overcrowded housing, temporary accommodation, or housing costing over 50% of income).

Access to adequate housing was also complicated by high private rents and high mortgage interest.

To address this situation, the government decided to eliminate rental subsidies for state houses, and instead to provide assistance through an accommodation supplement which would vary according to factors such as family size, income, and locality. The subsidy would be set at a level to incentivise (or force) each tenant “to seek the most cost-effective accommodation” (e.g. so that tenants without families but living in larger houses would move to smaller houses, freeing up those houses for other tenants with families).

The principles informing the housing reforms were self-reliance, fairness, efficiency, greater personal choice and that “those who can make greater provision for their own needs should be encouraged to do so.” Further, although budget cuts in health, education and social welfare had occurred in the 1991 budget, the Minister for Housing deposed that the government was not aiming for fiscal savings through the housing reforms, but rather the improvement of “efficiency and fairness.”

Prior to implementing the reforms, the government received a series of reports advising that the introduction of market rentals would lead to a “major deterioration” in the living standards of many state tenants.

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112 Lawson, unreported, supra note 69 at 7.
113 Ibid. at 5.
114 Ibid. at 9.
115 Ibid. at 6.
116 Ibid. at 16.
The government was also advised that many state house tenants would have limited ability to change their accommodation due at least in part to an inadequate supply of low-cost housing, particularly one-bedroom units. Various strategies for easing the reforms’ impact were recommended (such as staggered rent increases, moving progressively rather than immediately to market rentals, and reassessment of tenants during the introductory phase to determine which tenants required additional assistance). Most of these strategies were adopted.

Another important aspect of the reforms was the establishment of HNZ as a company under the Housing Restructuring Act 1992 [HR Act]\(^\text{118}\) to rent the state houses which had been administered by the Housing Corporation of New Zealand. In accordance with section 4 of the HR Act, HNZ’s principal objective was “to operate as a successful business that will assist in meeting the Crown’s social objectives by providing housing and related services....” The company’s shares were to be held by the Ministers of Housing and Finance, and they retained a level of control over the company, including the power to issue directions to it. The Ministers were also required to give notice to the company of the government’s social objectives every financial year.

Following the introduction of the reforms, their effects were monitored (although the accuracy and impartiality of the monitoring were contested) and various adjustments were made. These included modification of the accommodation supplement criteria and deferral of rent increases due to problems such as an insufficient supply of smaller units for tenants who could no longer afford their previous accommodation as a result of the increases. Ultimately, however, by 1995, HNZ had raised all rents to market levels.

### 4.2.2 The Lawsons and Mrs. Lawson’s application for review

Mrs. Lawson and her husband were elderly and her husband in poor health. They had occupied the same state house for 49 years. As a result of the reforms, the Lawsons’ rent progressively increased from $81 a week in 1992 to a total of $165 per week in 1995 (an increase of just over 100%). They were unable to pay the increased rate, and according to Mrs Lawson alternative accommodation in the same area was only available at a higher rate. Ultimately, HNZ sought to terminate the Lawsons’ tenancy, leading to her bringing the application for review.

Mrs. Lawson pleaded, amongst other things, that HNZ’s decision to increase rents to market rents breached her right to life (affirmed in section 8 of the NZBORA). She further alleged that in setting the

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\(^{118}\) *Housing Restructuring Act 1992 (N.Z), (1992/76)* (now the *Housing Restructuring and Tenancy Matters Act 1992*).
government’s social objectives for 1993/1994, and in not ensuring that HNZ charged affordable rents, the Ministers of Housing and Finance failed to have proper regard to her right to life and to New Zealand’s international obligations (including its obligations under the ICESCR).

4.2.3 The High Court judgment

Williams J dismissed Mrs. Lawson’s application. The judge found that HNZ’s decision to impose market rents was not amenable to judicial review. There was no evidence of fraud, corruption or bad faith, and nor did it appear to the judge that HNZ’s decision had breached section 4 of the HR Act or the social objectives the government had set in relation to housing. According to Williams J, the decision to increase rents was “purely commercial.”

The judge further considered that if HNZ’s decisions on rents were subject to judicial review, it would be placed at a competitive disadvantage as against private landlords. The implication of Mrs Lawson’s claim was that HNZ may have to charge less than the market could bear, while private landlords were not so restricted. If this were the case, HNZ’s ability to operate as a successful business would be affected, and the market distorted. Finally, Williams J held that Mrs Lawson’s complaint was that her rent had been increased, not that HNZ had failed to follow a necessary procedural step in making that increase. Accordingly, her claim concerned the merits of HNZ’s decision rather than the process by which it was made. This meant that it was outside the legitimate scope of judicial review.

Williams J then turned to Mrs. Lawson’s claims against the Ministers. The judge stated that the housing of lower income New Zealanders involved complex issues and was an area in which political judgments on the allocation of economic and social resources were required. Given this, in the absence of manifest unfairness relating to the procedure by which decisions about social housing were made, the court would be less inclined to intervene. In Mrs Lawson’s case, there was no procedural impropriety or inherent unfairness. Although Williams J recognised that the reforms had had “a seriously adverse effect on [Mrs. Lawson’s] financial position and on those who are similarly situated”, the judge also found that “any hardship which she experienced is insusceptible to judicial review.”

119 Lawson v. HNZ, supra note 69 at 485.
120 Ibid. at 486. HNZ’s discretion in this area was not completely unlimited. As with all other landlords, HNZ was subject to the Residential Tenancies Act 1986 under which tenants could apply for an order limiting their rent to market rent.
121 Ibid.
122 Ibid. at 486.
123 Lawson, unreported, supra note 69 at 48.
124 Lawson v. HNZ, supra note 69 at 487.
In relation to Mrs. Lawson’s claim regarding the right to life, Williams J found that “an unduly strained interpretation” of the right would be required for it to apply to Mrs. Lawson’s circumstances.\(^\text{125}\) Williams J also found that even if the right were applicable, the reforms constituted a reasonable limit on the right under section 5 of the \textit{NZBORA} (the limitations section of that statute), noting that “the provision of subsidised rental housing is no longer regarded as being as important in the public interest as was formerly the case.”\(^\text{126}\) HNZ could not, according to the judge, be expected to tailor its policies to the specific circumstances of each tenant.

The judge also considered as without merit Mrs Lawson’s allegation that relevant international obligations had not been taken into account. In reaching his decision, the judge considered, amongst other instruments and texts, articles 2.1 and 11 of the \textit{ICESCR} and the \textit{CESCR}’s General Comment 4 on the right to adequate housing. After referring to the statements in General Comment 4 regarding the content of that right, Williams J held:

“[I]t is not for this Court to judge whether the government of New Zealand has fully complied with those obligations. It is sufficient for this Court to reach the view that the government has plainly made efforts to balance the competing factors. Those efforts include the lengthy and detailed consideration of affordability and impact on living standards appearing in the reports earlier detailed and the changes to the accommodation benefit which accompanied them […] Whether New Zealand has fulfilled its international obligations is a matter on which it may be judged in international forums but not in this Court. […] [T]he Ministers do not say that they expressly took the international instruments into account, [but] the aims of the international instruments are comparable with the principles which underpinned the housing reforms and informed their formulation and implementation.”\(^\text{127}\)

\section*{4.2.4 Analysis of the judgment}

As Williams J pointed out, Mrs. Lawson’s claim was concerned with the effect that the increase to market rents would have on her and her husband’s standard of living, and particularly on their housing. New Zealand law, however, provided a very narrow scope for such a claim to be made. In essence, Mrs. Lawson was limited to seeking review on procedural grounds: specifically, whether the Ministers and HNZ made their decisions in accordance with the \textit{HR Act}. There was no legal basis for an inquiry into the consistency or otherwise of the move to market rents with Mrs. Lawson’s internationally recognised legal interest, the right to adequate housing.

\(^\text{125}\) Ibid. at 495.
\(^\text{126}\) Ibid. at 495 to 496.
\(^\text{127}\) Ibid. at 499.
Williams J’s finding against Mrs Lawson’s allegation that the Ministers failed to have proper regard to New Zealand’s international obligations, including its obligations under the *ICESCR*, does appear lenient and arguably was made without sufficient appreciation of the nature of those obligations. However, the judge was correct in finding that he had no jurisdiction to determine whether the reforms complied with such obligations. Therefore, it may well be that a fuller understanding of the obligations would not have been of any particular relevance to the judge’s findings. Further, the judge’s ruling that the right to life in the *NZBORA* did not cover Mrs. Lawson’s circumstances must have been correct. A finding to the contrary would have been inconsistent with the express decision not to include ESCR in the *NZBORA*, and specifically not to include a right to adequate housing.

If there had been a free-standing right to adequate housing (as defined in the *ICESCR*, including the prohibition against deliberate and unjustifiable retrogressive measures) in the *NZBORA* or in other domestic legislation, the nature of the court’s inquiry would have been different. The court would have been able to consider whether HNZ’s or the Ministers’ decisions breached that right, as opposed only to having jurisdiction to consider in a very general way whether the Ministers took the right and applicable obligations into account in making their decisions.

I discuss below some of the issues that would have been justiciable if Mrs. Lawson had been to rely directly on such a right.

### 4.2.4.1 Retrogressive measure

It is clear that the move to market rents constituted a deliberately retrogressive measure in terms of the *ICESCR*. As stated above, the government knew that the reforms would result in a “major deterioration” in the living standards of many state tenants. Further, the government was also advised before the reforms were implemented that “the most significant losers” would be current tenants.\(^{128}\)

That being the case, in accordance with the right to adequate housing as defined in the *ICESCR* (including the extent of permissible limitations), such a retrogressive measure had, amongst other requirements, to be prescribed by law and not be incompatible with the nature of the right to adequate housing. Further, the government was obliged to consider carefully all alternatives to that retrogression before implementing it, and to choose the least restrictive option available.

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\(^{128}\) *Lawson, unreported, supra* note 69 at 11.
If Mrs. Lawson had been able to plead such a right before Williams J, the court could have examined whether the government complied with these obligations.\(^\text{129}\) Such an inquiry could have been significant.

### 4.2.4.2 Prescribed by law and alternatives considered?

There is a strong argument that the move to market rents was not prescribed by law. Williamson J found that nothing in the *HR Act* or in the list of social objectives for HNZ required the company to increase rents to market rates.\(^\text{130}\) Rather, the government made the initial decision to increase rents to market rates as part of its 1991 Budget, and HNZ implemented the first two staggered increases as the government’s agent. HNZ then made the remaining increases up to market rates independently from government, but with the knowledge that this was what the government wanted it to do. While Williamson J ultimately held that the increases were “prescribed by law” in terms of section 5 of the *NZBORA* by applying a “pragmatic approach”, this finding seems questionable in light of the judge’s conclusion that the *HR Act* “does not refer to rent levels.”\(^\text{131}\)

Of course, had the government been aware of such a requirement it may well have legislated for the increase. However, as well as the increase apparently not being prescribed by law, there is nothing in the judgment to indicate that the government carefully considered all other alternatives to its policy before implementing it. For example, nothing is said about whether the government considered providing at least some additional housing itself to meet the demand (and why it rejected that option); whether it considered arguably less drastic options, such as requiring tenants who had large state houses to move to smaller ones if, for example, those tenants’ families were no longer living with them; or whether it considered persisting with less severe measures that were already being undertaken prior to the reforms.

\(^{129}\) If there were a right to adequate housing in the *NZBORA*, it may be that any limitation to it would have to be assessed in terms of s. 5 of the *NZBORA* rather than art. 4 of the Covenant. S. 5 provides that “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 limitations prescribed by law as can be demonstrably justified in a free and democratic society.” In *R v. Hansen*, *supra* note 15 at 64, Blanchard J explained the applicable test under section 5 as follows: “New Zealand courts have commonly adopted the test used by the Supreme Court of Canada in *R v Oakes*, which was summarised by that Court in the following way in *R v Chaulk*:

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must: (a) be ‘rationally connected’ to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right or freedom in question as ‘little as possible’; and (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.”

\(^{130}\) *Lawson v. HNZ*, *supra* note 69 at 484.

\(^{131}\) *Ibid.* at 485 and 496. Williamson J did consider whether the move to market rents came within s. 5 of the *NZBORA*, and concluded at 496 that “even if the conduct complained of had prima facie been held to be with the scope of s 8 [the right not to be deprived of life], it is also within reasonable limits demonstrably justified in a free and democratic society.” However, the judge’s analysis of this issue was brief and no doubt affected by the fact that the pleaded right was the right to life, not the right to adequate housing.
such as requiring tenants who could pay market rates for the properties they were in to pay those rates.\textsuperscript{132} Clearly, alternative policy options existed, and there is no indication that the government was forced to move quickly because of, for example, resource limitations. As set out above, the reforms were not designed to produce savings.

Had the government’s consideration of alternatives been an issue, different evidence may have been led. However, it does appear from the judgment that the government decided on the policy of moving to market rates, and that the evaluation after that point was exclusively concerned with the measures that would be required to implement and ameliorate the effects of the policy. If this were the case, it would have been arguable that the government’s approach failed to conform to another of the requirements of article 4 of the Covenant.\textsuperscript{133}

4.2.4.3 Reforms incompatible with the nature of right?

In addition, if there had been an enforceable right to adequate housing in New Zealand, a real and justiciable issue would have arisen as to whether the reforms were incompatible with the right of Mrs. Lawson and others to adequate housing.

The existence of such a right would not have meant that the rights of certain state house tenants could have always trumped the rights of others in need of housing, or that the state could never change housing policy. However, if the rights of some state tenants had to be restricted to achieve greater overall equity (such as requiring some tenants to move to smaller accommodation so that other people requiring larger state houses could be accommodated), such restrictions would not have been able to be implemented in a way that effectively destroyed those tenants’ rights.

In the context of the reforms, this would have meant that the government (or HNZ) would have had to ensure that before state tenants were required to move from current accommodation which was adequate, and before those tenants were required to pay market rates for their current accommodation, there was in fact adequate (even if not of the same standard) housing on offer from HNZ or from other landlords. In other words, a policy which arguably improved the position of at least some members of one disadvantaged group (private tenants), but also resulted in people who formerly had access to adequate

\textsuperscript{132} See ECOSOC, Initial reports submitted by States parties under articles 16 and 17 of the Covenant: NEW ZEALAND, 1991 Reg. Sess., E/1990/5/Add.5 (1991) at para. 430 [“Initial Report”], which states: “Where tenants are able to pay market rates, they are charged accordingly. As at 31 March 1989, about 7 per cent of the Corporation's tenants were paying market rates. The majority, however, are charged at a lower rate in accordance with their income.” The Initial Report was before Williams J.

\textsuperscript{133} Similarly, there may have been an argument available that the Ministers failed to take into account the obligation to consider alternatives, and therefore failed to take into account a relevant consideration. Such an argument would have provided a ground for judicial review. That said, any such review would still have only been concerned with whether or not the Ministers took the obligation into account, not whether they complied with it.
housing no longer having such access (e.g. falling into the category of serious housing need because they had to move to substandard housing or had to expend a large proportion or the majority of their income on accommodation) would be unlikely to be consistent with the right to adequate housing.

Because Lawson v. Housing New Zealand was not argued on this basis, it is not possible to state definitively whether the government knew that the effect of the reforms would be to push some tenants into inadequate housing, or whether that in fact happened. However, various facts in the judgment indicate that that the government was aware that this could occur or at least did not have a solid factual basis for believing that it would not; and that some state tenants lost their former housing without any guarantee of an adequate replacement.

New Zealand’s initial report under the ICESCR, drafted before the reforms were implemented, recorded that: “The main problems [in relation to housing] are the high cost in the private sector of houses and finances, or of rents, relative to income [...]” As set out above, the judgment also recorded this understanding. In addition, policy advice to government recognised that it was essential to the reform’s success that there was an adequate supply of low-cost housing. Despite this, there is nothing in the judgment to indicate that the government determined prior to the implementation of the reforms that there was such supply. Indeed, as the reforms proceeded, it was noted in 1992 that there were problems in respect of tenants whose relocation options were constrained by a shortage of one-bedroom units. In 1994, one of the staggered rent increases was deferred due to a continuing shortage of these units.

Further, in 1993 the Chair of the Board of Housing New Zealand wrote to the Prime Minister, advising him that a rent increase planned for November 1993 would particularly impact on approximately 9000 retired persons, mainly women, who would generally not be able to find alternative accommodation. These people had in the past been the best tenants. The rent increase would result in them paying more than 40 percent, and in some cases more than 50 percent, of their income on accommodation. The Chair advised the Prime Minister that this would cause “considerable individual distress.” The government, however, decided to proceed with the rent increase apparently without implementing any of the remedial strategies the Chair of the Board suggested, on the basis of advice that “the figures might have been overstated.”

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134 Initial Report, supra note 132 at para. 416.
135 See Lawson, unreported, supra note 69 at 5, where Williams J states: “High private rents and high mortgage interest compounded the problem.”
136 Ibid. at 7.
137 Ibid. at 19.
138 Ibid. at 35 and 36.
139 Ibid. at 36.
Therefore, the government not only knew that the availability of adequate housing on the market was limited, but also knew that its reforms would force many tenants out of their current properties (indeed that was its intention) and simultaneously increase demand for smaller properties which were already oversubscribed. Despite this, the government appears to have simply assumed that, similar to what occurred in Attorney-General v. Daniels in relation to the provision of special education facilities, adequate housing would somehow be provided by a combination of market forces, HNZ, private landlords and the accommodation supplement. This assumption proved to be incorrect. Indeed, evidence before the Court (albeit contested) was that during the reforms the number of households in serious housing need rose significantly. These households included state tenants who could not afford to pay their rent and tenants in private accommodation.\footnote{I note that it is not clear from the judgment how many of the latter were already in private accommodation and how many were in private accommodation as a result of being unable to pay rent for a state house.}

Accordingly, on the facts set out in the judgment, there are clear indications that the reforms were incompatible with the nature of the right to adequate housing of numerous tenants. It appears that the move to market rents may well have resulted in many tenants being moved from a situation in which they could enjoy the right to a situation in which the right was effectively negated (and accordingly breached).

Mrs. Lawson and her husband were some of the state tenants forced to move as a result of the implementation of market rents. Unfortunately, there is no indication in Williams J’s judgment of what would happen to the Lawsons following the termination of their tenancy for non-payment of rent, no doubt because as Williams J found any hardship which Mrs Lawson would experience as a result of the reforms was legally irrelevant.\footnote{Lawson v. HNZ, supra note 69 at 488.} However, if in Mrs. Lawson’s case the move to market rentals meant that she and husband had to move out of their state house into substandard accommodation, then again there would have been a clear argument that the Lawsons’ right to adequate housing had been violated. From the information available from the judgment, that this could have occurred was clearly possible (unless Mrs Lawson and her ill husband, in their mid-seventies and early eighties respectively at the time of the hearing, were able to find adequate housing outside the area in which they lived or in another city).

4.2.5 Summary

The facts in Lawson v. Housing New Zealand indicate that the move to market rentals may have breached the right to adequate housing of many state tenants, causing considerable hardship and distress.

Generally speaking, Williams J must be correct in stating that a court should be reluctant to intervene in areas with high policy content. However, where there is evidence of considerable prejudice to people and
indications that their rights (whether at international or domestic law) are being breached by a certain policy, a judicial analysis of the justifications for and proportionality of that prejudice, and of the measures taken to ameliorate it, is justifiable and desirable.

Such an analysis will not necessarily lead to a finding that a particular measure is impermissible, and indeed a finding in favour of the measure will strengthen its legitimacy. In the case of the housing reforms, the ability to invoke a more detailed judicial evaluation than that undertaken in Lawson v. Housing New Zealand would have constituted not only more appropriate recognition of the severe consequences of the reforms for many state tenants (whatever the outcome of such an evaluation), but also would have been consistent with New Zealand’s obligation to protect the right to adequate housing. Such a jurisdiction would not have required the Court to decide on the best way for the New Zealand government to provide housing assistance. Rather, it would have done no more than allow the Court to analyse the reforms that the government designed to ensure that they did not breach the right to adequate housing, affording the government an appropriate margin of discretion.

Finally, if such a right had been in place before the reforms were implemented, then the government would have had to have taken it into account in policy design, and the right would have influenced that policy. It is difficult to see how such an influence could be considered as negative. Indeed, while Williams J was correct to a point in considering that policy could not be designed to meet individual circumstances, policy can and should be designed to take into account internationally recognised rights and ensure that those rights are not breached as a result of its implementation.

However, similar to Attorney-General v. Daniels, the judgment of Williams J in Lawson v. Housing New Zealand is entirely consistent with Parliament’s intention that the right to adequate housing should not be justiciable domestically and should not be permitted to constrain executive action.

4.2.6 Reform of market rents regime

In 2000, the Labour government (which had in 1999 replaced the National government responsible for the reforms) enacted various amendments to the HR Act. One of its amendments included a change from market rents to income-related rents for tenants of the successor to HNZ, the Housing New Zealand

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142 As well as the matters set out above, and consistent with the CESC R’s statement of the factors relevant to determining the justifiability or otherwise of a retrogressive measure (see Chapter 1 above), the adequacy of government consultation on the reforms could have been examined. In Lawson v. Housing New Zealand, witnesses for Mrs Lawson alleged that consultation was inadequate, but this issue was apparently irrelevant to Williams J’s judgment.
Corporation. In relation to income-related rents, New Zealand’s third periodic report under the Covenant states:143

“Through income related rents, the Housing New Zealand Corporation provides below-market rents to Corporation tenants. Corporation tenants pay no more than 25% of their income in rent, although minimum rents do apply. Tenants with incomes above the New Zealand Superannuation low-income threshold will pay progressively more than 25 percent of their income, until the market rate is reached. Around 90 percent of Corporation tenants pay an income-related rent.”

It is not clear whether Mrs. Lawson and her husband would have benefitted from the move back to income-related rents.

4.3 The irrelevancy of the ICESCR in domestic litigation: additional jurisprudence

As Attorney-General v. Daniels and Lawson v. Housing New Zealand demonstrate, the lack of justiciable ESCR in New Zealand law mean that the ICESCR is largely irrelevant in domestic litigation. Other cases also illustrate this point, and suggest that ESCR are not well-understood in New Zealand.

Ankers v Attorney-General144 was an application for judicial review of directions that the Minister of Social Welfare issued relating to the granting of special benefits. Amongst other allegations, the applicant pleaded that the Minister failed to take into account New Zealand’s obligations under articles 2(1), 9, 10 and 11 of the ICESCR in issuing the directions.

The judge, Thorp J, found that the Minister had not considered the Covenant obligations personally, but that this was because senior officials of the Department of Social Welfare decided not to refer the Minister to them. The officers took this course because their view was that the directions did not conflict with New Zealand’s obligations under the ICESCR.

Thorp J referred to authority that the collective knowledge of departmental officials is to be treated as the knowledge of the relevant minister, and found that “within the senior ranks of the department there is ongoing monitoring of New Zealand’s compliance with the covenant and it forms part of the framework of documents within which officials endeavour to develop and provide appropriate policy advice to the Minister.”145

143 Third Periodic Report, supra note 65 at para. 406.
145 Ibid. at 602.
On that basis, Thorp J dismissed the allegation that the Minister had failed to take into account the *ICESCR* (although ultimately found in favour of the application on other grounds). The issue of whether or not the directions were consistent with the Covenant was of course not justiciable, and the understanding that the officials had of the relevant obligations was apparently irrelevant.

*Rahman v. Minister of Immigration*\(^{146}\) was an appeal and an application for judicial review of a decision upholding a deportation order. Amongst other allegations, the appellant alleged that the relevant administrative tribunal failed to consider article 11(1) of the Covenant and that this failure invalidated its decision.

Importantly, McGechan J reaffirmed that those exercising statutory powers of decision should consider international obligations.\(^{147}\) However, McGechan J went on to emphasise that the obligation of progressive realisation was not immediate, and also considered that it was in any case subject to article 4 limitations. It was in this context that article 11 had to be interpreted.\(^{148}\) The judge then found that the tribunal did not have article 11(1) in mind when it made its decision, but this was of no consequence provided that “the content of the obligations, such as they are, in fact was taken into account to any extent necessary.”\(^{149}\) Deciding that they had been, the judge dismissed the appeal and application for review.

The outcome in *Rahman v. Minister of Immigration* seems correct, and on the facts of the case it is difficult to see how article 11(1) was particularly relevant. However, McGechan J’s “such as they are” reference to the Covenant’s obligations indicates that the judge perceived of the Covenant as imposing elastic and mostly unenforceable obligations.\(^{150}\) Further, although McGechan J did refer to ESCR as human rights in the course of his judgment,\(^{151}\) the judge also (and perhaps unintentionally) characterised them as mere needs. At paragraph 64 of the judgment, McGechan J stated: “The Tribunal was entirely conscious of the human need for adequate food, clothing and shelter, and the desirability of improvement.” That sentence also arguably indicates that McGechan J did not see the Covenant as imposing any concrete obligation on States parties, and was more a declaration of aspirations.\(^{152}\)

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\(^{147}\) *Ibid.* at para. 54.


\(^{149}\) *Ibid.* at paras. 63-64.

\(^{150}\) See also para. 62 of *Rahman, supra* note 146, where McGechan J states: “The international obligations assumed under Article 11 are to have due regard to sovereignty, available resources, progressive implementation, and preservation of the general welfare of New Zealand society.”


\(^{152}\) In this regard, see also para. 59 of *Rahman, supra* note 146, in which McGechan J states: “That obligation [in art. 2(1)] is, however, limited by being to maximum of ‘available’ resources, and to achieving Nirvana ‘progressively’. It is not an open-ended or immediate obligation.” In this way, McGechan J appears to characterise the Covenant as being aimed at utopian ideals.
In *Aorangi School Board of Trustees v. Minister of Education*, the Board sought judicial review of the Minster’s decision to close Aorangi Primary School. The case is noteworthy for the lack of any reference to the *ICESCR* in the judgment, even though the issues before the court clearly touched on the right to education of the children who attended the school. Further, it appears that at least counsel for the Board did not consider that the case was a human rights case, despite the fact that it involved the right to education. The judgment records the following: 153

“In considering the reasonableness of the decision, the orthodox test is that the applicant must show the decision was so unreasonable, no rational decision maker could have come to it. Counsel, Mr Caldwell, submitted that *because this case involves rights to education and development, it is akin to a human rights case* and so reasonableness should be assessed by reference to lower threshold, namely fairness.” [emphasis added]

5 PART IV: THE STATUS OF ESCR IN NEW ZEALAND: ACADEMICS, THE GOVERNMENT, AND OTHERS

5.1 The position of New Zealand academics

As well as having a low profile in New Zealand courts, the Covenant and ESCR generally have received little attention from New Zealand academics. Of a small group who have published in relation to ESCR, the most prolific author appears to be Paul Hunt, 154 while Geiringer and Palmer’s work would seem to be the most comprehensive examination of ESCR in the New Zealand context. 155

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153 *Aorangi School Board of Trustees v. Minister of Education* (21 December 2009) CIV-2009-409-002812, H.C. at 100. In this regard, see also *Shortland v. Northland Health Ltd* [1998] 1 N.Z.L.R 433 (C.A.). Despite the fact that *Shortland v. Northland Health Ltd* concerned the legality of a denial to provide health services, there is no reference in the judgment to the highest attainable standard of physical and mental health recognised in article 12 of the *ICESCR*.


155 See Geiringer and Palmer, *supra* note 21. Butler and Butler describe the reasons why ESCR were not included in the *NZBORA* in their book *The New Zealand Bill of Rights Act: a commentary* (supra note 31). However, Butler and Butler do not engage in any detailed analysis of ESCR (no doubt because their book is about the *NZBORA* and ESCR are not generally included in that statute). See also Bernard Robertson, “Economic, Social and Cultural Rights: Time For A Reappraisal” (1997) online: New Zealand Business Roundtable <http://www.nzbr.org.nz/documents/publications/publications-1997/nzbr-rights.doc.htm> at (discussed in the Chapter 1 above) and Smillie, *supra* note 49.
None of these authors have given sustained attention to whether ESCR should be fully justiciable in New Zealand. However, of those that have considered or touched on the issue, Smillie argues that if the NZBORA is to be retained, it should include ESCR. Hunt would apparently be in favour of greater justiciability, and Robertson would not.

Geiringer and Palmer do not take a firm position either way, but rather focus on the reference in article 2(1) of the ICESCR to “all appropriate means”. They argue that article 2(1) imposes an obligation to implement some form of “enhanced accountability”; and propose that the article requires the government to “consider all available options [for enhancing governmental accountability] and to institute the particular mix of accountability mechanisms that is judged to be both ‘appropriate’ (using the language of Article 2(1)) and consonant with available resources.” They go on to state:

“We do not seek here to resolve here the vexed question of the extent to which judicial or quasi-judicial remedies for violation of ESC rights and New Zealand are either ‘appropriate’ or economically viable [...]. In our view, however, a rights-based approach to social policy requires these questions to be confronted and addressed in a principled manner.”

5.2 The New Zealand government’s position

The New Zealand government has consistently rejected any suggestion that ESCR should be given an enhanced status in domestic law.

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156 Smillie, supra note 49 argues that the NZBORA should be repealed, on the basis that it is an important element in a slide towards what he argues would be an undemocratic “juristocracy” in New Zealand. His alternative prescription is, however, the inclusion of ESCR in the NZBORA or any future entrenched Bill of Rights. At 193 to 194 of his article, Professor Smillie states: “Furthermore, many would argue that these economic and social rights are under more serious threat in New Zealand today than the civil and political rights guaranteed by the New Zealand Bill of Rights Act. Certainly, it seems more likely that a future New Zealand government will revert back to the free market/user pays economic policies of Roger Douglas and Ruth Richardson than legislate to authorise torture, or capital punishment, or indefinite detention without trial, far less the killing of all blue-eyed babies. With a period of slower economic growth in prospect and the major political parties under pressure from upper and middle-class voters to offer meaningful tax cuts, there is a very real prospect of reduced government spending in the critical social areas and this will impact heavily on the poorest and most vulnerable members of our society.” Professor Smillie also argues, at 189, that the NZBORA “did nothing to arrest or mitigate the disastrous social consequences of the massive increase in income inequality that New Zealand experienced in the late 1980s and 1990s as a result of the aggressive free-market economic policies pursued by successive governments” (noting that, between 1985 and 2000, New Zealand registered the greatest increase in income inequality of any OECD country), and that the NZBORA “is not an effective tool against real social injustice.”

157 See in particular Hunt, Reclaiming Social Rights, supra note 154.

158 Geiringer and Palmer, supra note 21 at 28.

159 Ibid. at 28.
5.2.1 Reports under the Covenant

In its initial periodic report under the Covenant, New Zealand advised that “[a]fter discussion of the issues involved, it was decided not to extend the terms of the proposed Bill [for the NZBORA] to include social and economic rights. The enjoyment of these rights, it was felt, is already adequately protected under the wide range of specific laws by which the Government is committed to positive action for their promotion.”

In its Concluding Observations on New Zealand’s initial periodic report, the CESCR expressed concern that the NZBORA did not include ESCR. New Zealand responded to this concern its second periodic report, essentially by reiterating the position it took in its initial periodic report: namely, that ESCR were adequately protected by other means. New Zealand further stated that many of the Covenant norms “do not lend themselves to translation into legislation or justiciable issues, but are statements of principle and objectives.”

The CESCR, however, returned to the issue of justiciability in its Concluding Observations on New Zealand’s second periodic report. Affirming the interdependence and indivisibility of human rights, the CESCR encouraged New Zealand to reconsider its position on the justiciability of ESCR.

New Zealand declined this suggestion. In its third periodic report, New Zealand advised the CESCR that “the indivisibility of human rights is a principle of paramount importance to New Zealand.” The government emphasised, however, that under the Covenant it was for each State party to determine how to give effect to the Covenant in national law. The government further asserted that New Zealand domestic law provides remedies in respect of ICESCR rights; that national legislation is, wherever possible, interpreted and applied in a way consistent with New Zealand’s international obligations; and that non-judicial and quasi-judicial remedies are also available.

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160 Initial Report, supra note 132 at para. 6.
162 See ECOSOC, Second periodic reports by States parties under articles 16 and 17 of the Covenant: NEW ZEALAND, 2002 Sub. Sess., E/1990/6/Add.33 (2001) at para 48(a)), which states: “The Government decided against the inclusion of economic, social and cultural rights in the New Zealand Bill of Rights Act 1990 on the basis that such rights are implemented through other legislation and administration, and the common law;” and “it is considered that the present systems of protection in New Zealand provide an appropriate level of protection to fulfil, in practice, New Zealand’s obligations under the Covenant.”
163 Ibid. at para. 50.
164 Ibid. at para. 50.
166 Ibid. at para. 50.
167 Ibid. at para. 20.
More specifically, the government referred to the right to freedom from discrimination in the *NZBORA* and the *HRA*;\(^{168}\) to “targeted legislation” which implements certain Covenant rights, such as rights relating to education, conditions of employment, social security and health;\(^{169}\) and to the possibility of seeking judicial review in respect of Covenant rights.\(^{170}\) In relation to judicial review, the government stated: “Judicial review in the context of Covenant rights will be focussed primarily on the rights as expressed in the particular statute, but, where applicable, the Court will also have regard to the Convention [sic].” The government also stated that the Covenant had been invoked in a number of domestic proceedings, referring specifically to *Air New Zealand v. Kippenberger*\(^{171}\) and *Lawson v. Housing New Zealand*.\(^{172}\)

Perhaps unsurprisingly, the government did not advise the CESCR of the limited or non-existent effect that the Covenant had had in those proceedings, or of the limited extent of the obligation to take into account the Covenant’s rights and obligations in domestic decision-making as interpreted in cases such as *Ankers v. Attorney General* and *Lawson v. Housing New Zealand*. Neither did it mention the occasions on which New Zealand courts failed to refer to the Covenant or made only a peripheral reference to it, despite the fact that the issues before the court concerned a Covenant right (such as the High Court and Court of Appeal decisions in *Attorney-General v. Daniels*). Nor did the government provide a summary of any analysis informing its position that despite its endorsement of the principle that all human rights are indivisible, ESCR should not be protected in the same way as CPR.

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\(^{168}\) *Ibid.* at paras. 22 and 23.


\(^{171}\) *Air New Zealand v. Kippenberger* [2000] 1 N.Z.L.R 418 (H.C.). This was a case concerning amongst other matters the right to freedom of association, provided for at that time by sections 6 and 7 of the Employment Contracts Act 1991 (now repealed) [ECA], affirmed in section 17 of the *NZBORA*, and also set out in art. 22(1) of the *ICCPR* and in art. 8(1)(a) of the *ICESCR*. However, it does not appear from the judgment that any of the parties to the proceedings invoked the Covenant or relied on it in any particular sense. Instead, the judge, Randerson J, commenced his analysis by stating at 12 that he “should construe the relevant statutory provisions not only in a manner which is consistent with s 5 of the ECA, but also consistently with s 17 of the New Zealand Bill of Rights Act 1990 which provides for a right to freedom of association.” His Honour then referred to the *ICESCR* in a general discussion about the right to freedom from association, stating at 12: “Part I of the [Employment Contracts Act 1991] is also consistent with Article 22 of the International Covenant on Civil and Political Rights and Article 8 of the International Covenant on Economic, Social and Cultural Rights.” At 17 of the judgment, following a finding by the judge, Randerson J stated: “This finding is consistent with the objects of the ECA as well as with s 17 of the New Zealand Bill of Rights Act 1990 and the international covenants to which New Zealand is a party.” No further mention of the Covenant was made in judgment. Therefore, the Covenant did not play any significant role in the outcome of the case. Further, arguably the critical point for statutory interpretation purposes was the right was affirmed in the *NZBORA*.

\(^{172}\) *Third Periodic Report, supra* note 65 at paras. 25 and 26.
5.2.2 Universal Periodic Review

The status of ESCR was also an issue in New Zealand’s examination under the Universal Periodic Review [UPR] procedure. The New Zealand government responded to it in much the same fashion as it responded to the CESCR.

The recommendations made to New Zealand in the course of the UPR included a recommendation by Brazil that New Zealand ratify the Optional Protocol to the ICESCR; a recommendation from Jordan that New Zealand further incorporate its international human rights obligations into national law; a recommendation by the Czech Republic that New Zealand ensure that the NZBORA appropriately reflect all of its international obligations; and a recommendation from South Africa that New Zealand consider integrating the Covenant’s provisions into domestic legislation to ensure that ESCR are justiciable domestically.¹⁷³

New Zealand rejected the Brazilian recommendation, accepted the Jordanian recommendation and advised that it agreed in part with the recommendations of the Czech Republic and South Africa. In relation to the Brazilian recommendation, New Zealand stated that it was not considering ratification of the Optional Protocol currently, but may reconsider this position at a later stage.¹⁷⁴ In respect of the Jordanian recommendation, it advised that it gave effect to human rights obligations through legislation and policy, and that it would continue to review the need for further legislation, policies or practices.¹⁷⁵ It stated that it agreed with the Czech Republic that human rights obligations should be appropriately implemented nationally, but did not accept that all obligations should be included in the NZBORA. Responding to the South African recommendation, New Zealand stated that while it agreed that ESCR should be appropriately implemented in national law, it only accepted “in part that these rights are to be implemented by justiciable legislative incorporation.”¹⁷⁶

¹⁷⁵ Ibid. at 3, para. 11.
¹⁷⁶ Ibid. at 4, para. 17.
5.3 The New Zealand Human Rights Commission and civil society

The New Zealand Human Rights Commission [NZHRC]\(^{177}\) has taken a different stance to that of government, and one much more in favour of an enhanced status for ESCR.

In the NZHRC’s *New Zealand Action Plan for Human Rights (Mana ki te Tangata)* [the Action Plan],\(^{178}\) which set out priorities for action between 2005 and 2010 to improve New Zealand’s human rights performance, ESCR were a principal focus. The Action Plan identified issues such as the impact of poverty on the realisation of fundamental human rights, and the entrenched social and economic inequalities that divide Maori and Pacific Islanders from other New Zealanders, as amongst the most urgent human rights issues facing New Zealand.\(^{179}\) It also stated that there is “compelling evidence of the persistent inequalities in people’s experience of economic, social and cultural rights.”\(^{180}\) Amongst the Plan’s priorities for action was the promotion of discussion “on the legislative status of economic, social and cultural rights as well as civil and political rights.”\(^{181}\)

In its submission to the UPR, the NZHRC reiterated statements it had made in the Action Plan regarding the fragility of New Zealand’s human rights protections, and stated that ESCR were “particularly insecure.”\(^{182}\)

Some civil society groups have made similar observations and recommendations. In submissions to the UPR, the New Zealand branch of Amnesty International and a series of other non-governmental organisations expressed concern at the lack of governmental support for ESCR as justiciable rights.\(^{183}\)

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\(^{177}\) The New Zealand Human Rights Commission is an institution continued under section 4 of the *HRA*, and is also defined as an independent Crown entity under the *Crown Entities Act 2004* (N.Z), 2004/115 (which means that it is generally independent of government policy).


\(^{181}\) *Ibid.* at 40. See also N.Z., “Inquiry to review New Zealand’s existing constitutional arrangements: Report of the Constitutional Arrangements Committee” 2005 (Hon. Peter Dunne, Chair). The Committee identified (at 155 para. C30) a list of what it considered to be current constitutional issues, which included whether there were “rights that need enhanced legal protection eg. Through inclusion in the New Zealand Bill of Rights Act 1990 (Socio-economic rights? Property rights? Privacy?).”


\(^{183}\) *UPR NZ Summary, supra* note 182, at para. 8.
Another non-governmental organisation advocated in favour of New Zealand ratifying the Optional Protocol to the *ICESCR*.

### 5.4 Summary

Outside of government, there is a degree of concern over ESCR’s current status in domestic law, and some support for an enhanced status. Geiringer and Palmer also make an incontestable point when they argue that the government should address the status of ESCR in a principled manner.

There is, however, little evidence of such principle in the New Zealand government’s approach. At the same time as the government affirms that indivisibility is a principle of considerable importance for New Zealand, it advises the CESCR and the international community that it has no intention of addressing the imbalance in terms of legal protection between ESCR and CPR in domestic law. The government asserts that some Covenant norms are not justiciable, without stating which norms it is referring to, or the reasons for its views. Similarly, the government puts forward as evidence of compliance with the Covenant examples of the ways in which certain aspects of ESCR are justiciable, including in particular the right to freedom from discrimination in the *NZBORA* and *HRA*, without stating why such justiciability is acceptable while general justiciability for all Covenant rights is not. Additional justification for such a position would seem to be particularly necessary in the New Zealand context, where the judiciary has no power to strike down legislation.

New Zealand’s reports under the Covenant and its report for the Universal Periodic Review provide little indication that the government has undertaken the type of principled analysis to which Geiringer and Palmer refer, and I am unaware of any public document which sets out such an analysis. As a result, the government’s statement regarding indivisibility rings of the rhetoric to which Geiringer and Palmer averted in their article.

### 6 CONCLUSION

The title to the *NZBORA* states that the Act’s purpose is to “affirm, protect and promote human rights and fundamental freedoms in New Zealand” and to “affirm New Zealand’s commitment” to the *ICCPR*. The effect of not including the majority of ESCR in the *NZBORA* is therefore to identify those rights as something other than human rights and as not fundamental, consistent with the view of the government responsible for the *NZBORA*’s enactment. The express reference to the *ICCPR* signifies a prioritising of New Zealand’s commitments under that Covenant, while the absence of any similar reference to the *ICESCR* in domestic legislation ensures that a distance between the *ICESCR* and domestic law is

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*184 Ibid. at para 1.*
maintained. While the *ICCPR* is in many respects part of New Zealand’s law, the *ICESCR* is effectively a stranger to it.

The status of ESCR in New Zealand law and the government’s current position regarding the justiciability of these rights reflect the traditional distinctions made between CPR and ESCR. The basis for the government’s view that domestic protections for ESCR are adequate is unclear, as is the government’s measure of adequacy. The cases discussed above also raise real questions about the accuracy of that view. This is particularly so when those cases are considered in conjunction with other aspects of the reforms that took place in New Zealand in the 1980s and 1990s, a topic I take up in Chapter 7.
THE PURPOSE OF THE COMPARATIVE ANALYSIS IN CHAPTERS 3, 4 AND 5

In the following three chapters, I describe and analyse the status of ESCR in Brazil, South Africa, and Finland. Each of these state’s constitutions affirm a range of ESCR and mostly provide these rights with an equal status to CPR.

The purpose of this analysis is to explore the nature of ESCR in each state’s legal order (as these rights are not always formulated in the same terms as in the ICESCR), and the reasons each state decided to constitutionalise ESCR. The comparative study provides insights into what some of the options might be for enhancing ESCR’s legal status in New Zealand in a manner which reflects the principles of interdependence, indivisibility and equality referred to in Chapter 1. It also gives important examples of how national courts have applied these rights in concrete cases. These examples assist in demystifying ESCR and provide the basis for a more informed critique of the often abstract arguments that are made against these rights (a critique which I undertake in Chapter 6).

At first sight, it may seem misguided to look to countries such as Brazil and South Africa for the purpose of considering what steps New Zealand should take to protect and promote ESCR. This is principally because ESCR in New Zealand are realised to greater extent than they are in either Brazil or South Africa.

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185 Another approach to ESCR is that followed in the constitutions of Ireland (Constitution of Ireland (Ireland) (29 December 1937)) and India (Constitution of India (India) (26 January 1950)). With the exception of the right to education in art. 42, the recognition of ESCR in the Irish constitution is limited to certain “Directive Principles of Social Policy” set out in art. 45. The article provides: “The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.” Similarly, the Indian constitution includes various provisions relevant to various ESCR in Part IV, but these are only “Directive Principles of State Policy”. S. 36 of the constitution provides: “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.” While this approach may be preferable to excluding ESCR altogether from constitutional guarantees, it is nonetheless flawed as it relegates ESCR to a non-justiciable and inferior status relative to CPR. As Craig Scott and Patrick Macklem argue in “Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution” (1992) 141 U. Pa. L. Rev. 1 at 38-40, “[d]espite the best of intentions, this approach serves to marginalize the centrality of social rights [and] the values they seek to vindicate […]. [I]n a world increasingly committed to judicial protection of human rights, excluding social rights from the ambit of justiciability will tend to have a negative effect on those rights and ultimately on the people that depend on them.”

For example, the 2009 UN Human Development Index ranks New Zealand in the Very High Human Development group, at number 20. Brazil, however, is ranked in the High Human Development group, at number 75, while South Africa is ranked still lower: number 129 in the Medium Human Development group.\textsuperscript{187} Further, the distribution of income in Brazil and South Africa is significantly less equal than in New Zealand. In the United Nation’s 2009 Human Development Report Gini index, New Zealand’s score is 36.2, while Brazil’s is 55.0 and South Africa’s 57.8.\textsuperscript{188} Brazil also faces many serious problems relating to ESCR (e.g. high rates of illiteracy, large numbers of people living in slums or slum-like conditions, a high proportion of the population without any form of social security, and incidents of forced or slave labour).\textsuperscript{189} As the jurisprudence from the South African Constitutional Court discussed in Chapter 5 demonstrates, South Africa suffers from similar problems; problems which are either not nearly as significant or have been resolved in New Zealand. Because of these differences, it could appear that there is nothing New Zealand could learn from Brazil or South Africa.

However, although the progressive realisation of ESCR is more advanced in New Zealand than in Brazil or South Africa, New Zealand has not yet achieved full realisation.\textsuperscript{190} Accordingly, article 2(1) of the Covenant obliges New Zealand to continue progressive realisation “by all appropriate means, including particularly the adoption of legislative measures.” Further, ESCR do not have full recognition in New

\textsuperscript{187} See United Nations Development Program [\textit{UNDP}], online: <http://hdr.undp.org/en/statistics/>. The Human Development Index is a composite index which combines indicators of life expectancy, educational attainment and income. The \textit{UNDP} states that the index “serves as a frame of reference for both social and economic development”.


\textsuperscript{189} See for example CESCR, \textit{Concluding observations of the Committee on Economic, Social and Cultural Rights: BRAZIL, 30\textsuperscript{th} Sess., E/C.12/1/Add.87 (2003) and CESCR, Concluding observations of the Committee on Economic, Social and Cultural Rights: BRAZIL, 42\textsuperscript{nd} Sess. E/C.12/BRA/CO/2 (2009). See also Chapter 3 of this thesis.

\textsuperscript{190} Note also that care must be taken in measuring ESCR realisation by using indices such as the Human Development Index [HDI]. These indices are indicative of ESCR realisation in a partial sense, but they are not definitive. As AnnJanette Rosga and Margaret L. Satterthwaite state in “The Trust in Indicators: Measuring Human Rights” (2009) 27 Berkeley J. Int’l Law 253 at 268, indices such as the HDI and the Physical Quality of Life Index “were designed to measure relative national levels of human development and not the compliance with, and fulfillment of, ESC rights.” See also David L. Cingranelli and David L. Richards, “Measuring Government Effort to Respect Economic and Social Human Rights: A Peer Benchmark” in Shareen Hertel and Lanse Minkler, eds., \textit{Economic Rights: Conceptual, Measurement and Policy Issues} (New York: Cambridge University Press, 2007) 214, who argue that a state’s score on indices such as the HDI and the PQLI does not necessary reflect the efforts of that state’s government to realise ESCR. The authors contend at 215 that “governments of rich countries are always ranked higher on the PQLI or HDI than the governments of poor countries, given the high correlation of these measures with the country’s overall level of wealth. [...] Using such measures to compare governments becomes unfair to the extent that these measures say nothing about how much effort the government actually exerts toward improving the level of its citizens’ enjoyment of these rights, given what resources that government has at hand.” For a series of detailed indicators for ESCR and CPR which are based on the normative content of these rights as defined in international treaties, see Annex I of the \textit{Report on Indicators for Promoting and Monitoring the Implementation of Human Rights}, OHCHR, HRI/MC/2008/3.
Zealand’s legal system and do not share an equal status with CPR. Given that the opposite is the case in Brazil and South Africa, an analysis of ESCR in these countries may be instructive. If constitutional recognition has had positive impacts on ESCR in Brazil or South Africa, such as in individual cases (which would be unlikely to have any impact on the indices referred to above),\textsuperscript{191} in protecting against retrogression, in improving ESCR realisation or in promoting a principled approach to ESCR that recognises their status as fundamental human rights, then the Brazilian and South African models may be relevant to New Zealand’s decision-making about the steps it should take in respect of ESCR. This is especially so if the reasons for constitutionalising ESCR in Brazil and South Africa are applicable to New Zealand.

Further, the Brazilian and South African approaches to the legal status of ESCR share many similarities with that of Finland. Finland is ranked number 12 in the 2009 UN Human Development Index, seven places above New Zealand,\textsuperscript{192} and its score on the Gini index is 26.9.\textsuperscript{193} Therefore, even if there were an argument that the Brazilian and South African models are irrelevant to New Zealand because of the lower levels of development in those countries (an argument which would in any case be weak for the reasons set out above), the same reasoning could not apply in respect of the Finnish model. Moreover, once it is accepted that the Finnish model may be relevant, the same must apply to the Brazilian and South African models given that they are informed by many of the same principles.

Finally, the legal status of ESCR in countries which are commonly sources of legal inspiration for New Zealand, such as the United Kingdom,\textsuperscript{194} Canada,\textsuperscript{195} and Australia,\textsuperscript{196} is broadly similar to the status they

\textsuperscript{191} For example, a right to housing in a particular state may allow people to avoid eviction or to access adequate housing; and a right to health may allow people to access medical services that would otherwise have been denied to them. However, these positive impacts may not translate into changes in nationally based indices. See also supra note 190.

\textsuperscript{192} Supra note 187.

\textsuperscript{193} Human Development Report 2009, supra note 188 at 195.


\textsuperscript{195} See Martha Jackman and Bruce Porter, “Socio-Economic Rights Under the Canadian Charter” in Malcolm Langford, ed., Social Rights Jurisprudence: Emerging Trends in International and Comparative Law (New York: Cambridge University Press, 2008) 209. They note at 209 that the Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11) does not expressly refer to any of the guarantees in the ICESCR (although a provincial Charter, that of Quebec, does expressly include ESCR), and “[t]he closest the Charter comes to recognising a socio-economic right is the section 23 right to publicly funded minority education at the primary and secondary levels […]”. Therefore, while sections 15 (equality rights) and 7 (right to life, liberty and security of the person) of the federal Charter arguably protect dimensions of ESCR
have in New Zealand. Therefore, while comparative analyses of such countries may be of interest in relation to more nuanced changes (such as interpreting CPR in a way which protects certain elements of ESCR), they would not shed any light on the reasons there could be for greater legislative recognition of ESCR or the options available for enhancing the legal status of ESCR directly. Brazil, South Africa and Finland clearly have much more potential in this respect. Indeed, given the similarities of ESCR’s legal status in New Zealand, the United Kingdom, Canada and Australia, if the comparative analysis in this thesis produces information or insights that are relevant to New Zealand, it may also be relevant to those other countries (in each of which the legal status of ESCR is a matter of debate).}

197 See King, supra note 194 at 292-293, who refers to arguments that have been advanced in the United Kingdom in favour of incorporating the Covenant into domestic law, including by the Joint Committee on Human Rights, “a multi-party body representing members of the House of Commons and the House of Lords”; Jackman and Porter, supra note 195 at 228-229, who argue that in their interpretations of the federal Charter, the Canadian courts have largely failed to play an “active role in safeguarding socio-economic rights”, but that they can and should do so; and the 2009 Concluding Observations (Australia), supra note 196 at para. 11, in which the CESCR recommends that the Australian federal government “consider the introduction of a Federal charter of rights that includes recognition and protection of economic, social and cultural rights, as recommended by the Australian Human Rights Commission […]”. See also the ACT ESCR project: Protecting Economic, Social and Cultural Rights in the Act, online: Australian National University <http://acthra.anu.edu.au>. This is a joint project between the Australian National University, the Australian Human Rights Centre at University of New South Wales, and the Australian Capital Territory Department of Justice and Community Safety. Its purpose is to “assess whether the ACT Human Rights Act 2004 should be amended to include economic, social and cultural rights.”
Chapter 3
ESCR in Brazil

1 INTRODUCTION

In this chapter, I first describe how Brazil’s Constitution\(^1\) [Constitution] recognises ESCR, the mechanisms that it provides for the protection of those rights, and the status of the ICESCR in the domestic legal order.

In Part II, I refer to jurisprudence of Brazil’s Federal Supreme Court (Supremo Tribunal Federal [FSC])\(^2\) to illustrate some of the impacts that fully justiciable ESCR have had in Brazil, and also the approach the FSC has taken in respect of those rights. Following that review of the FSC’s jurisprudence, in Part III I discuss some of the principal differences between the social rights in the Constitution and the ESCR in the Covenant. I also consider the ways in which the Constitution does or does not define the content of the social rights, and I explore in greater detail how the Constitution protects those rights.

In Part IV, I describe the reasons why ESCR were given constitutional status in Brazil, and an equal status with CPR. I also refer to the ongoing problems in Brazil in relation to the realisation of ESCR despite the constitutional status of these rights, but note that similar problems exist in respect of CPR.

2 PART I: CONSTITUTIONAL RECOGNITION AND PROTECTION OF ESCR

2.1 Preamble and Part I

The first reference to ESCR in the Constitution is in the preamble. This refers to the establishment of a “democratic state, destined to ensure the exercise of social and individual rights […] as supreme values”.\(^3\) Following this, Part I lists the Constitution’s fundamental principles and objectives. These include “human dignity”\(^4\), “the building of a free and just society, in which solidarity reigns”\(^5\), and “the eradication of poverty and marginalization, and the reduction of social and regional inequality”\(^6\).

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\(^1\) Constituição da República Federativa do Brasil de 1988 (5 October 1988) [“Constitution”].
\(^2\) The FSC is essentially Brazil’s constitutional court. Art. 102 of the Constitution provides that the FSC’s principal function is safeguarding the Constitution.
\(^3\) All translations of the Constitution are mine unless otherwise indicated.
\(^4\) Art. 1(III) of the Constitution.
\(^5\) Art. 3(I) of the Constitution.
\(^6\) Art. 3(III) of the Constitution.
2.2 Part II

Part II is entitled “Fundamental Rights and Guarantees”. Chapter I of this Part lists numerous CPR, such as the right not to be subject to torture or to inhuman or degrading treatment, and also establishes various duties in relation to those rights. Chapter II then deals with “Social Rights”, which article 6 declares as being “the right to education, health, food, work, housing, leisure, safety, social security, protection for mothers and children, and assistance in the case of destitution, as defined in this Constitution.”

Accordingly, the Constitution defines social rights as fundamental, and bestows upon them the same status enjoyed by CPR.

Following this, articles 7 to 11 guarantee various rights relevant to the right to work, such as a right to protection from unjustifiable dismissal, a right to a minimum wage, a right to paid holidays, a right to maternity leave, a right to freedom of association, and a right to strike.

While articles 7 to 11 set out rights relevant to the right to work in some detail, the other social rights (e.g. the right to education and to health) are merely listed. These other rights are further defined in Part VIII of the Constitution, which I now discuss.

2.3 Part VIII

Part VIII includes various chapters regarding “the Social Order”, the objective of which is “social well-being and social justice.” The specific areas Part VIII deals with are social security (defined to include health care, pensions and benefits (such as sickness, unemployment and old age benefits or pensions), and social welfare); education; culture; sport; science and technology; mass communication; the environment; the family; and indigenous peoples.

Essentially, Part VIII further defines most of the social rights listed in Part II, establishes certain entitlements relevant to each right, and sets out the duties incumbent on the Federal Republic of Brazil (defined as the Federal Union, the Brazilian states, the Federal District, and the municipalities [the State]) in relation to each right.

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8 Art. 193 of the Constitution.
9 The principal difference between what I have referred to as pensions and benefits (a Previdência Social) and social welfare (a Assistência Social) is that entitlement to the former is based on one’s contributions, whereas entitlement to the minimum benefits provided by the latter is based on need.
10 Chapter II (Social Security); Chapter III (Education, Culture and Sport); Chapter IV (Science and Technology); Chapter V (Mass Communication); Chapter VI (the Environment); Chapter VII (the Family, Children, Adolescents, and the Elderly); Chapter VIII (Indigenous Peoples).
11 Art. 18 of the Constitution.
For example, article 196 provides that “[h]ealth is everyone’s right and the State’s duty, to be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at ensuring universal and equal access to activities and services for health promotion, protection and recovery.” Articles 197 to 200 then set out, in broad terms, the principal functions of the national health system and rules relating to its organisation and funding.

Similarly, article 205 states that “[e]ducation is the right of all and the duty of the State and the family, and shall be promoted and fostered with the cooperation of society at large, with a view to the full development of individuals, their preparation for the exercise of citizenship and their qualification for work.” Article 206 sets out the principles that govern the delivery of education, and articles 208 to 214 provide for matters such as free preschool and primary education, private schools, and the organisation and financing of education across the country.

Part VIII also includes provisions which declare rights other than those set out in Part II, such as a right to an ecologically balanced environment and the rights of Brazil’s indigenous peoples to their traditional lands.

2.4 Amendment of the social rights or their content

2.4.1 Stone clauses

The Constitution provides considerable protection for the Part II fundamental rights and guarantees. While article 60 of the Constitution provides that the Constitution may be amended and sets out the process by which this may occur (including a requirement that any constitutional amendment be approved by a seventy-five percent majority in each House of the National Congress), article 60 also states that any amendment which would “tend to abolish” the Constitution’s individual rights and guarantees is prohibited. This means that the Part II provisions relating to individual rights and guarantees (including social rights) may not be the subject of retrogressive constitutional amendment (e.g. any constitutional amendment which purported to remove the right to social security from the Constitution would be prohibited). Because of this, these provisions are commonly referred to as “stone clauses”.

12 As translated in Initial Report-Brazil, supra note 7 at 245.
13 Art. 225 of the Constitution.
14 Art. 231 of the Constitution.
15 The National Congress is made up of the Chamber of Deputies and the Federal Senate: see art. 44 of the Constitution.
16 Art. 60(4)(IV) of the Constitution.
2.4.2 Progressive amendments

While retrogressive constitutional amendments of the stone clauses are prohibited, progressive amendments are not. This means that, for example, the catalogue of social rights in the Constitution may be expanded. This has already occurred on two occasions, with housing\(^{18}\) and food\(^{19}\) being added to the Constitution’s original list of social rights.

2.4.3 Permissible retrogressive amendments

As set out above, while the social rights are listed in Part II and are therefore included in the stone clauses, article 6 also states that such rights are “as defined in this Constitution.” With the exception of the right to work, the definitions of (or specific entitlements relevant to) most of these rights are not set out in Part II, but in Part VIII.\(^{20}\) This means that, for example, although the right to social security or the right to education must always be present in the Constitution, the content of these rights is subject to constitutional amendment, and retrogressive amendments have occurred. For example, prior to the fifty-third constitutional amendment, article 208 of the Constitution stated that the State was obliged to provide pre-school education and crèche to all children up to six years of age. The fifty-third amendment reduced this age to five years.\(^{21}\)

In addition, complementary laws, which define specific aspects of social rights (such as, for example, the concept of unjustifiable dismissal in article 7(I); or the concept of “essential services” which must be maintained during strikes\(^{22}\)) may also be modified or revoked without requiring a constitutional amendment. This means that the legislature may, for example, narrow the breadth of protections set down in complementary laws concerning social rights.

2.4.4 Retroactive vs. prospective retrogression

Those possibilities noted, the Constitution does provide an additional layer of protection against certain retrogressive amendments by prohibiting what may be referred to as “retroactive retrogression”. Article 5(XXXVI) provides that the law may not, amongst other things, prejudice acquired rights or matters that are res judicata. This means that, for example, a person who has met the conditions for an entitlement to a pension under a certain pension regime established in accordance with the social security provisions of Part VIII has acquired a right to a pension in accordance with that regime. If the State subsequently

\(^{18}\) Emenda Constitucional 26 (14 February 2000).
\(^{19}\) Emenda Constitucional 64 (4 February 2010).
\(^{20}\) As stated above, articles 7-11 (located in Part II) guarantee various rights relevant to the right to work. It is not clear why these rights have been given such an enhanced level of protection relative to the other social rights.
\(^{21}\) Emenda Constitucional 53 (19 de dezembro de 2006).
\(^{22}\) See art. 9(I) of the Constitution.
wishes to modify that regime (for example, to make it less generous) in a manner other than expressly provided for in the regime, it may only do so in a way that does not affect those people who already hold acquired rights to pensions under the regime. In other words, any such modification must be prospective in its effects rather than retroactive.

A more difficult issue is whether there are any limitations on measures that constitute prospective retrogressions (e.g. in terms of, for example, the level of enjoyment of a particular social right). In an article entitled “The principle of the prohibition of retrogression in relation to the fundamental social rights of the Federal Constitution of 1988” 23, Sarlet explains that there is both general acceptance amongst academics that prospective retrogression is not absolutely prohibited (reflecting the fact that economic conditions within a state vary) and also general agreement that prospective retrogression may be proscribed under certain circumstances. However, no consensus exists over what those circumstances are. 24

Sarlet’s position is that a prospective retrogression would be unconstitutional if it were inconsistent with a constitutional right (e.g. a lowering of the minimum wage to an amount insufficient to meet basic needs 25); otherwise breached the Constitution (e.g. was discriminatory); or would result in the reduction of the enjoyment of a particular right below a “minimum core” (which Sarlet defines as the minimum set of resources that each person requires to lead a dignified life). 26

Sarlet also argues that a prospective retrogression must be proportional, in the sense that the effect of the retrogression must be in proportion to the importance of that retrogression for the common good. 27 Further, the rules governing the transition from one regime to a presumably less generous regime must be reasonable and sufficiently differentiated to take into account the different effects that the regression may have on different individuals. Accordingly, a prospective retrogression may be disproportionate and therefore impermissible even if it does not violate what Sarlet refers to as the minimum core.

The FSC does not appear to have considered in any particular detail the permissibility or legitimate scope of prospective retrogressions under the Constitution, and Sarlet does not cite any Brazilian jurisprudence

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24 Ibid. at 69.
25 Art. 7(IV) of the Constitution provides that the rights of workers include: “a nationally unified minimum monthly wage, determined by law, capable of covering the basic needs of workers and their families with regard to housing, food, education, health, leisure, clothing, hygiene, transportation and social security, periodically adjusted to maintain its purchasing power.” (As translated in Initial Report-Brazil, supra note 7 at 241).
26 Sarlet, supra note 23 at 74.
27 Ibid. at 78-79.
(although he does refer to a judgment of the Portuguese Constitutional Court, noting that Portuguese jurisprudence and legal theory is influential in Brazil’s legal system). There is, however, at least one judgment of the FSC that is relevant, and I summarise that judgment in Part III below. I also return in that Part to the issue of permissible retrogressions, and discuss the judgment of the Portuguese Constitutional Court to which Sarlet refers.

2.5 Remedies

The Constitution provides various enforcement mechanisms. These include a right to seek a declaration that legislation is unconstitutional; and a right to seek injunctive relief (**mandado de segurança**) against illegal acts or the abuse of power by a State agent acting in an official capacity.

The remedies available under the Constitution also include the **mandado de injunção** and the action for unconstitutionality on the basis of omission (**ação direta de inconstitucionalidade por omissão**). The reason for these remedies is that while many of the Constitution’s provisions declare a right or duty, they also state that the specific details or content of that right or duty will be set down in a complementary law or are “in the terms provided for by law” (for example, the amount of the minimum wage guaranteed in art. 7(IV); the right to strike in art. 9 and in art. 37(VII); or the obligation of the State to organise and provide for social security in article 194). Accordingly, a particular right may be rendered unenforceable (essentially for uncertainty) or the conditions under which it may be exercised (e.g. the right to strike) may be unknown where the legislature has failed to emit the necessary complementary law.

In such cases, the purpose of both remedies is to compel the legislature to legislate so that the right in question can be enforced or exercised within defined limits. In practice, the remedy normally takes the form of a declaration that legislation is required, which is then communicated to the relevant legislative body. The two remedies can also be used to challenge legislation enacted to give content to a right on

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28 Art. 102(I)(a) of the Constitution. A declaration that legislation conforms with the Constitution may also be sought from the FSC.
29 Art. 5(LXIX) of the Constitution.
30 Art. 5(LXXI) of the Constitution.
31 Art. 103(2) of the Constitution.
32 Art. 194 of the Constitution provides: “It is the responsibility of the State, in the terms provided for by law, to organise social security on the basis of the following objectives […].”
33 See for example, Companhia Paulista de Plásticos v. Congresso Nacional (29 August 2001) MI 542-7 (SP) (FSC). Note however that in Sindicato dos Servidores Policiais Civis do Estado do Espírito Santo v. Congresso Nacional (25 October 2007) MI 670-9 (ES) (FSC) [“Sindicato dos Servidores Policiais Civis”] the FSC took the extraordinary step of determining that because the National Congress had not legislated for the right to strike of civil servants even though the Constitution had been in force for 18 years, and despite other judgments of the FSC issuing the mandado de injunção on a merely declaratory basis, the regime applicable to the private sector would apply to civil servants’ right to strike for as long as Congress did not specifically legislate.
the basis that the legislation is inconsistent with that right, or is otherwise insufficient to enable the exercise of that right in accordance with the Constitution. 34

2.5.1 Damages?

The *Constitution* does not have any general provision setting out a right to damages where an unconstitutional act or omission has resulted in loss (although in some cases it does make specific provision, such as for unjustifiable dismissal35). According to Piovesan, in cases where a breach of any of the social rights is proved, the courts will most commonly order that the relevant State body take whatever action is necessary to fulfil the social right in question. However, because article 5(V) of the *Constitution* guarantees the right to compensation for “moral” or “material” damages, an individual could seek and be entitled to damages if he or she could prove that any unconstitutional act by the State (including a failure to act in a way required by the *Constitution*) caused such damage.36

2.6 Standing of the Public Prosecutor, political parties, trade unions, and other third parties

Article 129 of the *Constitution* provides that the functions of the Public Prosecutor (*Ministério Público*) include taking proceedings for the protection of, amongst other things, public property, the environment, and “other collective interests”;37 as well as taking the measures necessary to ensure that State authorities respect the rights set out in the *Constitution*, and to ensure that such rights are guaranteed. This means that a State body is expressly responsible for taking action to uphold the *Constitution* (including the social rights contained within it).

The *Constitution* further provides that a trade union or other legally constituted organisation in defence of its members, or a political party with representatives in the National Congress (apparently on behalf of any person), may seek injunctive relief (*mandado de segurança*).38 In addition, a political party with representatives in the National Congress, a trade confederation, and an organisation with national coverage all have standing to seek declarations that State action or legislation is unconstitutional.

34 See for example *Sindicato dos Servidores Policiais Civis*, supra note 33.
35 Art. 7(I) of the *Constitution* provides that one of the rights of employees is a right to protection against unjustifiable dismissal, including the right to compensation for such dismissal, in the terms set out in a complementary law.
36 Personal communications with Piovesan between 24 and 26 January 2010.
37 Art. 129(III) of the *Constitution*.
38 See art. 5(LXX) of the *Constitution*. See also art. 5(LXXIII), which entitles any person to bring a class action against any act which damages public property, “administrative morality”, the environment, or objects of historical or cultural heritage. In such a case, the person who brought the action will not be liable for costs, unless it is proved that he or she brought the action in bad faith.
2.7 Incorporation of the ICESCR into the domestic legal order

The Constitution provides that its rights and guarantees do not exclude any others deriving from international treaties to which Brazil is a State party. Further, article 5(LXXVIII)(3) of the Constitution states that a human rights treaty approved by the National Congress with a seventy-five percent majority has the status of a constitutional norm.

The FSC has held that any international human rights treaty which has not been approved in accordance with article 5(LXXVIII)(3) is superior to ordinary legislation (and therefore invalidates that legislation to the extent of any inconsistency), but is inferior to the Constitution itself. The ICESCR, to which Brazil is a State party, falls into this category. Therefore, while the Covenant is part of national law, in the case of conflict between the Constitution and the ICESCR, the Constitution would prevail.

The social rights in the Constitution are not always in the same terms as those in the ICESCR, and therefore there may be the potential for conflict between the instruments. Generally speaking, however, the Constitution includes most of the rights recognised in the ICESCR, and also guarantees rights and duties that the ICESCR does not.

2.8 Detail and prescription

The Constitution is a large document. It has some 250 articles not including its transitional provisions. It is also detailed and prescriptive, both in relation to ESCR and generally. For example, it goes so far as to

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39 See art. 5(LXXVIII)(2) of the Constitution.
40 See art. 5(LXXVIII)(3) of the Constitution.
41 Brazil acceded to the ICESCR on 24 January 1992.
42 See Banco Itaú v. Armindo Luiz Segabinazzi (3 December 2008) RE 349.703-1 (RS) (FSC).
43 For example, art. 6 of the Constitution refers simply to the right to health, whereas art. 12(1) of the ICESCR refers to the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”
44 The Constitution does not include any right to an adequate standard of living. However, as set out above, it does include rights to social security, housing and food, as well as other rights relevant to the right to work (such as to a minimum wage). Overall, therefore, it may be said that the Constitution guarantees a series of rights relevant to the right to an adequate standard of living. On the other hand, the Constitution does not, for example, have any equivalent provision to art. 13(2) of the ICESCR, which states that “the material conditions of teaching staff shall be continuously improved.” Neither does the Constitution expressly affirm, for example, “equal opportunity for everyone to be promoted in his employment to an appropriate higher level”, as set out in art. 7(c) of the ICESCR.
45 See, for example, the obligation that art. 217 of the Constitution imposes on the State “to promote formal and informal sporting activities, as a right of each person...”.

specify the percentages of the State budgets that must be allocated to education;\textsuperscript{46} and provides that certain minimums, defined in complementary laws, must be devoted to health.\textsuperscript{47}

Ferraz Junior attributes the length and detail of the \textit{Constitution} to a generalised distrust of public institutions.\textsuperscript{48} It appears that the intention was to include as much as possible within the \textit{Constitution}, and in that way cover the widest range of matters possible with the highest level of protection that the legal system could provide.

The \textit{Constitution} has been amended more times than any other Brazilian constitution, which may be partly a result of it being drafted in such detail.\textsuperscript{49} In a judgment of the FSC, Judge Marco Aúrelio referred to the considerable number of constitutional amendments, and stated ironically:\textsuperscript{50}

\begin{quote}
“It’s been often told, and this has become part of Brazilian folklore, that one day a citizen walked into a bookstore and asked for a copy of the Brazilian Constitution. The employee at the counter replied that they didn’t have any, as the store didn’t sell newspapers.”
\end{quote}

3 \hspace{1em} \textbf{PART II: LITIGATION OF SOCIAL RIGHTS IN BRAZIL}

The FSC has considered a series of cases relating to the alleged violation of social rights, and has delivered some important judgments in which it affirms the fundamental and immediate nature of these rights. I summarise a number of these cases below to illustrate the approach that the FSC has taken in social rights proceedings, including how it has dealt with allegations that it is breaching the principle of the separation of powers by adjudicating on social rights claims; how it has responded to attempts to justify a failure to meet constitutional guarantees on the basis of allegedly insufficient resources; and the way in which it has analysed allegations that certain measures are retrogressive and therefore impermissible. I also highlight the impact that litigation regarding the right to health has had in respect of

\textsuperscript{46} For example, art. 212 of the \textit{Constitution} provides: “The Union [i.e. the federal government] shall annually allocate no less than eighteen percent, and the States, Federal District and Municipalities no less than twenty-five percent, of tax revenues, including those resulting from transfers, to the maintenance and development of education.” See also Piovesan, \textit{supra} note 17 at 183.
\textsuperscript{47} See art. 198(2) and (3) of the \textit{Constitution}.
\textsuperscript{49} André Mello, \textit{Reformas Constitucionais no Brasil: instituições políticas e processo decisório} (Rio de Janeiro: Editora Revan, 2002). By 16 March 2010, the \textit{Constitution} had been amended 64 times.
\textsuperscript{50} \textit{Associação Nacional dos Membros do Ministério Público v. Congresso Nacional} (26 September 2007) ADI 3.104 (DF) (FSC) at 181 (Judgment of Judge Marco Aúrelio) [“\textit{Associação Nacional}”]. I note that Portuguese term for a judge of the FSC is \textit{Senhor/a Ministra/a}, and the term for a judgment is \textit{Voto}. I have simply translated these terms as “judge” and “judgment”.

HIV/AIDS sufferers. Finally, I note that while significant judgments have been issued, overall the Court’s social rights jurisprudence is somewhat limited.

3.1 Município de Porto Alegre v. Dina Rosa Vieira

In *Município de Porto Alegre v. Dina Rosa Vieira* the FSC considered an appeal against a lower court decision requiring that the Porto Alegre Municipality and the State of Rio Grande do Sul provide free medication to an indigent HIV/AIDS sufferer.

The FSC upheld the decision of the lower court, stating that the decision merely echoed a long line of FSC judgments on the right to health and particularly on the obligation to provide medication for those with HIV/AIDS who could not afford to pay for the medication themselves. In his judgment, Judge Celso de Mello affirmed:

“[The right to health] cannot be allowed to degenerate into an inconsequential constitutional promise, and the public administration permitted to substitute, illegitimately and in default of the collectivity’s just expectations, the fulfilment of its duty, with an irresponsible gesture of governmental infidelity to that which the Constitution itself requires.

In this context, a very serious obligation falls on the government, namely, to make health services effective, to promote, in favour of individuals and communities, preventative and rehabilitative measures that, grounded in suitable public policy, have as their objective the realisation and concretisation of [the right to health].”

In a separate but concurring judgment, Judge Marco Aurélio considered that a principal element of the State’s overriding obligation under the *Constitution* was to provide the minimum resources required to ensure the maintenance of human dignity.

According to Piovesan, the FSC’s judgments in *Dina Rosa Vieira* and in similar cases have had a highly significant effect. Piovesan states:

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52 *Ibid.* at 9-10 of the judgment of Judge Celso de Mello.


54 Piovesan, *supra* note 17 at 189-190. The CESCR is less complimentary, stating at para. 27 of its *Concluding observations of the Committee on Economic, Social and Cultural Rights: BRAZIL, 42nd Sess. E/C.12/BRA/CO/2* (2009): “The Committee is concerned that the growing number of HIV/AIDS cases registered during the last decade constitutes a serious health problem. The Committee notes with concern that although treatment with anti-retroviral drug therapy is available for free in the State party, the prevalence of HIV/AIDS is still high. In this regard, the Committee notes the higher prevalence of HIV/AIDS among economically disadvantaged communities.”
“[I]ndividual legal victories prompted a universal legislative response, and a law was passed that mandated the free provision of medicine for all people living with HIV. In other words, by virtue of the large number of court rulings instructing the government to provide free medicine for people with the HIV virus, Law No. 9,313 on the free distribution of medicine for HIV carriers and AIDS patients was approved on 13 November 1996, sanctioning Brazil’s national health service to supply all the necessary medicine for treatment. [...] In addition to this legislation, public policy on AIDS treatment is now considered exemplary, placing Brazil at the forefront of the international debate.”

3.2 Estado do Rio Grande do Sul v. Rodrigo Skrsypcsak

This case\(^{55}\) concerned an appeal from a lower court decision declaring that the State of Rio Grande do Sul was obliged to provide Rodrigo Skrsypcsak, a minor who suffered from a rare condition, the medication required to treat his condition. The medication was not made in Brazil, and was only available in the United States or in Switzerland.

The FSC dismissed the appeal. In its judgment, the Court referred to the priority that article 227 of the Constitution gives to children and adolescents.\(^{56}\) The FSC considered that it had been proven that the rare condition affected approximately 20 children in the State of Rio Grande do Sul (a number which presumably included Rodrigo Skrsypcsak), and posed a serious risk to the lives and development of those children. While noting that the medication was expensive, the FSC stated that the State’s Secretary of Health had recognised an obligation to pay for the medication, and that in any case the Constitution required the State to meet the cost. The Court further stated: \(^{57}\)

“The State should accept the functions that the Constitution imposes upon it, and budgetary constraints cannot be permitted to frustrate the implementation of constitutional obligations.”

\(^{55}\) Estado do Rio Grande do Sul v. Rodrigo Skrsypcsak (22 February 2000) RE 195.192-3 (RS) (FSC) [“Skrsypcsak”].

\(^{56}\) Art. 227 of the Constitution provides: “The family, society at large and the State are responsible for ensuring that children and adolescents will be given absolute priority with regard to the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as for guarding them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.” (As translated in Initial Report-Brazil, supra note 7 at 246).

\(^{57}\) Skrsypcsak, supra note 55 at 5.
3.3 Estado do Rio Grande do Sul v. Luiz Marcelo Dias e outro

In this case, the State of Rio Grande do Sul appealed to the FSC from a lower court’s decision requiring it to provide medication free of charge to patients with chronic manic depression and paranoid schizophrenia who could not afford to pay for the medication themselves.

The FSC dismissed the State’s appeal, repeating the statements it had made in Dina Rosa Vieira regarding the State’s obligation in respect of the right to health. In addition, the FSC imposed a fine on the State for bringing the appeal despite numerous judgments of the FSC reiterating the fundamental nature of the right to health and the State’s obligation to take the necessary steps to provide for that right.

3.4 Município de Santo André (2005)

In Município de Santo André v. Ministério Público do Estado de São Paulo the Municipality of Santo André was accused of breaching article 208(IV) of the Constitution by failing to provide crèche and preschool education free of charge to all eligible children within the Municipality’s jurisdiction.

The Municipality argued it did not have sufficient resources to meet what it referred to as the enormous demand for places, that its current institutions were already overcrowded, and that enrolling further children would compromise the quality of education delivered by those institutions. Referring to other judgments requiring it to enrol all eligible children in crèche and preschool, the Municipality also submitted that the judiciary was overstepping its jurisdiction, and unduly interfering with what it argued was an area reserved to the executive’s discretion.

In his judgment, Judge Celso de Mello emphasised what he referred to as the FSC’s “grave obligation to render effective social, economic, and cultural rights.” While ordinarily it would not be the Court’s role to interfere with public policy, the judge affirmed that the FSC would do so where the State (through action or omission) failed to comply with its constitutional obligations, and in so doing threatened the integrity of constitutionally guaranteed social rights.

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59 See Dina Rosa Vieira, supra note 51.
61 Art. 208(IV) of the Constitution (prior to the 2006 amendment referred to above) provided: “The duty of the State in relation to education shall be realised through the guarantee of ....attendance in crèche and pre-school to children of zero to six years of age.”
62 Município de Santo André (2005), supra note 60 at 7-8.
63 Ibid. at 9.
Judge Celso de Mello also stated that a characteristic of social rights was that they could only be gradually realised over time, and that such realisation was largely dependent on the financial resources of the State. Accordingly, it would be unreasonable to demand that the State fully comply with all of the Constitution’s guarantees in situations where the State could prove that it was unable to provide for certain rights due to financial constraints.\(^{64}\) However, mere allegation of resource limitations would not be sufficient to relieve the State of its constitutional obligations. In the absence of objectively verifiable evidence of limitations, the State would not be permitted to act in a way (or to fail to take action) which would result in the nullification of constitutional rights.\(^{65}\)

The judge emphasised that the Constitution gave a clear priority to the rights of children and adolescents, and referred to the importance of education in creating, maintaining and improving social well-being and standards of living, particularly for the less fortunate sectors of society. According to the judge, the fundamental nature of the right to education meant that the State was required to take the necessary steps to guarantee the right, and the Court would subject to close scrutiny any failure by the State to do so. Therefore, although generally speaking it was for the State to decide how to allocate state resources, when it came to the fulfilment or non-fulfilment of constitutionally guaranteed rights, the State would enjoy only a very limited discretion (meaning, presumably, that the State would only be able to justify breaches of the right to education due to insufficient resources in rare or exceptional cases).\(^{66}\)

Finally, the judge lambasted what he referred to as “inefficient administration”, “the government’s disregard for the basic rights of the citizenry”, “incompetence in determining an adequate budget for education”, and “a lack of political vision in understanding the enormous social significance of the right to pre-school education”.\(^{67}\) Presumably dismissing as inadequate any evidence that had been placed in front of the FSC regarding the Municipality’s financial resources, Judge Celso de Mello stated that article 208(IV) required the Municipality to provide crèche and pre-school for children of zero to six years old, and there was no course open to the Municipality other than to fulfil that obligation. Accordingly, the judge dismissed the Municipality’s appeal.

### 3.5 Município de Santo André (2007)

Despite the FSC’s strong language in its 2005 judgment, in 2007 the same parties were back before the FSC regarding the same issue.\(^{68}\) In its appeal, the Municipality attempted once again to argue, amongst

\(^{64}\) Ibid. at 11.

\(^{65}\) Ibid. at 12.

\(^{66}\) Ibid. at 13.

\(^{67}\) Ibid. at 18.

\(^{68}\) Município de Santo André v. Ministério Público do Estado de São Paulo (26 April 2007) RE 384.201-4 (SP) (FSC).
other things, that the lower court decisions had violated the principle of the separation of powers by requiring it to register children for crèche and pre-school despite an alleged lack of funds to finance the necessary programmes.

Unsurprisingly, the FSC rejected the Municipality’s submissions. However, in doing so, the FSC apparently advanced the interpretation of the constitutional obligation to provide preschool education that it had made in its 2005 judgment, and cast the obligation as being of an absolute nature (i.e. one which could not be avoided due to resource constraints or for any other reason). In his judgment, Judge Marco Aurélio stated:\footnote{Ibid. at 1.}

“As provided for in article 208, item IV of the Constitution, the State has a duty in relation to education, namely to guarantee that children of zero to six years of age can attend day-care centres and pre-schools. The State [...] should equip itself for unrestricted compliance with the dictates of the constitution, and not prevaricate by making excuses related to deficient funding.”

3.6 Estado do Rio de Janeiro v. Ministério Público do Rio de Janeiro

In this case,\footnote{Estado do Rio de Janeiro v. Ministério Público do Rio de Janeiro (23 June 2009) RE 594.018-AgR (RJ) (FSC) at 1.} the Public Prosecutor sued the State of Rio de Janeiro for failing to provide sufficient teachers in the São Gonçalo Municipality to deliver pre-school and primary education. The object of the initial proceedings was to obtain a Court order requiring the State to employ more teachers. The Public Prosecutor was successful in lower courts, and the State appealed to the FSC.

In its judgment dismissing the State’s appeal, the FSC simply affirmed that the right to education was “fundamental and non-derogable”, and that the State had an obligation to provide the resources necessary for the exercise of the right. Any omission in that respect would constitute a violation of the Constitution.\footnote{Ibid. at 2364.}

The FSC also referred to one of its earlier judgments, in which Judge Celso de Mello had cited with favour the argument of a scholar to the effect that the Constitution’s central objective was to promote the well-being of citizens by protecting their civil and political rights, and by ensuring the provision of the minimum resources necessary for a dignified existence. In that earlier judgment, Judge Celso de Mello had also approved of the scholar’s opinion that it was only once these minimum resources had been provided in respect of each social right that the issue of State discretion over budgetary allocation would
arise (i.e. until the State had met its core obligations under the Constitution, it would not be permitted to give preference to matters which did not have any priority under the Constitution).  

3.7 Associação Nacional dos Membros do Ministério Público v. Congresso Nacional

These proceedings concerned a challenge by the National Association of Members of the Public Prosecutor to a constitutional amendment which modified the manner in which pensions of the public servant pension regime, established by the Constitution, were to be calculated. The amendment expressly excluded from its ambit all public servants who had already acquired a right to a pension under the previous regime (i.e. those who had met all of the previous regime’s requirements for entitlement to a pension under that regime). The argument for the National Association was, however, that all public servants contributing to the regime at the time of the constitutional amendment were entitled to have their future pensions calculated on the basis of the previous regime, even if those public servants were not yet entitled to a pension under that regime.

The majority of the FSC dismissed the challenge, finding that those public servants who were not entitled to a pension under the previous regime at the time of the amendment had not acquired any rights in that regime. The FSC majority further found that the new regime did not violate any minimum core of the right to social security, as the new regime provided for the exercise of that right albeit under modified conditions.

However, in obiter comment, Judge Gilmar Mendes considered that in certain situations (which were not apparent in the case before him), a law or constitutional amendment could be unconstitutional if it unreasonably or disproportionately affected the position of an individual in the process of acquiring a right to a pension, even if at the time of the amendment that individual had not yet completed his or her acquisition of the right.

By way of example, the judge posited the situation of a person a couple of days away from meeting the requirements for an entitlement to a pension (e.g. 35 years of contribution) under a certain regime, and whether it would be constitutional to amend that regime to require a longer period of contribution from that person (e.g. 45 years). In such a situation, the judge considered that the question of whether or not such an amendment was constitutional would require an analysis of the proportionality or reasonableness of the amendment, including whether the amendment included sufficient and proportionate transitory provisions capable of taking into account the greater effect that the amendment would have on some

\[72\text{ Ibid. at 2369 citing from Judge Celso de Mello (4 May 2004) ADPF 45-MC (DJ).}\]

\[73\text{ Associação Nacional, supra note 50.}\]
persons (i.e. those close or very close to retirement under the former regime), and in light of the financial resources of the State.\textsuperscript{74}

Judges Carlos Britto and Marco Aurélio, on the other hand, would have allowed the action. Judge Britto considered that the State did not have complete discretion to modify the rules relating to public pensions in respect of public servants contributing to a certain regime, even when those servants had not yet acquired a right to a pension under that regime.\textsuperscript{75} The existence of such an unlimited discretion would not be reasonable or proportional, but rather would be arbitrary. Apparently, therefore, Judge Britto’s reasoning was that because the constitutional amendment purported to exercise such an arbitrary power, it could not be lawful. In Judge Aurélio’s opinion, public servants contributing to a certain regime had a contractual right to that regime, even if they had not yet obtained a right to a pension, and therefore the State could not purport to modify the regime unilaterally.\textsuperscript{76}

\subsection*{3.8 Partido Socialista Brasileiro v. Mesa da Câmara dos Deputados e outros}

In this case,\textsuperscript{77} the Brazilian Socialist Party challenged a constitutional amendment which sought to fix the maximum monthly benefit payable for maternity leave by the State social security regime at $1,200 Brazilian reais (to be adjusted from time to time in accordance with inflation).

Article 7(XVIII) of the \textit{Constitution} (one of the stone clauses) provides for maternity leave “without prejudice to one’s employment or salary” for a period of 120 days. Article 201 simply states, amongst other things, that the social security regime established under the \textit{Constitution} must provide for maternity leave.

The FSC agreed with the submission that the amendment would constitute a “historical retrogression”\textsuperscript{78} to the degree to which the right to social security, and more particularly to maternity leave, had been realised in Brazil. As the amendment purported to repeal at least in part (or reduce the effect of) article 7(XVIII), it was unconstitutional. Although the FSC did not say this expressly, clearly such a purported retrogressive amendment to one of the stone clauses was impermissible under the \textit{Constitution}.\textsuperscript{79}

\textsuperscript{74} \textit{Ibid.} judgment of Judge Gilmar Mendes at 174.
\textsuperscript{75} \textit{Ibid.} judgment of Judge Carlos Britto at 164.
\textsuperscript{76} \textit{Ibid.} judgment of Judge Marco Aurélio at 185.
\textsuperscript{77} \textit{Partido Socialista Brasileiro v. Mesa da Câmara dos Deputados e outros} (3 April 2003) ADI 1.946 (DF) (FSC) [“PSB”].
\textsuperscript{78} \textit{Ibid.} at 4.
\textsuperscript{79} In \textit{PSB} (supra note 77) the FSC also apparently agreed with a submission that a consequence of the amendment would be that in any particular case the state’s social security regime would only be responsible for paying a maximum benefit of $1,200 reais (the Brazilian currency), even if the mother applying for the benefit received a salary in excess of $1,200 reais. Any shortfall would therefore have to be met by employers. It was submitted that
3.9 Limited jurisprudence

While the cases set out above are significant, the jurisprudence of the FSC in respect of social rights is relatively limited. This is because despite initial concerns that the breadth of the Constitution and the number of rights it guarantees would lead to a flood of cases, relatively few cases concerning the ESCR guaranteed in the Constitution have in fact been brought.

Also, despite the special status that the ICESCR occupies in the legal system, I am not aware of any case in which the ICESCR has been invoked directly (although some judgments do mention the Covenant as support for a particular interpretation of the Constitution).

Piovesan attributes the relative paucity of social rights litigation to factors such as distrust of the law and the courts, a lack of rights-awareness amongst the population (including within civil society in respect of ESCR), and the cost of taking proceedings (noting that the courts are used to a much greater extent in regions with higher rankings in human development indices).

4 PART III: DIFFERENCES BETWEEN THE CONSTITUTION AND THE ICESCR

In this Part I discuss what I see as being some of the principal differences between the social rights and corresponding obligations set out in the Constitution and those set out in the ICESCR. These are the lack of any express and generally applicable equivalent in the Constitution to the Covenant’s concept of progressive realisation; the apparent irrelevance of resource limitations in justifying failures to provide for the effect of the amendment would be to incentivise employers to employ male employees rather than female employees, so as to reduce their potential exposure to having to pay maternity leave. Accordingly, employers would be encouraged to discriminate on the basis of sex. While this might have been true, it is difficult to see how this possibility could affect the constitutionality or otherwise of the amendment, as the amendment did not purport to make such potential discrimination legal.


81 Piovesan, supra note 17 at 189. For accounts of ESCR cases other than those referred to above, see generally Piovesan, supra note 17 at 186-189. Note that The Economist recently reported that the backlog of cases (of all types) waiting to be heard by the FSC is “enormous” (see “A special report on business and finance in Brazil: The self-harming state” The Economist (12 November 2009), online: The Economist http://www.economist.com) (“Special Report on Brazil”). However, The Economist does not attribute this to the Constitution, but to very unrestricted rights of appeal.

82 See Sindicato dos Servidores Policiais Civis, supra note 33 at 101. Also, as Piovesan states (supra note 17 at 190), judges do not tend to refer to the General Comments of the Committee on Economic, Social and Cultural Rights when interpreting the social rights in the Constitution. According to Piovesan, “[t]his silence on the available international legal corpus for protection highlights both the Brazilian judiciary’s unfamiliarity with the subject and its refractory attitude towards international law, as well as the failure of litigators to exploit international human rights instruments.”

83 Ibid. at 190-191.
social rights as required by the *Constitution*; the lack of any general limitations provision in the *Constitution*; the Brazilian concept of the minimum core; and the different considerations that arise in determining the permissibility of retrogressive measures under the *Constitution*.

In the course of this discussion, I explore further the ways in which the *Constitution* protects social rights, and how those rights are or are not defined. I conclude with a number of general observations about the regime for social rights under the *Constitution*.

### 4.1 Immediate and full applicability of rights and relevance of resource limitations

The *Constitution* does not include any provision equivalent to article 2(1) of the ICESCR, and there is no express reference to “maximum available resources” or any similar concept. This appears to mean that in general terms (and other than where expressly provided) the State has an immediate and ongoing obligation to guarantee the social rights included in the *Constitution*, rather than to realise those rights progressively until full realisation is reached.\(^84\) Put another way, while the ICESCR provides a series of obligations that apply before States parties obtain full realisation of the rights recognised in the Covenant, the *Constitution* generally does not admit any state prior to full realisation as legitimate.

Although Judge Celso de Mello’s judgment in *Município de Santo André (2005)* initially appeared to accept that social rights could only be fully realised over time, ultimately the judge’s conclusion was simply that the Municipality had to meet its constitutional obligation to provide preschool education and had to do so without delay. Subsequent judgments, such as *Município de Santo André (2007)* and *Estado do Rio de Janeiro v. Ministério Público do Rio de Janeiro* do not refer to progressive realisation, but rather simply affirm the State’s obligation to do whatever is necessary to comply with the right to education as set out in the *Constitution*.

Consistent with this, and as cases such as *Dina Rosa Vieira* and *Município de Santo André (2007)* demonstrate, the FSC response to a pleading of insufficient resources appears to be a simple affirmation of the right in question, and a reassertion of the State’s obligation under the *Constitution* to provide the resources necessary to realise the right. Although sections of Judge Celso de Mello’s judgment in *Município de Santo André (2005)* appear to leave some room for the State to rely on resource constraints to justify a failure to guarantee a constitutionally protected social right, the other FSC jurisprudence

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\(^84\) An exception to this is, for example, the obligation art. 208(II) imposes on the State to achieve progressively universal access to free secondary school education. Importantly, this express reference to progressive realisation indicates that generally speaking (and in the absence of any such reference), the *Constitution*’s obligations apply immediately and in full.
discussed does not refer to the possibility of such an exception. Further, the judge’s ultimate conclusion in *Município de Santo André* (2005) seems to align that judgment with the other jurisprudence, which overall reflects the absence of any express resource-based limitation on social rights in the *Constitution*. The tenor of the judgments also suggests a perception by the FSC that failure to realise social rights is due to the lack of sufficient political will, rather than any alleged lack of resources.

Overall, the FSC has apparently (and appropriately) seen its role as enforcing the plain text of the *Constitution* (e.g. finding in the *Município de Santo André* (2007) that the State’s failure to guarantee to all eligible children attendance at pre-school and crèche was inconsistent with article 208(IV) of the *Constitution*; or finding in the *Partido Socialista Brasileiro* case that the attempted cap on maternity leave benefits was inconsistent with article 7(XVIII)).

This approach is consistent with social rights being fundamental rights. While the legislature retains a certain discretion over budgetary allocations, following the line of reasoning referred to in *Estado do Rio de Janeiro v. Ministério Público do Rio de Janeiro*, such a discretion only arises once each social right has been guaranteed in the terms set out in the *Constitution*. Until such a time, funding for social rights must be given a priority consistent with their constitutional status (similar to the priority that funding for CPR must receive).

Further, while some provisions of the *Constitution* expressly restrict certain rights, there is no general limitations provision similar to article 4 of the *ICESCR*. This reinforces the impression that the social rights, together with the CPR included in the *Constitution*, must be provided for and respected continuously (unless and until such rights are amended in a manner consistent with the *Constitution*).

### 4.2 Minimum core

In the jurisprudence summarised above, the FSC refers to the State’s obligation to guarantee no less than the minimum levels of social rights necessary for human dignity (“o mínimo existencial”; “o mínimo de condições materiais para uma vida digna”) or no less than the minimum core (“o núcleo essencial”) of these rights. Sarlet, as noted above, also refers to the concept of the minimum core and the inalienability of that core. As I now discuss, this concept appears to be different from the concept of minimum core obligations under the *ICESCR*.

In contrast to the position under the *ICESCR*, the minimum core in Brazilian constitutional law apparently does not represent a basic starting position from which the State is expected to move beyond (by direct

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85 See, for example, the restrictions on the freedom of association, set out in art. 5(XVII) and art. 8(II) of the *Constitution*.
provision or by any other means). Instead, it signifies the minimum level of realisation of each constitutionally guaranteed right which must be obtained and maintained at all times, and may not be reduced even by constitutional amendment (i.e. a purported constitutional amendment will be unconstitutional to the extent that it would result in the reduction of a right below this minimum).

Further, the minimum core is comprised of a bundle of entitlements over and above the absolute basics which characterise the concept of minimum core obligations under the Covenant.  

There is an important distinction to be made between the minimum core of each social right guaranteed in Part II of the Constitution (and which is protected by the stone clauses), and the State’s obligation to meet the requirements of constitutional provisions which relate to the social rights but are outside of Part II.

For example, it may be that the constitutional provisions outside of Part II that are relevant to the right to education require the provision of entitlements greater than the minimum core of that right. Clearly, while those provisions remain unaltered, they define the State’s obligations. It is those provisions that the State must comply with, rather than merely being concerned with guaranteeing the minimum core.

However, the State may vary such provisions through the process set down in the Constitution for its amendment. As stated above, the scope of permissible amendment is then defined by the concept of the minimum core. Because the stone provisions, including the social rights, cannot be amended, it follows that no other amendment can be made which would result in the nullification of the social rights or otherwise render them ineffective. In order for this not to occur, the minimum core of each right must always be maintained, and it is beyond the power of the legislature to violate or negate that core.

Accordingly, the concept of the minimum core appears to envisage that the legislature may modify, reduce or remove any constitutional entitlements relevant to a particular right provided that the minimum core of that right is maintained (and the amendment is otherwise in accordance with the Constitution). Anything over and above that minimum appears not to be constitutionally guaranteed in a prospective sense (with the acquired rights doctrine protecting against retroactive retrogression).

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86 See, for example, Sarlet’s explanation of the minimum core. According to Sarlet (supra note 23 at 74), this core “is directly connected to the dignity of the human person [...] [It must be understood] as including all the material resources that are required for each individual to live a dignified life, which necessarily can only mean a healthy life; one which is in accordance with minimum qualitative standards [...] [This notion] includes much more than the guarantee of mere physical survival, and therefore is not restricted to the notion of a vital minimum or a strictly liberal notion of a minimum sufficient to ensure the exercise of fundamental liberties.” Sarlet also considers that the minimum core is a dynamic rather than fixed notion, arguing at 78 that: “Whenever the issue of retrogression is being considered, it is always important to be aware that the content of the minimum core necessary for a dignified life is conditioned [and determined] by historical, geographical, social, economic and cultural factors, as well as time and place [...]”
The legislature’s discretion in this regard corresponds with the discretion that State parties have under the *ICESCR*. The Covenant does not oblige a State party to realise rights to any greater extent than whatever may constitute full realisation, and accordingly there is no requirement that a State party keep in place entitlements which are not necessary for such realisation to occur or to be maintained. Therefore, if realisation of the minimum core can be equated with full realisation in terms of the Covenant, then in substance the discretion that the State has under the *Constitution* with respect to entitlements over and above what is necessary to guarantee the minimum core is very similar to the discretion a State party has under the *ICESCR* with respect to entitlements over and above what is necessary to maintain full realisation.

By way of summary, therefore, the *Constitution* protects the social rights at two levels. First, it safeguards the minimum essential levels of the rights, effectively in perpetuity, through the mechanism of the stone clauses. Second, it provides for a series of specific entitlements and duties relevant to the social rights in other constitutional provisions. This introduces some flexibility into the system. However, the provisions outside of Part II may only be modified by constitutional amendment (as opposed to, for example, a mere parliamentary majority), and even then, only to the extent that such amendment does not violate the minimum core.

### 4.3 Retrogressive measures

As discussed in Chapter 1, because the principal objective of the Covenant is to ensure that States parties continue to move toward full realisation, the prohibition against unjustifiable retrogressive measures plays a critical role in ensuring the efficacy of the *ICESCR*. Also, the *ICESCR* apparently envisages that even if full realisation is obtained, backsliding may legitimately occur. One of the purposes of article 4 of the *ICESCR* is to ensure that any backsliding is only permissible under certain conditions.

In contrast, the concept of retrogression appears to be of less importance under the *Constitution*. In any particular case, the question would seem to be not so much whether there has been an illegitimate retrogression. The inquiry is instead, and simply, whether the measure (or omission) violates any right guaranteed under the *Constitution* (e.g. the violation of any acquired right, the violation of any right guaranteed by the stone clauses, or the violation of any other right set out in a constitutional provision). Where the measure in question is a constitutional amendment, the inquiry is whether the amendment is inconsistent with one of the stone clauses, either for direct contravention of such a clause (e.g. the attempted cap on maternity leave benefits) or because the amendment would led to the violation of the minimum core of a particular social right (e.g. would result in the failure to provide a minimum benefit, entitlement or legislative provision required to render that right effective).
The judgment of the Constitutional Court of Portugal, mentioned by Sarlet and referred to above, provides a useful example of how the question of retrogression may be of secondary importance to an evaluation of what is required to fulfil a particular right.87

In its judgment, the Portuguese Constitutional Court considered a decree of the Portuguese National Assembly which modified the entitlement to a minimum guaranteed benefit which could be claimed in cases of, for example, unemployment.88 The decree purported to restrict the eligibility for this benefit to those of 25 years of age or over (other than those under 25 who were already receiving a benefit under the old regime, and were therefore considered to have acquired rights to that benefit, pregnant women, persons with exclusive responsibility for children, or certain married or de facto couples). Formerly, all those of 18 years of age or older had been entitled to claim the benefit. There was no other benefit available for people between 18 and 25.

The decree was introduced for political reasons rather than as a measure in response to financial limitations. Apparently, the state could continue to meet the costs of the former, more widely available benefit.

The President of Portugal, who brought the proceedings challenging the constitutionality of the decree, characterised it as a retrogressive measure. The President submitted that the result of the decree would be to reduce the level at which the right to social security had been realised in Portugal.

The majority of the Constitutional Court found that the Constitution of Portugal guaranteed a right to the minimum social security required for a dignified existence. This right would be triggered when a person under Portugal’s jurisdiction was unable to provide basic necessities for him or herself. Accordingly, although it was for the legislature to decide how to guarantee this right, the right had to be guaranteed by one means or another at all times. This meant that the central issue in the case was not so much whether the decree in question was retrogressive, but whether the consequences of the decree would lead to the denial of the minimum right to social security guaranteed by the Constitution of Portugal.

The majority judgment found that the decree purported to remove the previous benefit for people between 18 and 25 without putting any other benefit or equivalent entitlement in place for that age group. In that way, the decree resulted in the Portuguese state failing to guarantee that age group’s right to the minimum social security required for a dignified existence, and accordingly constituted a violation of the Constitution.

87 Sarlet, supra note 23 at 76.
88 Acórdão 509/02 (19 December 2002) 768/02 (Tribunal Constitucional de Portugal).
This approach appears similar to that adopted by the majority of the FSC in *Associação Nacional*. In that case, the majority judgments did not engage in any analysis of whether the changes to the social security regime would result in those who had not yet fulfilled all of the eligibility requirements for a pension enjoying a lesser right to social security than those who had met the relevant requirements (i.e., a prospective retrogression). Rather, the central questions were whether the changes affected any acquired rights or effectively nullified the right to social security (by, for example, removing any entitlement to a pension altogether or setting pension benefits at such low rates so as to make them incapable of fulfilling their purpose). The majority answered both of those questions in the negative, and therefore found that the changes did not contravene the *Constitution*.

### 4.3.1 Proportionality

While some of the minority judgments in *Associação Nacional* indicated that the FSC could determine that a retrogressive measure was disproportionate and therefore unconstitutional even if the measure did not violate the minimum core of any social right and was only prospective in its effect, the judgments of the majority did not expressly support that position. Therefore, it is unclear whether, as argued by Sarlet, Brazilian law requires that a retrogressive measure be proportional.

At a technical level, however, it seems to follow that if a measure does not violate any specific provision of the *Constitution*, and does not impinge upon the minimum core of any particular right, it is irrelevant whether or not the measure is proportional (and this seems to have been the approach of the majority in *Associação Nacional*). Strictly speaking, proportionality should only be a consideration when a measure limits a particular right in some way (i.e., where a *prima facie* violation of a right has arisen). If there is no such limitation, it is difficult to see what the legal basis would be for the FSC to assume jurisdiction to conduct a proportionality analysis. In such a situation, no legal injury would have occurred or would be threatened.

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89 This is not to say that the concerns the minority expressed in *Associação Nacional* are not valid. However, in the absence of an express provision (either in contract or in the *Constitution* itself) requiring that any prospective alteration to the rules regarding pension regimes be proportional, it is difficult to see where the FSC’s jurisdiction to impose such a requirement would come from. Also, it is unclear how the Court could apply such a proportionality requirement, or that the Court could produce a necessarily fairer outcome by imposing the requirement. As discussed above, Judge Gilmar Mendes posited the situation of a person a couple of days away from meeting the requirements for an entitlement to a pension under a particular regime (e.g., 35 years of contribution) who then finds that following a constitutional amendment to that regime, he or she has to contribute for 10 more years before becoming entitled to a pension. This seems unfair, but determining the “fair” cut-off point also seems inherently complex: should those within one month of becoming entitled to a pension be excluded from the amendment? Or 6 months? Or one year? Because of this, such matters seem inherently more suitable for determination by contract between the relevant parties.
4.4 The definition of rights and of the minimum core of those rights

4.4.1 Provisions establishing entitlements or duties

Many of the provisions that define duties or entitlements relevant to the social rights do so in a relatively detailed manner. For example, article 206 of the Constitution stipulates that education must be delivered in accordance with a series of principles, including equality of access, the freedom of individuals to learn, teach, and research, and to divulge their theories, art, and knowledge. Article 206 also requires, amongst other things, that education in public institutions be free of charge. Further, as well as establishing that the State is required to provide free pre-school and primary education, article 208 states that the State must provide special education for disabled persons (preferably in conventional schools) and must provide access to higher education, on the basis of capacity.

Similarly detailed provisions exist in respect of, for example, social security, and in relation to other rights. Therefore, while the Constitution does not always provide a high level of certainty regarding the content of the rights it guarantees, it often gives a reasonable amount of guidance (and certainly more than that offered by the ICESCR).

On the other hand, the absence of a general limitations provision means that in particular cases it may be unclear how any conflicts between particular rights or rights-holders may be resolved, and whether all rights must be guaranteed without any limitation whatsoever. In some cases, the constitutional provision provides the answer. For example, article 203(V) states that an invalid or elderly person is entitled to a benefit equivalent to the minimum monthly salary on the terms set out in that article. Therefore, it is clear that for as long as article 203(V) is in force, every person who meets the conditions set out in that article is entitled to a sum no less than the minimum monthly salary. However, in other cases there is greater uncertainty. For example, the Constitution does not stipulate if or when the State may decline to provide health services (such as, for example, when the cost of a particular treatment would only benefit a small number of people, and would compromise the ability to provide treatment for a wider class), even though it would seem rational to assume that such a denial would have to be considered constitutional in some circumstances.

The FSC has not, as far as I am aware, considered these types of issues directly or attempted to articulate the existence of any implied limitations to specific rights. Instead, as illustrated above, it has simply

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90 See arts. 194 to 203 of the Constitution. Complementary laws also provide additional definition of rights; indeed, that is their principal purpose.
tended to affirm the right in question and to require the State to make adequate provision to realise the right (e.g. the Skrupsyak case).

4.4.2 The minimum core

With the possible exception of the right to work, the Constitution does not define the minimum core of each social right. 91

Defining such a core would appear, at first sight, to be a complicated exercise. For example, what is the minimum standard of health to which each person is entitled in accordance with the right to health guaranteed in the Part II stone clauses? Would an amendment to the definition of the right to health in article 196 of the Constitution (which refers to a “guarantee of universal and equal access to activities and services for health promotion, protection and recovery” and is not part of the stone clauses) contravene such a minimum standard? If some amendment of article 196 is constitutional, what would be the permissible range of amendments that the legislature could make?

Similarly, is the guarantee in article 208(IV) of the Constitution that children of a certain age may attend pre-school and crèche part of the minimum core of the right to education in Part II? Would it be unconstitutional (i.e. constitute a violation of the right to education’s minimum core) for the State to remove that entitlement altogether on a prospective basis, and only provide free primary education? Is the right of an invalid or elderly person to a benefit referred to in article 203(V) of the Constitution part of the minimum core of the right to social security, or could the State amend article 203(V) of the Constitution to provide for a lesser benefit without offending the minimum core of the right to social security?

However, while the determination of such issues appears complex in the abstract, there does not in fact seem to be any reason why the Court could not carry out such an exercise in a concrete case. 92 In so doing, the Court could be guided by appropriate expert evidence and relevant national and international definitions and analysis.

91 Given the location of arts. 9 to 11 in Part II, it is arguable these provisions define the minimum core of the right to work.
92 Baragwanath J’s approach in LSA Daniels & Ors v. Attorney-General (3 April 2002) M 1615-SW99 (H.C.) to determining the nature of the right to education under the New Zealand Education Acts perhaps provides an example of how such an analysis could be conducted and the type of result it could produce (notwithstanding that New Zealand Court of Appeal overturned Baragwanath J’s finding regarding the right to education in Attorney-General v. Daniels [2003] N.Z.L.R 742 (C.A.)). As discussed in Chapter 2, Baragwanath J determined that the New Zealand Education Acts established a right to an education that was not clearly unsuitable, and was regular and systematic. This type of definition seems (albeit at first sight and without detailed analysis) the sort of definition that could result from the analysis of the minimum core of a particular right.
The minimum standard of the right to health could be defined with reference to the fundamental principles and objectives set out in Part I of the Constitution, expert evidence, and, for example, instruments such as the CESCRR’s General Comment on that right. Once a minimum standard had been defined, the constitutionality of a purported amendment to the definition of the right to health in article 196 of the Constitution could be analysed from the perspective of whether the amendment would lead to the Constitution guaranteeing less than that minimum standard or would otherwise contravene the Constitution (e.g. because it would result in unlawful discrimination).

The minimum core of the right to education could be similarly determined (including by consideration of expert evidence regarding, amongst other things, the significance of pre-school education to the values underlying the right to education in general). Once it had been decided whether pre-school education is so fundamental to the right to education in general that it forms part of the minimum core of that right, the answer to the question of whether a purported removal of the right to pre-school education from the Constitution would contravene the right’s minimum core would naturally follow.

Finally, the minimum core of the right to social security and the permissibility of reducing the benefit referred to in article 203(V) below a monthly minimum salary could be ruled upon by determining, for example, the core values that the right to social security affirms (such as human dignity and solidarity, set out in article 1(III) and article 3 of the Constitution as two of the fundamental principles and objectives of the State), and by considering empirical evidence regarding the impact of such a change on the ability of those receiving the benefit to maintain themselves in a manner consistent with their dignity.

4.5 Summary

Overall, the regime for social rights set out in the Constitution appears considerably less flexible, and consequently more protective, than that set out in the ICESCR. The concept of stone clauses reflects an understanding that the rights those clauses protect are indispensable; a society who does not guarantee them cannot legitimately be considered as constitutional. Similarly, the apparent irrelevance of resource constraints in adjudging compliance with the Constitution emphasises the fundamental nature of social rights and their equality with CPR.

The remedies expressly available under the Constitution provide strong mechanisms for enforcing those rights (although the problems referred to above and below limit their effectiveness), and may be

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93 Note, however, that the Brazilian state retains an ability, within the restrictions discussed above, to amend the Constitution; something which no one State party may do under the Covenant. Art. 29 of the ICESCR sets out the process by which States parties can amend the Covenant. By way of summary, no proposed amendment comes into force until it has been accepted by a two-thirds majority of the States parties, and even then, such an amendment does not bind any State party who does not accept it.
contrasted with the absence of any express provisions relating to remedies in the *ICESCR*. The relatively wide provisions relating to standing would also seem to facilitate litigation concerned with all of the constitutionally guaranteed rights.

The detail that some entitlements and duties are expressed in provides considerable certainty as to their content. However, this detail may also be seen as negative and unduly rigid where circumstances change in a way which complicates (or is seen to complicate) compliance, or where particular provisions are no longer seen as corresponding to social requirements. It is difficult to draw any conclusions about whether such rigidity is or is not desirable. While it may lead to relatively frequent constitutional reform, it may also provide important protection against retrogression.

Conversely, the absence of any express limitations provision in the *Constitution* and the current uncertainty about the scope of other entitlements and duties relevant to the social rights, and the content of the minimum core of each such right, means that in some situations it may be unclear whether the State is entitled to prioritise some needs over others; and if so, when or under what conditions it may do so.

However, this uncertainty may be reduced over time as the FSC further develops its jurisprudence. It may be that in an appropriate case and on the basis of objective evidence regarding genuine resource constraints (and contrary to the trend of the jurisprudence discussed above), the FSC would find that it was legitimate for the State not to provide certain resources that an individual required in favour of maintaining the ability to provide resources in other areas. On the other hand, the FSC could reaffirm that resource constraints are irrelevant, but define a certain entitlement or a right’s minimum core in a way which provides a margin of discretion for the State, or allows for the rejection of certain claims under specific circumstances (e.g. although each person has a right to the resources necessary to maintain their dignity, the concept of dignity does not require life to be preserved at all costs). Much would clearly depend on the right in question, and the extent to which the *Constitution* does or does not define the scope of that right.

Finally, even though the *ICESCR* is formally part of Brazilian law, its visibility within the Brazilian legal system is low. This is perhaps unsurprising, given the strong provisions in the *Constitution* in favour of social rights. However, the General Comments of the CESCR may well be relevant to and useful in the interpretation of the social rights, particularly their minimum core.
5  PART IV: THE REASONS FOR THE INCLUSION OF ESCR IN THE CONSTITUTION

The drafting and enactment of the Constitution was one of the principal events in the Brazilian transition to democracy, following 21 years of military rule (from 1964 to 1985). It was the product of 19 months’ work by a Constituent National Assembly, which carried out an extensive process of public consultation. This process, combined with fractures in the political and military leadership, and a growing civil society movement, meant that the decision-making about the content of the Constitution was not entirely under the control of the traditional elites. As a result, the final text of the Constitution reflects victories and defeats of both the conservative and progressive sectors of the population.  

For some, the Constitution was, and is, much more than a signpost marking the end of military rule. Instead, it is seen as having a transformative function; or as a mechanism through which Brazil will be converted into a fully functioning democracy. The inclusion of ESCR in the Constitution as fundamental rights, alongside and equal to CPR for the first time in a Brazilian constitution, was a recognition of the interdependence and indivisibility of all human rights and of their equal need for protection. However, the emphasis on ESCR in the Constitution also constituted (and constitutes) an affirmation of what Brazilians wanted their society to be, and the ways in which it needed to change. As Antunes Rocha states:

“The promulgation of the 1988 Constitution represented the act of reconstruction of the Republican State. It established new values to act as the State’s foundations, and re-orientated the State towards specific objectives which prioritise the person: not just a certain type of person, from the elite, miserly with the poor and lavish with the rich, abusive of those who lack power and servile to the powerful, but rather the human being that lies at the heart of Brazil, a human being who wants to be a dignified citizen, with control over his or her destiny. […]

This was the reason for elevating the status of social rights in the constitutional text, making them more extensive and more powerful, focused on this State inhabited by citizens hungry for food, work and justice […]

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95 “A clear decision was made to affirm in the Constitution that social rights are fundamental rights. The idea of separating the value of liberty (civil and political rights) from that of equality (economic, cultural and social rights) was inconceivable.” Flávia Piovesan, “A Proteção dos Direitos Humanos no Sistema Constitucional Brasileiro”, online: Instituto Americano de Derechos Humanos <http://www.iidh.ed.cr> at 8.
It was for this land and these Brazilians that the members of the 1987-88 National Assembly drafted the Constitution, with the idea that from this creation, the promised land of democracy would be reached. This Constitution was, and is (we believe), the seed from which a more just, more equal and more free society could grow."

Of course, the Constitution had and still has its critics. Amongst other things, it has been accused of ignoring the Brazilian reality of profound social and economic inequality, and of failing to specify how the theoretical equality it posits would be achieved. There was also concern that the Constitution with its broad catalogue of rights would give rise to new conflicts by “exciting expectations and generating impatience”, and warnings that “social advancement is not achieved simply through the text of a constitution.”

One response to this type of criticism is offered by Abreu Dallari. He argues that while difficulties in achieving the vision set out in the Constitution had to be expected, and the Constitution alone would not ensure the effective guarantee of human rights, “it cannot be doubted that it is better to have a Constitution favourable to the promotion and protection of human dignity [than not to have such a constitution], as it facilitates and provides a platform for social mobilisation, in a democratic and humanistic sense.”

5.1 Ongoing problems

Despite the constitutional status that social rights have in Brazil, and notwithstanding the considerable progress that Brazil has made recently in relation to improving their realisation within its jurisdiction, it is clear that many Brazilians do not enjoy most, if not all, of these rights. In its most recent State report under the Covenant, Brazil advised:

“[D]espite improvements, the country is far from achieving social indicators that would make it one of the developed countries. Brazil has 52 million people living in poverty (30% of the population), highly disparate income levels, and regional gender and race inequalities that pervade all the social segments reviewed here. These conditions hamper the full achievement of equitable citizenship for all.”

97 Vicente Barreto, “Dos Direitos Individuais e Coletivos” in Retrocesso, supra note 80 at 56.
98 Ubiratan Borges de Macedo, supra note 77 at 59.
99 Roberto Campos “Razões da Urgente Reforma Constitucional” in Retrocesso, supra note 80 at 138.
100 Dalmo de Abreu Dallari “Os Direitos Fundamentais na Constituição Brasileira”, in Debate, supra note 96 at 59 [translated by author].
101 See in general ECOSOC, Second periodic reports submitted by States parties under articles 16 and 17 of the Covenant: BRAZIL, 2008 Sub. Sess., E/C.12/BRA/2 (2008) (“Second Report (Brazil)”). At para. 24, for example, Brazil affirms that it “has already cut nearly in half the population living in extreme poverty, from 9.9% of the population in 1990 to 5.7% in 2003, a 42.4% reduction.” See also the Special Report on Brazil, supra note 81 (“A better today. Brazil’s growing middle class wants the good life, right now”).
102 Second Report (Brazil), supra note 101 at para. 13.
Further, even though important victories in relation to the enforcement of the social rights have been obtained through litigation, persistent and significant problems with the Brazilian legal system mean that its ability to provide an effective remedy for violations of these rights is limited. These problems include those referred to by Piovesan and mentioned above (e.g. distrust of the law and the courts, and poverty), the likelihood of considerable delay in reaching a final judgment on a matter, and systematic non-compliance with judgments or complications relating to their implementation.\(^{103}\)

Such problems are not, however, restricted to the realisation or enforcement of social rights. For example, in its 2005 Concluding Observations on Brazil’s second periodic report under the International Covenant on Civil and Political Rights, the Human Rights Committee [HRC] expressed concern about:\(^{104}\)

“...the widespread use of excessive force by law enforcement officials, the use of torture to extract confessions from suspects, the ill-treatment of detainees in police custody, and extrajudicial execution of suspects. It is concerned that such gross human rights violations committed by law enforcement officials are not investigated properly and that compensation to victims has not been provided, thus creating a climate of impunity.”

The HRC also referred to an amendment to the Constitution providing a power for the Prosecutor-General of the Republic to seek the transfer of certain human rights violations from state to federal jurisdiction. While welcoming the development, the HRC stated that it was “concerned about the ineffectiveness to date of such a mechanism” and that it was also concerned “about the widespread reports and documentation of threats against and murders of rural leaders, human rights defenders, witnesses, police ombudsmen and even judges.”\(^{105}\)

\(^{103}\) See José Eduardo Faria, “Direitos Sociais e Justiça” in Maria Helena Rodriguez Ortiz, ed., Justiça Social: uma questão de direito (Rio de Janeiro: DP&A editor, 2004) at 125. See also Faria’s reference to a belief amongst the Brazilian population that their legal system is increasingly ineffective: José Eduardo Faria, “O Judiciário e o Desenvolvimento Sócio-Econômico” in José Eduardo Faria, Ed., Direitos Humanos, Direitos Sociais e Justiça (São Paulo: Malheiros Editores Ltda, 1998) at 18. While Faria was writing in 1998, The Economist’s 2009 Special Report on Brazil, supra note 81 states that, due to the possibility of potentially endless appeals and therefore considerable delay, “if a contract is broken or payment withheld, it is better to give up than rely on the courts for redress.”


\(^{105}\) Ibid. at para. 13. The HRC’s observation at para. 16 is also worth highlighting as it demonstrates the need for considerable resources to comply with certain CPR. In that paragraph, the HRC stated: “The Committee is concerned about gross overcrowding and inhuman conditions of detention in jails at the state and federal levels, the use of prolonged remand in police custody and the arbitrary confinement of prisoners after their sentences have been completed (arts. 9 and 10).

The State party should urgently take steps to improve the conditions for all persons deprived of their liberty before trial and after conviction. It should ensure that detention in police custody before access to counsel is limited to one or two days following arrest, and end the practice of remand detention in police stations. The State party should develop a system of bail pending trial, ensure that defendants are brought to trial as speedily as possible, and implement alternatives to imprisonment. In addition, the State party should take
Accordingly, while there is clearly a difference between the formal legal protection that social rights have in the Constitution and the degree to which they are realised in fact, a similar difference exists with respect to CPR. It is therefore plausible to suggest that the fact that social rights are not enjoyed to the extent guaranteed in the Constitution is much more attributable to widespread and entrenched problems with the Brazilian state and Brazilian society rather than to any inherent difficulty with such rights being fully justiciable.

Even if that is not accepted, it is strongly arguable (similar to the position Abreu Dallari adopts) that the existence of significant violations of ESCR in Brazil merely reinforces the importance of such rights being constitutionally guaranteed, as this provides a basis for recognising such violations, seeking redress for them, and promoting their better realisation (however imperfectly). Clearly, few would suggest that because CPR are regularly violated in Brazil, the legal protections that do exist in respect of those rights should be relaxed or removed, or indeed that such protections are the cause of the problem. Instead, most would argue that the high incidence of CPR violations (including serious violations) demonstrates that the Brazilian state is failing to protect fundamental rights, and must do whatever is necessary to comply with its constitutional and international obligations. The same argument must apply to ESCR.

6 CONCLUSION

In drafting their Constitution, Brazilians sought to create a transformative framework for their society. Rather than merely focussing on reasserting and affirming CPR, which could have been expected given the prolonged period of military rule, they appear to have been guided by wider definitions of justice, injustice and freedom. The status that the Constitution bestows on ESCR is not only a recognition of the indivisibility and interdependence of ESCR and CPR, but also of the equal importance of each in the creation and maintenance of a society consistent with human dignity.

Clearly, Brazilian society does not yet conform to the Constitution. More specifically, the Constitution has not resolved the serious problems that Brazil has in respect of CPR or ESCR. However, it could never be expected to do so. What it has done is to provide a means for classifying such problems and failings as unacceptable from not just a political perspective, but also a legal perspective. The setting of minimum standards for both CPR and ESCR is consistent with the fundamental nature of both sets of rights, as is the jurisdiction of the FSC to review state action or inaction against those standards and grant remedies for violations.
Chapter 4
ESCR in Finland

1 INTRODUCTION

In this chapter, I examine the legal status of ESCR in Finland. In Part I, I describe the ESCR guaranteed by the Constitution of Finland [the Constitution] and the institutions principally responsible for ensuring compliance with ESCR and other constitutionally guaranteed human rights. The Finnish system of constitutional checks and balances seems to me to provide a relatively unique method for addressing the tension between parliamentary supremacy and the need to provide strong protection for all rights (whether CPR or ESCR), and therefore I spend some time discussing this system. I also briefly consider the remedies that are available for breach of the rights recognised by the Constitution.

In Part II, I analyse the status of the ICESCR in the domestic legal order. Part III provides a summary of Finnish jurisprudence on ESCR. In Part IV, I discuss the extent to which all of the ESCR guaranteed in the Constitution are justiciable in Finnish courts. In Part V, I carry out a broad comparison of the ESCR in the Constitution with those set out in the ICESCR.

In Part VI, I provide an account of the reasons that ESCR enjoy a constitutional status in Finland. I then highlight, in Part VII, elements of Finland’s domestic and international policy in respect of human rights in general and ESCR in particular.

2 PART I: CONSTITUTIONAL RECOGNITION AND PROTECTION OF ESCR

2.1 Chapter I: Fundamental provisions

Chapter I sets out the Constitution’s “fundamental provisions”. These provisions define human rights as one of the Constitution’s central concepts and their protection as one of the Constitution’s main purposes.

Section 1(2) provides:

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1 The Constitution of Finland (11 June 1999) [Constitution]. All references to the Constitution are to an English translation available on the website of the Finnish Ministry of Justice, online: <http://www.om.fi/en>.

2 In referring to provisions of the Constitution, I use the term “section”, rather than, for example, “article”, as this is the term used in the translation of the Constitution upon which I have relied. It is also the term used in the majority of academic texts regarding the Constitution that I have consulted.
“[...]. The constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society.

Finland participates in international co-operation for the protection of peace and human rights and for the development of society.”

Section 2 concerns “democracy and the rule of law”. Amongst other matters, the section states: “Democracy entails the right of the individual to participate in and influence the development of society and his or her living conditions.”

2.2 Chapter II: Basic rights and liberties

Chapter II declares the “basic rights and liberties” guaranteed by the Constitution. A range of CPR and ESCR are included. I set out the constitutionally guaranteed ESCR below. Of course, some of the rights I list as ESCR could also be classified as CPR; as the Finnish government recognises, there are crossovers and linkages between each category.4

2.2.1 ESCR

Section 6(1) provides that “[e]veryone is equal before the law.” Section 6(2) prohibits different treatment “without an acceptable reason” on the grounds of “sex, age, origin, language, religion, conviction, opinion, health, disability, or other reason that concerns his or her person.” Section 6(3) states that: “Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act.”

Section 16 declares a right to a basic and free education. While there is no right to free higher education, section 16 imposes a duty on “public authorities” to “guarantee for everyone equal opportunity to receive

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3 For example, the right to life, personal liberty and integrity (s. 7(1)); freedom of movement (s. 9); and freedom of expression (s. 13).
4 The “Government Report to Parliament on the Human Rights Policy of Finland”, 2004 (Finland) [“2004 Government Report”] states at 197-198: “It is not always even possible to draw the line between civil and political rights and economic social and cultural rights. For example, the rights relating to trade unions belong in principle to both categories of rights. The different rights are also closely related to one another. It is often noted that the freedom of expression has no real meaning if education does not provide possibilities for persons representing different social groups and both sexes to participate in the discussions. The principle of non-discrimination is an integral element of all human rights and Article 2 on the prohibition of discrimination is common for the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.”
5 The Constitution does not define the term “public authorities.” The term is however understood to cover all institutions of the Finnish state (i.e. the legislature, the executive and the judiciary): see Martin Scheinin, “Constitutional Law and Human Rights” in Juha Pöyhönen, ed., An Introduction to Finnish Law (Helsinki: Kauppakaari, 2002) 32 at 34 [Scheinin, “Constitutional Law and Human Rights”]. Note also that Finland is a unitary state divided into municipalities, and has a unicameral Parliament: see ss. 24 and 121 of the Constitution and
other educational services in accordance with their ability and special needs, as well as the opportunity to
develop themselves without being prevented by economic hardship.”

Section 17 provides for a right to one’s language and culture. Amongst other matters, the section states
that Finland’s national languages are Finnish and Swedish, and that either language can be used before
the courts and other authorities. Section 17 also guarantees the right of the Sami, the Roma and “other
groups” to “maintain and develop their own language and culture”; and states that “the rights of persons
using sign language and of persons in need of interpretation and translation aid owing to disability shall
be guaranteed by an Act.”

A right to work is affirmed in section 18(1). This right is expressed as being the right of everyone “as
provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of
his or her choice.” Dismissal from employment “without a lawful reason” is prohibited.

Section 18(1) also states that public authorities “shall take responsibility for the protection of the labour
force.” Public authorities must “promote employment and work towards guaranteeing for everyone the
right to work”.

Section 19 affirms that “[p]rovisions on the right to receive training that promotes
employability are laid down by an Act.”

Social security rights are set out in section 19. Section 19(1) states that “[t]hose who cannot obtain the
means necessary for a right of dignity have the right to receive indispensable subsistence and care.”
Section 19(2) provides that “[e]veryone shall be guaranteed by an Act the right to basic subsistence in the
event of unemployment, illness, and disability and during old age as well as at the birth of a child or the
loss of a provider.”

Under section 19(3), the public authorities are obliged to “guarantee for everyone, as provided in more
detail by an Act, adequate social, health and medical services and promote the health of the population.”
Section 19(3) also requires public authorities to “support families and others responsible for providing for children so that they have the ability to ensure the well-being and personal development of the children.” Finally, section 19(4) imposes an obligation on public authorities to “promote the right of everyone to housing and the opportunity to arrange their own housing.”

As well as the rights set out above, the Constitution affirms a right to property and provides that the state must “endeavour to guarantee for everyone the right to a healthy environment [...].”

2.3 Observance of human rights and constitutional control

2.3.1 Section 22

In the following section, I describe the main institutions tasked with upholding the Constitution. Before setting out their specific duties, however, I consider the general obligation regarding rights that section 22 of the Constitution imposes on all “public authorities”, including the courts.

Section 22 provides: “The public authorities shall guarantee the observance of basic rights and liberties and human rights.” The reference to “basic rights and liberties” is a reference to those rights guaranteed in Chapter II of the Constitution, while the term “human rights” encompasses all other human rights which Finland is bound to comply with under the international instruments to which Finland is a State party (whether or not such instruments are incorporated into the domestic legal system). Accordingly, all state institutions must ensure compliance with not only constitutionally protected rights, but all other human rights binding upon Finland (including those set out in the ICESCR).

Section 22 also has an important effect on the status of the ICESCR in domestic law. I return to this issue in Part II below.

13 In relation to this right, Scheinin states that its relatively weak formulation is due to a recognition that the right to life, personal liberty and integrity guaranteed in s. 7 of the Constitution includes “an individual right to emergency shelter in conditions that would otherwise pose a risk to the life and personal security of the person.” Martin Scheinin, “Protection of the Right to Housing in Finland” in Scott Leckie, ed., National Perspectives on Housing Rights (The Hague: Martinus Nijhoff Publishers, 2003) 241 at 244 [Scheinin, “Right to Housing in Finland”].

14 S. 15 of the Constitution. S. 15 declares: “The property of everyone is protected. Provisions on the expropriation of property, for public needs and against full compensation, are laid down by an Act.”

15 S. 20 of the Constitution. This section states: “Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.”

16 Scheinin, “Constitutional Law and Human Rights”, supra note 5 at 34.

17 Ibid.
2.3.2 The Courts

Finland has two Supreme Courts: the Supreme Court and the Supreme Administrative Court. Each supervises a range of inferior courts. The Supreme Court has final jurisdiction over all civil, commercial and criminal matters,\(^\text{18}\) while the Supreme Administrative Court has final jurisdiction over all administrative (i.e. public law) matters.\(^\text{19}\)

The Finnish courts play a critical role in protecting rights (including ESCR). They do this not only by upholding rights in concrete cases, but also by adopting the most rights-friendly interpretation of legislation where such an interpretation is possible (as required by section 22).\(^\text{20}\) Sections 106 and 107 of the Constitution also provide all courts in the Finnish judicial system with jurisdiction to supervise the constitutionality of ordinary and inferior legislation. However, this jurisdiction is limited.

2.3.2.1 Sections 106 and 107

Section 106 provides that “[i]f, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, a court of law shall give primacy to the provision of the Constitution.” Section 107 of the Constitution provides that if subordinate legislation is inconsistent with the Constitution or any other ordinary legislation, a court must not apply the subordinate legislation.\(^\text{21}\)

Accordingly, both sections 106 and 107 envisage that even if a court finds that, in the terms specified in sections 106 and 107, subordinate or ordinary legislation is inconsistent with the Constitution, such a finding does not render the legislation in question invalid. Instead, it simply results in the legislation not being applied in the case before the court. The legislation itself remains de jure valid until Parliament decides to take some action in respect of it.\(^\text{22}\) Further, although simple inconsistency is enough where subordinate legislation is being considered, a court may only decline to apply an Act for inconsistency with the Constitution where such inconsistency is evident.

\(^{18}\) S. 99 of the Constitution.
\(^{19}\) Ibid.
\(^{20}\) Note also that, as discussed below, s. 77 of the Constitution provides that the President of the Republic may request an opinion from either Supreme Court on the constitutionality of bills adopted by Parliament. Further, s. 99(2) of the Constitution provides that both courts may propose to the government that legislation should be enacted. The Constitution does not, however, define the circumstances in which the courts could exercise their discretion under s 99(2).
\(^{21}\) S. 107 of the Constitution also stipulates that not only the courts, but also “any other public authority” must not apply subordinate legislation which is in conflict with the Constitution or any Act.
To date, the courts have only applied section 106 in a limited number of cases, none of which appear to have concerned ESCR. According to Hautamäki, section 106 will remain little utilised; in his opinion, the Supreme Courts are unlikely to apply section 106 very often and the inferior courts are unlikely to apply it at all. Indeed, “[w]hen the Supreme Court for the first time left unapplied a provision of an act, the decision promptly became the subject of comment. Application of the evident conflict rule was criticized, because it was recognized as an overreaction and as too intrusive an instrument to use for that situation.”

2.3.2.2 Judicial review: a relative unknown in Finnish law

The power section 106 grants the judiciary is novel in Finnish law, and its high threshold and infrequent application reflects Finnish legal tradition. Prior to the enactment of the Constitution, the general consensus of Finnish constitutional law scholars was that courts did not have any power to judicially review legislation for consistency with constitutional law. As Jyränki states, “[r]eviewing the constitutionality of laws [was] not part of court practice in Finland. With some reservations […] the courts [were] obliged to consider the statutes adopted by parliament as being in accordance with the constitution.”

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23 See the “Government Report to Parliament on the Human Rights Policy of Finland”, 2009 (“2009 Government Report”), where the role of the courts in the protection and implementation of human rights, and the courts’ jurisdiction under s. 106 of the Constitution is explained at 94-95 as follows: “The courts are also part of the system of monitoring the implementation of fundamental and human rights, and in individual cases, they can take a stand on the issue. Under section 106 of the Constitution of Finland concerning the primacy of the Constitution, a court must give primacy to the Constitution if, in the case being considered by the court, the application of a legal provision would be in evident conflict with the Constitution. So far, there have been few cases involving an evident conflict with the Constitution (KKO 2004:26; VakO 2005:6254; Helsingin HaO 9.10.2006 T:06/1410/1, which was, however, annulled KHO 2007:77; KHO 2008:25). There have also been a small number of cases in which section 106 of the Constitution has been considered but not applied.”


26 Ibid. at 8. The reservations that Jyränki later discusses are limited. At 11, Jyränki refers to, for example, the doctorum opinio, according to which “the courts, even other authorities and citizens, must not apply and follow a law which is ‘clearly, manifestly and beyond all doubt’ contrary to the constitution- unless that special law has been adopted using the qualified procedure provided for constitutional amendments.” However, Jyränki points out that no such situation has ever arisen in Finland. Jyränki further explains at 14 that the Supreme Court has, in some cases, adopted a strained interpretation of a particular law where that interpretation was consistent with the Constitution, on the basis that the legislature could not be presumed to have limited a constitutional right without using the “exceptive enactment” procedure (discussed in Part V below).
It appears that the courts have been historically excluded from hard judicial review with the aim of avoiding their politicisation on the one hand and maintaining parliamentary supremacy on the other. Indeed, some Finnish scholars opposed Finland’s ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR] on this basis, arguing that the ECHR was inconsistent with Finnish legal culture and democratic tradition, and that it would result in the transfer of considerable power to the courts.

Consistent with there not being any strong judicial review role for the courts, there was also no strong rights tradition in Finland (i.e. there was no generalised understanding of rights as entitlements held by the individual and enforceable against the state through the courts). Scheinin states that “[i]n simple terms, equal rights of participation have been seen [as] sufficient in the field of ‘rights’, as everything else can be left to the hands of the democratically elected legislature.” Indeed, “[s]trong individual rights that would have priority in relation to majority decisions are not only unnecessary but actually an obstacle for democracy, if the notion of democracy is understood as being identical with majority rule.”

However, the political and economic changes in the 1990s that led to Finland joining the Council of Europe and the European Union, as well as Finland’s ratification of instruments such as the ECHR have led to rights discourse becoming central in Finnish policy and increasingly in law (as I discuss in more detail below). The greater (albeit still constrained) role for the courts that section 106 envisages is

27 Jyränki argues that “[a] decision of a court establishing that a law is contrary to the constitution consists of an intervention into the domain of legislation. And legislative power should […] be given to a body or bodies which are elected and may be removed according to democratic principles. […] If the exercise of the legislative power is subordinated to the control of a court or courts, the court(s) in question may be transformed into political organs. Judicial review becomes an institution with whose assistance the judges impose on society their own idea of proper social order, disregarding that of Parliament.” Ibid. at 12.
28 Martin Scheinin, “European Integration and International Protection of Human Rights – The End of Domestic Constitutions?” in Maija Sakslin, ed., The Finnish Constitution in Transition (Helsinki: Hermes-Myynti Oy, 1991) 42 at 44 [Scheinin, “European Integration”]. Scheinin himself does not appear to be one of these authors; rather, he merely describes their position. See also Veli-Pekka Viljanen, “The International Challenge to the Finnish System of Fundamental Rights” in Maija Sakslin, ed., The Finnish Constitution in Transition (Helsinki: Hermes-Myynti Oy, 1991) 53 at 65-66: “By adopting the Convention, Finland has taken a step away from a pure statute law system in the direction of a case law system, a system where organs of a judicial nature, in this case the European Court of Human Rights and the European Commission of Human Rights, play the most important role in developing law. […] All in all, one of the most important repercussions of the development described above appears to be the strengthening of the role of the courts. The Finnish commentators most critical of this development have seen in it a distrust of Finnish democracy.”
29 Scheinin, “Right to Housing in Finland”, supra note 13 at 241.
30 Ibid. See also Päivi Leino, “A European Approach to Human Rights? Universality Explored” (2002) 71 Nordic Journal of International Law 455, who states at 474 that “in Finland and France rights are seen as a task of the legislature.”
consistent with this trend. To some extent, the fears of the Finnish scholars referred to above may be materialising, although other scholars consider this transformation of Finnish legal culture to be positive.

2.3.3 The Constitutional Law Committee

Instead of the courts, the body with the greatest responsibility for supervising the constitutionality of legislation is a standing parliamentary committee, the Constitutional Law Committee [CLC]. Section 74 of the Constitution requires the CLC to “issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.”

The CLC’s principal role is therefore to “preview” bills and to issue opinions on their consistency with not only the Constitution but also with international human rights treaties. Its jurisdiction is accordingly preventative and abstract. The CLC does not review enacted legislation and it has no power to act on its own initiative. Further, rather than previewing all bills, it only considers those referred to it. Such referrals occur when doubts have been raised about the constitutionality of a particular bill (and presumably where there is a general perception that an issue has been raised which is worthy of the CLC’s consideration).

32 Scheinin argues (ibid. at 149): “[…] the application of international human rights treaties in courts, the strengthening of constitutional provisions on fundamental rights and European economic integration, all have contributed towards a strengthening role of the courts.”

33 Husa argues that “[t]he strong emphasis on preventative control in the Finnish system might be somewhat weakened by the new Basic Law [i.e. the Constitution], in addition to which the membership of the EU and the ECHR will increase the pressure for consolidation of the ex post facto court-control (i.e. judicial review) in the future.” Husa, supra note 22 at 368.

34 Scheinin, “Constitutionalism and Rights in the Nordic Countries”, supra note 31 at 149.

35 Ibid. at 138.

36 In the “2009 Government Report”, supra note 23 at 93, the role of the CLC is explained as follows: “The task of the Parliamentary Constitutional Law Committee is to issue opinions on whether the matters under consideration in the Parliament are in compliance with the Finnish Constitution and international human rights conventions. The monitoring carried out by the Committee is pre-emptive and abstract in character, and therefore is not directly connected with concrete cases. The Constitutional Law Committee gives opinions on a significant number of issues covering a wide range of fundamental rights. The Committee also issues opinions on how the matters under consideration relate to human rights conventions, particularly to the European Convention on Human Rights. The effectiveness of pre-emptive constitutional monitoring is demonstrated by the fact that there have been very few situations concerning the interpretation of case law referred to in section 106 of the Constitution of Finland […] The representatives of the Constitutional Law Committee also take part in hearings organised by international human rights monitoring bodies, in which periodic reviews on Finland are discussed.”

37 Scheinin explains that, in practice, referrals to the CLC come from parliamentary committees who have been instructed by Parliament to seek an opinion from the CLC about the constitutionality of a certain bill. Scheinin, “Constitutional Law and Human Rights”, supra note 5 at 40-41.
The opinions of the CLC are generally considered to be binding, even though the Constitution does not expressly grant them this status.\(^3\) This appears to mean that a bill which the CLC considered to be inconsistent with Constitution would not be passed into law unmodified (unless it were enacted as a “limited derogation”, a unique Finnish legal institution which I explain in Part V below).\(^4\) Similarly, if the CLC considered that a bill would contravene Finland’s international obligations, the bill would presumably need to be amended before its enactment.

In addition to being de facto binding on Parliament, the CLC’s opinions constitute authoritative interpretations of the Constitution.\(^5\) As such, the courts accord considerable weight to them.\(^6\)

Amongst other issues, the ability of the CLC to identify issues in the abstract has been questioned, as has its impartiality. However, while the model does have certain weaknesses, Finnish constitutional law scholars generally consider that the CLC is performing its supervisory and interpretative functions relatively well.\(^7\)

### 2.3.3.1 Membership of the CLC and evidence

The CLC’s membership is comprised of Members of Parliament.\(^8\) There is no requirement for the members to have legal training, although jurists are often amongst the CLC’s membership and its Chair is usually legally educated.\(^9\) In reviewing a legislative proposal, the CLC may hear evidence and apparently often does. This evidence may include evidence from experts in constitutional law.\(^10\)

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38 Husa, supra note 22 at 365. See also Scheinin, “Constitutional Law and Human Rights”, supra note 5 at 40.
39 Husa, supra note 22 at 366-367.
40 Scheinin, “Constitutional Law and Human Rights”, supra note 5 at 40.
41 Husa, supra note 22 at 366-367 and n. 85. Hautamäki also states that the CLC has opined that it would not be open to a court to find “an evident conflict” between an act and the Constitution under s. 106 if the CLC had already reviewed the act in question as a bill, and found it to be consistent with the Constitution. The only exception would be if the CLC “has not assessed the act in a way that it appears in the court.” Hautamäki, supra note 24 at 147.
42 See Scheinin who states that the problems identified with the CLC include the possibility of members voting along party lines. However, Scheinin adds that “the general understanding among Finnish constitutional law scholars is that the system is functioning relatively well.” Scheinin, “Constitutional Law and Human Rights”, supra note 5 at 41-42. For a more sustained critique of the CLC, see 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 Perspectives (Copenhagen: Nordic Council of Ministers, 2001) 287.
43 S. 35 of the Constitution provides that the CLC must have at least seventeen members. These members are elected by Parliament (see s. 37).
45 Scheinin, “Constitutional Law and Human Rights”, supra note 5 at 41, and Länsineva, supra note 44 at 73.
2.3.3.2 The CLC’s role in relation to ESCR

As the Constitution guarantees ESCR, the CLC has been required to consider the consistency of a wide variety of bills with those rights. Indeed, section 19 of the Constitution has become one of the most often cited constitutional provisions in the CLC’s opinions, a number of which I summarise in Part IV below.46

2.3.4 The Chancellor of Justice and the Parliamentary Ombudsman

Section 108 of the Constitution sets out the duties of the Chancellor of Justice. Generally speaking, the Chancellor’s role is to ensure that all public authorities, including the President, comply with the law. Section 108 also requires the Chancellor to monitor “the implementation of basic rights and liberties and human rights.” The Chancellor must submit an annual report to Parliament regarding his or her activities and observations. The President and the government may also request opinions and information from the Chancellor on legal issues.

The Parliamentary Ombudsman has similar duties to those of the Chancellor, and is also required to submit an annual report to Parliament.47 However, although both the Chancellor and the Ombudsman may receive and review complaints regarding the conduct of public authorities, and make recommendations on those complaints, the Ombudsman takes a more active role in this regard in practice than does the Chancellor.48 The actions that both offices may take also include official investigations of and prosecutions against public authorities, the issuing of reprimands, and the proposal of legislative reforms.49

The role of the Chancellor of Justice and the Parliamentary Ombudsman in the Finnish legal system is significant. Indeed, the 2009 Government Report refers to these institutions as “the supreme supervisors of legality.”50 The Parliamentary Ombudsman is particularly important in relation to ESCR. Many of the complaints the Ombudsman receives concern social welfare and health services, and whether such services are being provided in accordance with the Constitution’s provisions and those of other relevant legislation.51

46 Leino, supra note 30 at 484.
47 S. 109 of the Constitution.
48 Scheinin, “Constitutional Law and Human Rights”, supra note 5 at 54.
50 Ibid. at 93.
51 Ibid. See also Scheinin, “Right to Housing in Finland”, supra note 13 at 250, who states: “The Ombudsman has emphasized that the right to social assistance belongs to everyone, and the situation and needs of self-employed persons must be assessed individually. In one of her decisions in 1988, the Deputy Ombudsman criticized municipal instructions related to the allocation of social assistance benefits for being unduly restrictive in relation to the right to indispensable subsistence. In relation to a concrete case, she stated that the municipality had acted unlawfully when it had required, as a condition for social assistance, that the family move to cheaper housing.” Scheinin does not state, however, what the consequence was of the Deputy Ombudsman’s finding. For a fuller account of the
2.3.5 The President and the Speaker

Additional checks on Parliament’s power are provided by the President and the Speaker of Parliament. Section 77 of the Constitution provides that any legislative proposal (i.e. a bill) adopted by Parliament must be submitted to the President of Finland for confirmation before it enters into force as law. In considering whether to confirm a proposal adopted by Parliament, the President may seek an opinion from either of Finland’s Supreme Courts regarding the constitutionality of the proposal, including its consistency with the ESCR guaranteed in the Constitution. The President may decide not to confirm the proposal (a decision which obviously would be affected by the nature of any advice from the Supreme Courts), in which case Parliament would have to reconsider the proposal. Parliament could still enact the proposal following such reconsideration, but clearly a decision by the President against confirmation would have important political implications.

Under section 42 of the Constitution, the Speaker may refuse to include a matter on Parliament’s agenda or put a matter to vote if he or she considers the matter to be unconstitutional. Such a refusal by the Speaker may be reviewed by the CLC.

2.4 Remedies

Unlike the Brazilian Constitution, for example, the Constitution does not contain detailed and multiple provisions regarding remedies. However, section 118 of the Constitution provides:

“Everyone who has suffered a violation of his or her rights or sustained loss through an unlawful act or omission by a civil servant or other person performing a public task shall have the right to request that the civil servant or other person in charge of a public task be sentenced to a punishment and that the public organisation, official or other person in charge of a public task be held liable for damages, as provided in more detail by an Act.”

In a number of cases, discussed in more detail below, the courts have awarded compensation for the violation of ESCR guaranteed by the Constitution. The actions that the Chancellor of Justice and the Parliamentary Ombudsman are empowered to undertake can also be considered as remedies.


52 S. 77 (1) of the Constitution.
53 If following such reconsideration Parliament readopted the proposal without material alterations, the proposal would then enter into force as law: s. 77(2) of the Constitution.
2.5 Summary

The *Constitution* affirms a modern and progressive catalogue of human rights (although as discussed in Part V below, there are differences between the ESCR set out in the *Constitution* and those in the *ICESCR*). It also establishes obligations on public authorities with regard not only to the rights the *Constitution* specifically guarantees, but also to those which are binding on Finland in the international sphere.

The division of responsibilities between the executive, the legislature and the judiciary for the interpretation and enforcement of the *Constitution* reflects the Finnish preference for maintaining control over Finland’s supreme law in the hands of elected representatives. While rights are protected by the highest law of the land, a non-judicial institution, the CLC, is the source of the most authoritative interpretations of those rights rather than the judiciary. Further, outside of Parliament, the judiciary is only one of the organs responsible for monitoring whether human rights are being upheld. The Chancellor of Justice and the Parliamentary Ombudsman are also given significant responsibilities in this regard.

The Finnish model is based on the premise that it is principally for Parliament to make the law and for elected representatives to ensure that the law is consistent with the *Constitution*. If the Finnish system works as it is intended to do, any bill which could lead to legislation which would contravene the *Constitution* is identified through the mechanism of the CLC before it becomes law. Accordingly, the judiciary’s jurisdiction not to apply an ordinary law for inconsistency with the *Constitution* is circumscribed, and is designed on the assumption that it will be required very infrequently.

Overall, Finland’s system provides an important example of how a constitutional status can be granted to rights, including ESCR, while limiting the amount of power transferred to the judiciary and away from elected representatives in the process. This example seems particularly significant in relation to ESCR, as provides an answer to the objection that issues relating to ESCR are properly for elected representatives, not the judiciary. Under the Finnish system elected representatives in Parliament enact the *Constitution* and choose to include ESCR in it (and whether or not to retain those ESCR over time, subject to the considerations discussed in Part V below); and elected representatives in the CLC are principally

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54 Clearly, the CLC will be influenced, or even highly influenced, by interpretations of such rights by constitutional law experts or international institutions such as the European Court of Human Rights. However, the point is that, for the purposes of Finnish law, the CLC is the most important decision-making body with regard to the content of the *Constitution*'s rights and the consistency of legislative proposals with them and with the *Constitution* generally, not the Finnish judiciary.
responsible for determining the scope of those ESCR and whether proposed legislation is consistent with them. The judiciary’s role in this regard is subordinate.

3 PART II: THE STATUS OF THE ICESCR IN FINLAND

Finland is a State party to the ICESCR, having ratified it on 19 August 1975. The ICESCR is also fully incorporated into Finland’s domestic law, but its exact status is somewhat unclear.

As a general rule, international obligations do not form part of Finland’s national law until they have been incorporated into the domestic system by an Act of Parliament or a Presidential decree. When this occurs, the international instrument is usually incorporated into domestic law in its entirety. In other words, as Kulovesi explains, “the acts of implementation seldom contain any substantive provisions, but simply state that the provisions of a certain international obligation are brought into force in Finland.”

With the apparent exception of international human rights treaties, if a treaty is incorporated into domestic legislation by an Act, it has the same status as any other Act. If, however, it is incorporated by a decree, it becomes part of the corpus of inferior legislation. This means that, as provided for in section 107 of the Constitution, in the case of any conflict between a treaty incorporated by decree and an Act, the courts and other public authorities would be obliged to give precedence to the Act.

The ICESCR was incorporated by a decree. Therefore, although the ICESCR forms part of Finnish domestic law in its entirety, at first sight it would appear to be inferior not only to the Constitution but also to other ordinary legislation. This was the case prior to the enactment of the Constitution in 2000 (the incorporation of the ICESCR as a decree having preceded the Constitution).

However, Scheinin argues that section 22 of the Constitution bestows a special status on international human rights treaties. In his opinion, the section:

55 See s. 95 of the Constitution, which provides: “The provisions of treaties and other international obligations, in so far as they are of a legislative nature, are brought into force by an Act. Otherwise, international obligations are brought into force by a Decree issued by the President of the Republic.”

56 Kati Kulovesi, “International Relations in the New “Constitution of Finland” (2000) 69 Nordic Journal of International Law 513 at 520. Therefore, for example, the European Social Charter was brought into force in Finnish domestic law by Act No. 843 which simply stated: “The provisions of the European Social Charter, concluded in Turin on 18 October 1961, and of its Additional Protocol are, as far as they fall within the domain of legislation, in force as they have been agreed upon.” Cited by Scheinin in Martin Scheinin, “Incorporation and Implementation of Human Rights in Finland” in Martin Scheinin, ed., International Human Rights Norms in the Nordic and Baltic Countries (The Hague: Kluwer, 1996) 257 at 281 [Scheinin, “Human Rights in Finland”].

57 See also Scheinin, “Human Rights in Finland”, supra note 56 at 275.

58 Ibid.

59 Ibid.

60 Although Scheinin does not specifically state this, I have presumed that his reference to international human rights treaties is a reference to treaties to which Finland is a State party.
“[e]stablishes a constitutional obligation [on] all authorities, including the judiciary, to give due effect to international human rights, independently of their formal incorporation into the domestic legal order and the hierarchical rank of the incorporating enactment. Consequently, the obligation of public authorities, including courts of law, to apply international rights treaties ratified by Finland is no longer determined by the hierarchical rank of the incorporating enactment. Another aspect of Section 22 is that the rule of *lex posterior* has less relevance than before in solving situations of tension between a domestic piece of legislation and an international human rights treaty incorporated at the rank of ordinary law. After the entry into force of the new Constitution, there is, in addition to a doctrinal ground, even a constitutional reason to avoid applying the *lex posterior* rule to the detriment of human rights treaties.”

### 3.1 Conflicts between the ICESCR and an Act or the Constitution

If Scheinin’s argument is correct, then section 22 of the *Constitution* obliges public authorities to guarantee the observance of the *ICESCR*, despite it being incorporated into domestic law as merely a decree. In other words, the effect of section 22 is to modify the *ICESCR*’s original status in domestic law. As a result, arguably the effect of the section is that public authorities, including judges, are required to give precedence to the *ICESCR* in the case of any conflict between it and another Act.

It is less clear how any conflict between the *ICESCR* and the *Constitution* would be resolved. While section 106 affords the *Constitution* primacy over ordinary legislation, it says nothing about the weighting to be given to international human rights obligations afforded a special status by section 22. Further, section 106 is only directly relevant to the work of the courts, not the CLC.

I am not aware of any case in which the courts or other public authorities have identified or attempted to resolve any conflict between the *ICESCR* and ordinary legislation or the *Constitution*. However, as I discuss in more detail in Part V below, there is the potential for such a conflict to arise.

### 3.2 The profile of the ICESCR in Finland

Despite the formal status of the *ICESCR* in Finnish domestic law, it does not seem to have a particularly high profile in Finland’s legal system. In its concluding observations on Finland’s fourth periodic report under the *ICESCR*, the Committee on Economic, Social and Cultural Rights [CESCR] expressed concern that while the *ICESCR* could be invoked before Finnish courts, there was no case law to suggest that this

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61 Scheinin, “Constitutional Law and Human Rights, supra note 5 at 34.
had ever occurred.\textsuperscript{62} The CESCR was also concerned that lawyers and judges were not familiar with the \textit{ICESCR}.\textsuperscript{63}

The Finnish state responded to these concerns in its fifth periodic report under the \textit{ICESCR}.\textsuperscript{64} It stated that while the courts had not expressly referred to the \textit{ICESCR} in many cases, they had done so on a number of occasions.\textsuperscript{65} The state also suggested that the reason for the relatively small number of references was that cases in which the \textit{ICESCR} could have been potentially relevant may have been decided “on the basis of the corresponding national provisions in harmony with the international human rights commitments.”\textsuperscript{66} Accordingly, reference to the \textit{ICESCR} in such cases would have been redundant.

Similar to the courts, the CLC does not appear to place any particular emphasis on the rights and obligations referred to in the \textit{ICESCR} (indeed, in most cases it seems that the CLC does not refer to the \textit{ICESCR} at all). Instead, its focus is on the ESCR provisions of the \textit{Constitution}.

\section{PART III: JURISPRUDENCE}

A number of judgments by the courts and various opinions of the CLC demonstrate how the ESCR recognised in Finnish law have been interpreted and applied.\textsuperscript{67}

\subsection{Judgments of the Finnish courts}

\subsubsection{Right to education}

The guarantee of basic education in section 16(1) of the \textit{Constitution} was referred to by the Supreme Administrative Court in a judgment concerning whether a municipality was obliged to provide a child who had special educational needs with a personal assistant free of charge (the municipality having declined to do so).\textsuperscript{68} The Court decided that the municipality had not appropriately assessed the child’s

\begin{thebibliography}{99}
\bibitem{ibid}\textit{Ibid.}
\bibitem{ibid1}\textit{Ibid.} at para. 12. The report cites a number of judgments but does not summarise the issues before the courts in those cases or the courts’ findings.
\bibitem{ibid2}\textit{Ibid.} at para. 13.
\bibitem{note}It is very likely that there are relevant judgments and opinions in addition to those mentioned here. However, my inability to read Finnish has meant that I have not been able to conduct my own research of primary sources. Instead, I have had to rely upon summaries by scholars writing in English. There is no reason to doubt the accuracy of their summaries, but the two I rely most on date from 2001. It is reasonable to assume that the jurisprudence of the courts and the CLC relevant to ESCR has developed since that time, and the two principal summaries did not in any case purport to provide a comprehensive review.
\bibitem{scheinin}As described by Scheinin in “Protection of ESCR in Finland”, \textit{supra} note 51 at 256.
\end{thebibliography}
individual need for such an assistant, and directed the municipality to reconsider its decision. Although
the legislation most relevant to this judgment appears to have been ordinary legislation which required the
municipality to provide education and teaching in accordance with each child’s age and ability, the
constitutional right was clearly relevant (presumably one of the issues being what the child in question
required to realise his or her constitutional right to education).

4.1.2 Right to work

In a case which preceded the enactment of the Constitution, a long-term unemployed person sued a
municipality for failing to provide him with a job.69 The right to work then guaranteed by Finnish
constitutional law provided that “unless otherwise prescribed in an act of Parliament, it is incumbent on
the state to arrange a possibility to work for a Finnish citizen”, for a particular period of time and
following a period of unemployment defined by an ordinary act of Parliament.70 The Supreme Court
found that the municipality had breached its duty, and required it to pay compensation to the unemployed
person. The Court’s judgment stands as authority for the proposition that courts may award
compensation when a public authority breaches constitutional guarantees related to ESCR (with section
118 of the Constitution now providing an express jurisdiction to that effect).71

4.1.3 Childcare

In 2001, the Supreme Court awarded compensation to a family following a finding that the right of the
family’s children to municipal childcare had been breached.72 The obligation that section 19(3) of the
Constitution imposes on public authorities to “support families and others responsible for providing for
children” had been implemented to an extent through ordinary legislation. The legislation provided a
right to childcare contingent on a child’s parents submitting an application four months in advance of the
date that the care was required. The family in the case before the Court duly submitted the application,
but the municipality failed to organise care until a date after the four-month period had expired. This
meant that one of the parents of the family had to stay home to look after the family’s children and lost
income as a result. The Supreme Court awarded damages in the amount of the lost income and costs.73

70 Scheinin, “Right to Housing in Finland”, supra note 13 at 245.
71 Ibid.
73 Scheinin, “Right to Housing in Finland”, supra note 3 at 246.
4.1.4 Right to adequate social, health and medical services

In a judgment dated 27 November 2000, the Supreme Administrative Court ruled in favour of a disabled person who alleged that the city of Helsinki had an obligation to pay for her orthopaedic shoes. A city physician had ordered, through a city-funded programme, one or two pairs of orthopaedic shoes for the applicant. However, expert reports demonstrated that the nature of the applicant’s disability meant that she wore out more than two pairs of shoes a year, and therefore required additional pairs.

In the Court’s opinion, the obligation section 19(3) of the Constitution imposes on the public authorities to guarantee social, health and medical services required the city to provide “the necessary aids for medical rehabilitation.” The Supreme Administrative Court considered that the city had not proved that it could not provide the additional shoes the applicant needed. Further, there were no reasons under section 6 of the Constitution (which provides that discrimination on certain grounds is prohibited “without an acceptable reason”) which would have permitted the city to prioritise the delivery of other health or medical services over the provision of the additional shoes. The Court stated (referring to sections 6, 19(3) and 22 of the Constitution):

“The State and the municipalities must, through means of legislation, the allocation of resources and the adequate organising of their operations, see to it that adequate health and medical services are guaranteed to everyone. The provision [section 22] obliges also courts to constitutional-rights-friendly interpretation.”

The relief that the Court awarded the applicant was an order that the city provide her with orthopaedic shoes “in accordance with her medically assessed needs.”

4.1.5 The right to indispensible subsistence and care

In a relatively large number of cases the administrative courts have relied on section 19(1) of the Constitution (which sets out the right to receive indispensable subsistence and care of those who cannot obtain the means necessary for a life of dignity) to quash decisions of municipalities denying social assistance (e.g. benefits) to certain groups of people. For example, in one case a municipality had declined to provide benefits to a university student on the assumption that the student had access to student loans. However, in fact the student was unable to obtain a loan from a bank because of the

75 Scheinin, “Right to Housing in Finland”, supra note 13 at 246.
77 Scheinin, “Right to Housing in Finland”, supra note 13 at 246.
78 Ibid. at 247.
student’s indebtedness.\textsuperscript{79} It appears that the effect of the judgment would have been that the municipality would have had to make a new decision, taking into account the actual circumstances of the student.

In another case, the Administrative Court of Turku and Pori found that the right to indispensable subsistence and care had to be guaranteed at all times to every person entitled to claim the right, even those who decline work offered to them (i.e. it was not permissible to reduce benefits below the minimum level guaranteed by the Constitution as a punitive measure against a beneficiary who refuses to work).\textsuperscript{80}

\section*{4.2 Opinions of the CLC\textsuperscript{81}}

\subsection*{4.2.1 Right to education}

A bill referred to the CLC in 2000 proposed that institutions providing basic art education would be permitted to give priority (in terms of offering places at the institutions) to students resident in particular municipalities. The CLC considered that the constitutional rights to education and to equality did not permit a state institution to make such a differentiation. It appears that the bill did not proceed any further after the CLC issued its opinion.

\subsection*{4.2.2 Right to basic subsistence}

In a 1995 opinion regarding proposed amendments to the Sickness Insurance Act, the CLC referred to section 19(2) of the Constitution and found that if the amendments would result in certain categories of persons losing their constitutional entitlement to basic subsistence, they would be unconstitutional.\textsuperscript{82} In other words, the legislature could organise social security as it saw fit, subject to the requirement that basic subsistence would always be guaranteed to those requiring it through one scheme or another (essentially the same finding that the Portuguese Constitutional Court made in respect of the right to

\textsuperscript{79} (1 June 1999) No. 368/3 (Administrative Court of Häme). For additional discussion of this and similar cases, see Scheinin, “Right to Housing in Finland”, \textit{supra} note 13 at 247.

\textsuperscript{80} (23 November 1998) No. 512/2 (Administrative Court of Turku and Pori) (cited in Scheinin, “Right to Housing in Finland”, \textit{supra} note 13 at 247). See also Arajärvi’s clarification that Finnish law does permit certain reductions to benefits for the purpose of encouraging (or forcing, depending on one’s interpretation) a beneficiary to return to work. However, the authorities must be satisfied that any benefit cuts do not compromise “the indispensable subsistence required by a life of dignity, and that [the reduction] cannot otherwise be considered unreasonable” (because, for example, the beneficiary has a justifiable reason for refusing work). Pentti Arajärvi, “The Finnish Perspective on the Last-Resort Support for Subsistence” (2007) 52 Scandinavian Studies in Law 17 at 35.

\textsuperscript{81} The summaries of the CLC’s opinions set out below are far from exhaustive. For much more comprehensive assessments, see Scheinin, “Protection of ESCR in Finland”, \textit{supra} note 51 at 260-276; and Krause, \textit{supra} note 42. I note that when discussing opinions of the CLC prior to the Constitution’s enactment in 2000, both Scheinin and Krause refer to provisions of the Constitution now in force rather than those in force under the previous constitutional regime. This is because of the similarity of the Constitution’s provisions on ESCR with those that were in place between 1995 and 2000 (as I discuss in Part VI below). Their method avoids confusion, and therefore I have adopted it.

\textsuperscript{82} Scheinin, “Constitutionalism and Rights in the Nordic Countries”, \textit{supra} note 31 at 144.
social security in the Constitution of Portugal, discussed in Chapter 3). Because the result of the proposed amendments would be that groups such as students and people waiting for a decision on a disability pension would be denied basic subsistence, the bill had to be amended.

Subsequently, in 1996, the CLC considered a bill which stipulated that unemployment benefits would not be adjusted for inflation in 1997, and that a 1996 adjustment which had been postponed would not be carried out. The CLC opined that the bill would not lead to a violation of section 19(2). However, the CLC stated that if employment benefits fell too far behind living costs in the future, section 19(2) might be contravened.  

In 1998, a bill which provided that unemployment benefits could be denied to immigrants who failed to co-operate with certain integration measures was referred to the CLC. The CLC found that while section 19(2) did not prevent the government from making benefits subject to conditions in certain circumstances, it would be unconstitutional to decline an unemployment benefit for reasons other than a failure to co-operate “that had directly to do with measures that promoted the employment of the person.” Because the bill did not so limit the cases in which unemployment benefits could be declined, it had to be amended.

4.2.3 Right to adequate social, health and medical services

In 1995, the CLC previewed a bill which proposed significant reductions in the level of a state allowance paid to parents caring for a child at home. The CLC found that section 19(3) of the Constitution did not protect the allowance as municipal childcare would still be available even in its absence (i.e. families caring for children would continue to have access to adequate state support as required by 19(3) following the implementation of the reductions). Accordingly, the bill was constitutional.

The CLC also previewed reforms to Finland’s national pension system, including a proposal to abolish certain supplements for children and for spouses. The CLC evaluated the reforms against section 19(3) of the Constitution, on the basis that the purpose of the supplements was to support families providing for their children, and found that they were constitutional. In the CLC’s opinion, the removal of the supplements would not contravene section 19(3), as other state welfare systems would continue to provide the minimum necessary support.

83 Scheinin, “Protection of ESCR in Finland”, supra note 51 at 265.
84 Scheinin, “Protection of ESCR in Finland”, supra note 51 at 267-268.
85 As described in Krause, supra note 42 at 334.
86 Ibid. at 335.
4.2.4 Right to property vs. obligation to promote right to housing

In a 1997 opinion, the CLC considered a bill which sought to introduce amendments to legislation concerning publicly subsidised housing. Under this legislation, private entities received subsidies from public funds to construct rental housing, and in return were subject to restrictions on their right to sell or otherwise dispose of the dwellings.

The CLC considered whether the restrictions the bill would impose constituted a disproportionate limitation on the right to property set out in section 15 of the Constitution. The CLC determined that the restrictions were connected with the duty of public authorities in section 19(4) of the Constitution to “promote the right of everyone to housing and the opportunity to arrange their own housing.” Accordingly, the limitation on the private entities’ right to property served a legitimate aim. The CLC also found that the limitation was proportionate, given the importance of the social objective underlying section 19(4), but set out certain amendments which would need to be made to the bill to ensure that it was fully compatible with section 15 of the Constitution.

5 PART IV: THE JUSTICIABILITY OF THE ESCR GUARANTEED IN THE CONSTITUTION

As set out above, the provisions concerning ESCR in the Constitution are in some cases formulated as rights, or as obligations on public authorities, or as a combination of the two. For example, section 16(1) of the Constitution states that everyone has a right to a basic education, while section 16(2) provides that the public authorities must guarantee for everyone an equal opportunity to receive education other than basic education in accordance with their ability and special needs.

On a plain reading of the ESCR in the Constitution, the fact that some sections bestow rights while others establish obligations would appear irrelevant to the question of whether such rights and obligations can be enforced in court. Judgments such as that of the Supreme Administrative Court regarding the obligation of the city of Helsinki under section 19(3) of the Constitution seem to support this view: a public authority’s failure to comply with an obligation stated as such in the Constitution is as justiciable as a failure to comply with a constitutional right.

However, it appears that a common interpretation of the ESCR in the Constitution is that not all of the obligations the Constitution imposes are justiciable (i.e. the declaration of an obligation does not

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87 See Scheinin, “Right to Housing in Finland”, supra note 13 at 249.
necessarily create a corresponding right enforceable in a court at the suit of an individual). In this regard, Scheinin states (somewhat confusingly): 88

“Where considered appropriate, the rights provisions [in the Constitution] are formulated as individual rights, thereby creating an expectation of ‘justiciability.’ However, the use of different formulations is by no means dichotomous. Some of the provisions on economic, social and cultural rights are formulated as individual rights, others as obligations for the exercise of public authority, and the third category represents a compromise between these two approaches.”

Scheinin then contrasts the right to receive indispensable subsistence and care in section 19(1) with the obligation in section 19(4) on public authorities to “promote the right of everyone to housing”. He refers to the former as “a clear individual right applicable in courts”, 89 while stating that the latter is the constitutional provision relating to ESCR that “lends least support to justiciability.” 90 This analysis suggests that an individual could not, for example, take proceedings against a public authority for an alleged failure to promote that individual’s right to housing on the basis of no more than section 19(4) of the Constitution.

Arajärvi advances an even more restrictive interpretation, arguing that only a very limited number of the ESCR in the Constitution are justiciable: 91

“One dimension of the basic rights - and to a smaller extent of the human rights [set out in international treaties to which Finland is a State party] - is the question whether they create subjective rights. In such cases they have an immediate juridical impact. Many of the basic and human rights, especially the civic and political ones, have been defined as subjective rights. Of the economic, social, and educational rights of the Finnish Constitution, only the rights to indispensable subsistence and care and to basic education are determined as subjective.”

In a similar vein, van den Brandhof states: 92

88 Ibid. at 242.
89 Ibid. at 243.
90 Ibid. at 242.
91 Arajärvi, supra note 80 at 27. See also the “2004 Government Report” (supra note 4) and the “2009 Government Report”, supra note 23 which make a similar distinction. For example, the “2004 Government Report” refers a number of times to subjective rights, but only in relation to the right to basic education free of charge and the right to receive indispensable subsistence and care (e.g. at 16 and 204). In contrast, s. 20 of the Constitution (which imposes an obligation on the public authorities “to endeavour to guarantee for everyone the right to a healthy environment”) is not referred to as establishing a subjective right. Similarly, the “2009 Government Report” states at 141: “The right to free basic education is a subjective right, which means that it applies to all Finnish residents. The Constitution also ensures the availability of other forms of education. However, they are not defined as a subjective right but as an obligation imposed on public authorities. The public authorities must guarantee everyone equal opportunities to receive other educational services in accordance with their ability and special needs and to develop themselves without being prevented from this by lack of means.”
“Some of the fundamental social rights have the nature of recommendations, some of them create individual rights which citizens may invoke in court. The latter is true in particular for some provisions laying down social security rights. The nature of the fundamental rights is derived from the wording used in the Constitution: where a provision expressly uses the words ‘a right to’, this right may be invoked in court. If the provision reads that it shall ‘be the concern’ of the authorities to provide something, it is a recommendation. This has been repeatedly confirmed in the case law of the Supreme Court.”

However, both Arajärvi’s and van den Brandhof’s interpretations appear inconsistent with the judgment relating to the city of Helsinki’s obligations under section 19(3) of the Constitution. Section 19(3) does not refer to a right, but rather establishes an obligation on the public authorities to guarantee adequate social services. Despite this, however, the Supreme Administrative Court considered that it had jurisdiction to determine whether the city had met its obligations under that section.

Indeed, because van den Brandhof expressly refers to this judgment and to section 19(3) of the Constitution in his analysis, his reasoning is difficult to follow. A further complication is that as far as I am aware, the formulation “be the concern of” is not used in the Constitution with regard to the rights or obligations relating to ESCR (although this apparent absence may simply be the result of van den Brandhof relying on a different translation of the Constitution). Finally, a number of the Constitution’s provisions which would seem to establish a justiciable right (such as section 6, regarding equality before the law, or section 15, regarding the protection of property), do not use the formulation “a right to”.

Therefore, if the Constitution does distinguish between justiciable rights and non-justiciable obligations, it is not entirely clear which provisions are justiciable and which are not. On the basis of Scheinin’s analysis (in which he refers to three categories, as set out above), it may be that there is a sliding scale between provisions which are unquestionably justiciable and provisions which are not justiciable. If that is the case, the provisions could be divided into the following three categories:

1. Provisions which refer expressly to rights and are therefore justiciable (e.g. section 16(1), regarding the right to education; section 17(2), regarding the right to use Finnish or Swedish before public authorities; and section 19(1), regarding the right to receive indispensible subsistence and care).

92 Van den Brandhof, supra note 5 at 223.
93 In referring to the judgment, van den Brandhof states (supra note 5 at 223) that the wording in section 19(3) “was capable of different interpretations”, and that the Supreme Administrative Court corrected an inferior court’s finding that the city of Helsinki had no specific legal obligation to provide the orthopaedic shoes. This result, however, appears to contradict van den Brandhof’s earlier conclusion that a provision of the Constitution could only be invoked in court if the provision used the words “the right to”.
2. Provisions which state rights, prohibitions, or guarantees without using the word “right” expressly, but nonetheless would seem to be justiciable (e.g. section 6(1) and (2), relating to equality before the law and the prohibition of unjustifiable discrimination; and section 19(3), regarding the obligation of the authorities to guarantee adequate social, health and medical services).

3. Provisions which refer to an obligation requiring the public authorities to promote certain matters, and which are not justiciable in a court but could still provide a basis for a complaint to bodies such as the Parliamentary Ombudsman, or could be relevant to an opinion of the CLC on the constitutionality or otherwise of a bill. Further, while these provisions do not give rise to a justiciable right in and of themselves, such a right may arise under ordinary legislation enacted to give effect to the constitutional obligations such provisions establish (e.g. section 6(4), which refers to the promotion of equality of the sexes; section 18(2), which requires public authorities to promote the right to work and “work towards” guaranteeing that right; and section 19(4), which states that public authorities must promote the right to housing).  

To the extent that this division is correct, it evidences an inequality in status between constitutionally guaranteed ESCR on the one hand and CPR on the other. While all CPR in the Constitution would appear to be cast as individual rights or guarantees which are justiciable in the courts in and of themselves, a number of the ESCR (or most, if Arajärvi’s interpretation is correct) seem not to be. Further, although in some cases the Constitution imposes an obligation to guarantee a particular right in ordinary law (e.g. section 19(2) requires that the right to basic subsistence be guaranteed by an Act), the effect of which would seem to be that there must be a justiciable right of that nature in ordinary law on an ongoing basis, the Constitution does not always makes such provision (e.g. section 19(4)).

Whether this unequal status affects the protection of ESCR in practice is difficult to determine, and it is relevant to recall in this regard that the jurisdiction of the CLC and the Ombudsman in relation to ESCR does not depend on their justiciability. However, there was clearly an express decision made to limit the role of courts in relation to ESCR to a greater degree than in relation to CPR.

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94 See Scheinin, “Right to Housing in Finland”, supra note 13 at 247, where Scheinin states that while the Constitution does not include “a subjective right to housing, specific provisions guaranteeing an individual right to housing do exist at the level of ordinary law.”

95 See in this regard Ilveskivi, supra note 12 at 225, who states “Unlike the right to necessary subsistence and care, the right to security of basic livelihood must be provided for everyone as an individual right at the level of an Act of Parliament.”
5.1 The justiciability of the ICESCR in Finnish law

The interpretation of the Constitution that scholars such as Arajärvi advance also creates some doubt about the extent to which the ICESCR’s provisions would provide a cause of action in Finnish law, notwithstanding its status in the domestic legal system. For example, would the obligation of progressive realisation in article 2(1) of the ICESCR not be justiciable in Finnish courts (as the article does not expressly declare a right, but rather an undertaking by States parties to take steps to progressively achieve full realisation), while the recognition of the right of everyone to the enjoyment of just and favourable conditions of work set out in article 7(a) of the ICESCR would be? There does not appear to be a definitive answer to such issues.\(^96\)

6 PART V: ESCR IN THE CONSTITUTION AND IN THE ICESCR

In this Part I highlight the main linkages and differences between the ESCR set out in the Constitution and those included in the ICESCR. I discuss the similarity between some of the Constitution’s obligations and the obligation of progressive realisation under the ICESCR, but argue that resource limitations would not justify a failure to comply with the Constitution. I also set out the ways in which the Finnish state could limit or enact retrogressive measures in respect of ESCR. Finally, I note the differences between the catalogue of rights affirmed in the ICESCR and those in the Constitution, and make a number of observations regarding the content of the ESCR in the Constitution.

6.1 Progressive realisation

The Constitution does not include any generally applicable provision which is equivalent to article 2(1) of the ICESCR, and the majority of the ESCR in the Constitution are not subject to progressive realisation. However, the nature of the obligation that a number of the Constitution’s sections impose is similar to that of progressive realisation under the Covenant.

For example, section 18(3) of the Constitution requires the public authorities to promote employment and “work towards guaranteeing for everyone the right to work”. Accordingly, while the section imposes two

\(^{96}\) Tuori argues that the ICESCR and the European Social Charter “do not establish subjective rights for individuals” despite their incorporation into Finnish domestic law. Instead, according to Tuori, the Covenant and the European Social Charter are only relevant in domestic law as interpretative aids (Kaarlo Tuori, “Social Law” in Juha Pöyhönen, ed., An Introduction to Finnish Law (Helsinki: Kauppakaari, 2002) 467 at 484). However, Tuori does not provide any reasoning for his position and it seems somewhat illogical. What justification could there be for interpreting at least some of the ESCR in the Constitution as justiciable on the one hand, but holding on the other that the ICESCR’s rights and obligations (many of which are the same or very similar to those set out in the Constitution) are non-justiciable in their entirety?
immediate obligations on the public authorities, namely to promote employment and to work towards the realisation of the right to work for everyone, there is no immediate obligation to achieve full realisation of that right. The nature of the section 18(3) “work towards” obligation is therefore very similar to that imposed by article 2(1) of the ICESCR.

The obligation that section 19(4) establishes, which is to promote the right of everyone to housing, also bears some resemblance to the obligation of progressive realisation. Rather than requiring the achievement of a particular goal (realisation of the right to housing), it merely requires that the right be promoted. In apparent contrast to section 18(3), however, full realisation of the right to housing is not an expressly stated objective under the Constitution. Whether this difference in the formulation of the two provisions was intended to have any practical effect is unclear.

6.2 Resource limitations

There is no express reference in the Constitution to resource limitations and it seems clear enough that resource constraints would not justify a failure to comply with constitutional guarantees. This proposition can be stated with the greatest certainty in relation to rights such as the right to indispensable subsistence and care and the right to basic education. However, it would also appear to apply equally to, for example, the guarantee of equal opportunity to receive higher education in section 16(2); the rights of persons who require interpretation or translation services as a result of disability (section 17(3)); and the right to basic subsistence and adequate social, health and medical services in sections 19(2) and (3).

At one level, the judgment of the Supreme Administrative Court in the city of Helsinki case could be viewed as suggesting that resource constraints may be relevant in some circumstances. As set out above, one of the Court’s reasons for finding against the city was that the city failed to show that it could not provide the orthopaedic shoes the applicant required. The implication from this is that had the city been able to demonstrate such an inability, it could perhaps have justified its failure to provide the shoes. However, the overall conclusion of the Court strongly militates against such an implication, and would seem to constitute a simple affirmation that the Constitution requires public authorities to do whatever is necessary to meet their obligations under section 19(3).

Finally, while resource constraints could perhaps affect the extent to which public authorities promote employment or the right of everyone to housing, on its face the Constitution would not permit authorities to rely on resource limitations as a justification for a failure to do nothing to fulfil either obligation.

97 See Arajärvi, supra note 80 at 24, who states that “[t]he right to indispensable subsistence and care is last-resort minimum protection that the society must be able to guarantee in all conditions.”
6.3 Minimum core obligations

The Constitution does not expressly reflect any concept equivalent to that of minimum core obligations as developed by the CESCR under the ICESCR (although presumably such obligations, to the extent they are relevant in Finland, apply in theory through the recognition given to the ICESCR in domestic law). Instead, the Constitution seems to require full and ongoing compliance with all constitutional guarantees, which themselves can be defined as minimum guarantees.

6.4 Limitations

While some provisions stipulate that the rights they declare may be limited in certain ways or circumstances, there is no generally applicable limitations provision in the Constitution equivalent to article 4 of the ICESCR. The CLC, however, effectively applies such a provision in exercising its preview function.

If the CLC considers that a legislative proposal referred to it would limit a constitutional right, the CLC will assess whether the proposal when enacted would meet seven requirements. These are: “(a) parliamentary legislation, (b) precision and definition, (c) legitimacy, (d) proportionality, (e) non-violation of the core of a basic right, (f) due protection under the law, and (g) compliance with human rights obligations.” While these requirements are based upon the ECHR and related jurisprudence, there are differences; and the CLC’s seven requirements constitute a stricter test than that generally applicable under the ECHR.

Accordingly, limitations on the ESCR recognised in the Constitution would appear to be subject to either the same or stricter requirements as those imposed by article 4 of the ICESCR.

6.5 Retrogressive measures

The Constitution does not prohibit retrogressive measures which do not affect the minimum thresholds guaranteed in respect of each constitutional right. In the words of Tuori:

98 See, for example, s. 6(2) (prohibition of different treatment on certain grounds “without an acceptable reason”); s. 9(2) (right to leave the country, which may be limited by an Act for the specified objectives set out in the subsection); and s. 10(3) (limits on the right to privacy for the purpose of, among other matters, the investigation of crime).
100 Ibid.
101 Ibid. at 317-318.
102 Tuori, supra note 96 at 485 [emphasis in original].
“The commissions set for the public authorities in the Constitution involve *the prohibition to weaken* social rights below the level required by the provisions. However, the provisions do not as such specifically protect the systems of benefits as they are provided in the current legislation.”

The state may, therefore, amend ordinary law to reduce entitlements relating to ESCR. Provided that such reductions do not affect the level of entitlements required to comply with constitutional guarantees (i.e. the core of any ESCR), such reductions are permissible. A number of the CLC’s opinions demonstrate this point. For example, although both the cuts to the state allowance for childcare and the abolishment of supplements for children and spouses were retrogressive measures, the CLC found that they did not contravene section 19(3) of the *Constitution*. This was because, in the CLC’s opinion, they would not result in there being a constitutionally insufficient level of support for those providing for children.

It is unclear whether in those cases the CLC applied the limitations criteria set out above. If the CLC did not, this may have been because the CLC considered that the measures did not limit the protected rights in any way. In other words, because the minimum support that the *Constitution* required would continue to be available, the reductions to the benefits in question had no effect on the applicable constitutional rights.

In addition, the state could theoretically repeal or retrogressively amend a constitutionally guaranteed ESCR, or could enact a “limited derogation” to such a right, according to the process set out in section 73 of the *Constitution*. Essentially, the concept of limited derogations (which appears to be unique to Finland) allows Parliament to enact ordinary legislation which is inconsistent with the *Constitution* but nonetheless lawful provided that the procedure set out in section 73 is followed. Following the enactment

103 In, “Right to Housing in Finland”, *supra* note 13 at 251, Scheinin states that the CLC “has at least in the rapid process of restructuring that Finland has been going through in recent years been active in assessing whether limited retrogressive measures fall under what is constitutionally protected.” See for considerably more detail on this point Krause, *supra* note 42. Note however that in a 2001 publication, “Protection of ESCR in Finland”, *supra* note 51 at 282, Scheinin states “[t]he most evident shortcoming of the Committee’s work under section 19 so far is that though the Committee has implied that both Section 19.1 and Section 19.2 require a certain level of social assistance or social security benefits, the Committee has so far been unable to give any meaningful opinion of what that level might be.” [emphasis in original]. It is unclear whether this is still the case.

104 S. 73 of the *Constitution* provides that Parliament may adopt a proposed constitutional amendment, repeal, or limited derogation according to a standard procedure or an urgent procedure. Under the standard procedure, the proposal is first debated in Parliament. If there is a majority of votes in favour of the proposal following the debate, the proposal proceeds to a final vote. However, that final vote may not occur until the first parliamentary session following parliamentary elections, which occur once every four years (i.e. in the words of the *Constitution*, the proposal is left in abeyance). Parliament may then adopt the proposal in that first parliamentary session provided that the proposal is supported by at least a two-thirds majority. This standard procedure may be bypassed if a proposal is declared urgent. Such a declaration cannot occur without the support of at least five-sixths of the votes in Parliament. If this level of support is achieved, Parliament may vote immediately on the proposal rather than being required to delay the vote until the next parliamentary term. A proposal considered under urgency must also obtain a two thirds majority for it to be considered as adopted by Parliament. Following adoption by Parliament, a proposal is then sent to the President of the Republic for confirmation, as discussed earlier.

of such legislation, the Constitution is limited to the extent set out in the particular enactment (e.g. the enactment could limit the scope of a particular ESCR guaranteed by the Constitution).

However, in practice such retrogressive action may be complicated by the CLC (as well as by political considerations). While the Constitution does not expressly protect the ESCR it guarantees against repeal, and neither does it expressly delimit the range of permissible amendments, the CLC could consider that a complete repeal of a particular ESCR would be inconsistent with Finland’s international human rights obligations and therefore contrary to core constitutional principles (such as the guarantee of the rights of the individual, set out in section 1 of the Constitution, and the guarantee in section 22 regarding basic rights and liberties and human rights). The status of the ICESCR in Finnish law would also complicate such a repeal, as the Covenant’s rights and obligations would remain binding as a matter of domestic law.

The CLC may also consider that a proposal to amend the Constitution which would violate the minimum core of a particular right or otherwise render the right ineffective would be unconstitutional (on the basis set out in the preceding paragraph), and therefore the proposal could fail on that basis. The same considerations would apply to attempts to enact limited derogations; indeed, it may well be that any purported derogation which would substantially undermine a constitutionally guaranteed right or a right recognised in the ICESCR would be considered beyond the scope of the power.106

6.6 Differences between the ESCR in the Constitution and in the ICESCR

Although the ESCR in the Constitution are similar to those set out in the ICESCR, there are differences. For example, rather than providing a stand-alone guarantee of equality between men and women, as set out in article 3 of the ICESCR, the Constitution states in section 6(1) that “everyone is equal before the law”; prohibits unjustifiable discrimination in section 6(2); and then provides in section 6(3) that “equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and other terms of employment, as provided in more detail by an Act.” The obligation stated in section 6(3) would seem to fall into the category of constitutional obligations which are unlikely to be justiciable.

The right to work set out in the Constitution appears more limited than that set out in the ICESCR. The Constitution does not include any specific guarantee of the right to remuneration which ensures “a decent

106 According to some scholars, the power to enact derogations is more circumscribed under the Constitution than it was under the former regime. This is because, unlike the former regime, the Constitution now refers to a “limited derogation” instead of providing for an open-ended power to derogate. This additional restriction reflects a more recent trend against the enactment of derogations. See, for example, Scheinin, “Constitutional Law and Human Rights, supra note 5 at 56; and van den Brandhof, supra note 5 at 197 and 221.
living” for workers and their families (article 7(a)(ii) of the ICESCR). Neither does the Constitution refer to “safe and healthy working conditions”, or rest, leisure, limits to working hours, or holidays, as set out in articles 7(b) and (d) of the ICESCR. Instead, section 18(1) of the Constitution merely states that the “public authorities shall take responsibility for the protection of the labour force.”

As discussed above, the Constitution does not guarantee a right to adequate housing (as recognised in article 11 of the ICESCR), but only requires that public authorities promote that right. Neither does the Constitution guarantee a right to “the highest attainable standard of physical and mental health”, as set out in article 12 of the ICESCR; the entitlement referred to in section 19(3) is to “adequate social, health and medical services.”

While the Constitution guarantees a right to free basic education and equal opportunity to have access to other educational services, it does not provide for the progressive introduction of free higher education, as referred to in article 13(2)(c) of the ICESCR. Neither is there any guarantee in the Constitution that the “material conditions of teaching staff shall be continuously improved.”

Finally, although the Constitution does set out rights to language and culture in section 17, these seem more limited than the rights relating to culture and science referred to in article 15 of the ICESCR.

Generally speaking, therefore, the Constitution's ESCR seem to be both narrower than those set out in the ICESCR and more immediate (as the majority of the ESCR in the Constitution are not subject to progressive realisation or, apparently, resource limitations).

6.6.1 Practical effect of differences?

As discussed in Part II above, the ICESCR is incorporated into the domestic legal system and has a special status in that system due to section 22 of the Constitution. Therefore, all of the obligations in the ICESCR bind the Finnish state not only internationally but also in domestic law. To the extent that the ICESCR provides rights over and above those in the Constitution, arguably those rights should be enforceable in domestic law in the same way as constitutional rights are enforceable.

If this is correct, it seems to be a strange result. For example, despite what appears to have been a specific decision not to provide a constitutional right to adequate housing, such a right exists at a quasi-constitutional level through the ICESCR. The same applies to the other rights referred to above.

Therefore, section 22 of the Constitution would seem to reduce substantially the effect of what appears to have been a deliberate choice to recognise different and in some ways more limited ESCR in domestic

\[107\] Art. 13(2)(e) of the ICESCR.
law than those recognised in the Covenant (unless any additional entitlements set out in the *ICESCR* are considered to be inconsistent with the *Constitution* and therefore inapplicable).

However, whether the Covenant’s ESCR are enforced or relied upon in domestic law in practice is uncertain. The scarce references to the Covenant in Finnish jurisprudence would indicate that as a general rule they are not, and that the differences that do exist between the ESCR in the Covenant and the *Constitution* have not been exploited to any significant extent.

### 6.7 The content of the Constitution’s ESCR

Similar to the *ICESCR*, the *Constitution* does not define in detail the content of the ESCR included in it. For example, it is not clear what constitutes “basic education” as guaranteed in section 16(1), or what entitlements must be provided in order to comply with the right in section 19(1) to “indispensable subsistence and care”. However, as far as I am aware, this lack of detail in the *Constitution* itself has not caused any real difficulty. The way in which ESCR are drafted in the *Constitution* is also consistent with the manner in which CPR are drafted.

In addition, the *Constitution* contemplates that ordinary legislation will detail the specific entitlements required to realise certain rights (both ESCR and CPR) or further define particular rights. For example, section 19(3) establishes that public authorities must guarantee adequate social, health and medical services “as provided in more detail by an Act”. On its face, this could suggest that whatever entitlements Parliament sets in ordinary legislation for the purposes of section 19(3) (and other rights similarly formulated) must be deemed to meet the constitutional guarantee.

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108 Relevant opinions of the CLC and judgments of the courts clearly assist in delimiting the scope of constitutionally guaranteed ESCR (and CPR), as may reports by institutions such as the Parliamentary Ombudsman. All may draw on Finnish academic doctrine and international materials (such as the CESCR’s General Comments). In addition, guidance as to the content of certain ESCR may be provided by the *travaux préparatoires* that preceded such rights. For example, Arajärvi (*supra* note 80 at 24) states that the bill submitted to Parliament as part of the process of enacting the fundamental rights reform in 1995 (discussed in Part VI below) defined indispensable subsistence and care as equating to “a level of income and services that guarantees the opportunities for living with dignity. This includes for instance arrangements of nutrition and housing necessary for the preservation of health and the ability to live.”

109 For example, s. 7(2) of the *Constitution* states that “no-one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity”, without defining what constitutes torture or what “human dignity” means.

110 Ordinary legislation may also provide for entitlements above and beyond the constitutionally guaranteed minimum. As a result, Tuori argues (*supra* note 96 at 483) that “social rights” in Finnish law can be divided into the following three categories: “The *social human rights* defined by international human rights agreements [and which form part of Finnish law following incorporation into the domestic legal system], the *social basic rights* affirmed in the national Constitution and the *social rights guaranteed in ordinary legislation.*” [emphases in original].
Such an interpretation of the Constitution would, however, be incorrect. The CLC clearly considers that it may differ from Parliament’s estimation of what is required to fulfil a particular right. Section 106 would also seem to provide the courts with jurisdiction to differ. Indeed, if Parliament enjoyed an absolute discretion to set and modify through ordinary legislation the level of entitlements required to comply with the ESCR included in the Constitution, the status of ESCR as constitutional rights would be considerably undermined.

Therefore, the better interpretation is that the Constitution establishes a series of minimum levels to which legislation must conform, while the exact determination of what those levels are may be open to debate and also to evolution over time (e.g. the content of the right to basic subsistence). This interpretation appears to be that adopted by Scheinin in a discussion of the effect of section 19(2). In Scheinin’s opinion, section 19(2) is relevant in administrative and judicial decision-making “when dealing with a person who is covered by the list of social risk situations in the constitutional provision but does not appear to meet the specific conditions set forth in ordinary laws for any of the existing forms of social security. With reference to the constitutional clause it is possible to interpret social security legislation so that the person is entitled to basic subsistence through the social security scheme under which he or she has submitted an application.”

7 PART VI: THE REASONS FOR THE CONSTITUTIONAL STATUS OF ESCR IN FINLAND

The Constitution entered into force on 1 March 2000. The main reason for enacting the Constitution appears to have been a perceived need to consolidate the four Acts which had been the main sources of Finland’s constitutional law. Amongst other issues, a series of amendments during the 1990s were considered to have undermined the Acts’ overall coherence. The constitutional reform also sought to limit the powers of the president.

111 See, for example, the summary of the CLC’s opinion on proposed amendments to the “Sickness Insurance Act” in the main text above.
112 Scheinin, “Constitutionalism and Rights in the Nordic Countries”, supra note 31 at 143.
113 These acts were the Constitution Act 1919, supra note 25; the Parliament Act (13 January 1928); the Act on the High Court of Impeachment (25 November 1922); and the Act on the Right of Parliament to Inspect the Lawfulness of the Official Acts of the Members of the Council of State, the Chancellor of Justice and the Parliamentary Ombudsman (25 November 1922).
114 See Hautamäki, supra note 24 at 134, who states: “In Finland the constitutional reform carried out at the turn of the millennium was seen as necessary for modernizing and updating the constitutional system. There was [a] need to codify constitutional laws and to create uniform and modern normative structures, and moreover to revise the current arrangements for the separation of powers.” See also van den Brandhof, supra note 5 at 194, who explains that prior to the enactment of the Constitution, “a growing need was felt to restrain the powers of the president who […] had autonomous power to decide foreign policy matters.”
The inclusion of ESCR in the Constitution was not a highly debated issue. This was because the decision to grant constitutional status to a relatively wide and modern range of ESCR had been made in 1995, as a result of a substantial reform of the fundamental rights provisions in one of the four former constitutional acts, the Constitution Act 1919. These reformed provisions were then included in the Constitution largely unaltered. Accordingly, the reasons for according ESCR the status they have in the Constitution must be traced back to the fundamental rights reform.

7.1 The fundamental rights reform

One of the principal motivations for the fundamental rights reform was Finland’s international human rights obligations. However, the reform may also be considered as part of Finland’s redefinition of itself in the course of its move towards Western Europe and away from Russia during the early 1990s.

Prior to the 1990s, the Soviet Union exercised an influence over domestic and foreign affairs in Finland, including on the way in which Finland participated in the international human rights regime. During the Cold War, the status of human rights discourse in Finland was controversial, as groups that sympathised with the Soviet Union considered it to be “anti-Soviet propaganda perpetrated by the US”, and opposed it on that basis.

However, revolutions in the Soviet Union satellite states between 1989 and 1991, the disintegration of the Soviet Union in 1991 and the end of the Cold War “brought about important changes in both foreign and domestic politics in Finland.” According to van den Brandhof:

\[\text{\textsuperscript{115}}\] Van den Brandhof, supra note 5 at 221.

\[\text{\textsuperscript{116}}\] See, for example, Finland’s fourth periodic report under the ICCPR (Human Rights Committee, Fourth periodic reports of States parties due in 1994: FINLAND, CCPR/C/95/Add.6 (1995)) which states at para. 17 that: “The amendment of the fundamental rights provisions of the Constitution Act is closely connected with the international human rights treaties binding on Finland. Its purpose is to bring the substance of the Finnish regime of fundamental rights closer to the international human rights obligations. Therefore, it is proposed in a number of instances that fundamental rights be extended to all persons within Finland’s jurisdiction and aimed more accurately in the direction pointed by the human rights treaties.” See also para. 4 which states: “The protection of fundamental rights is developed by extending and specifying the rights to liberty guaranteed by the Constitution in accordance with the path laid down in international agreements on human rights, and by including in the Constitution provisions concerning the principal economic, social, cultural and environmental rights including the guarantee of legal protection with regard to administration and the exercise of law.” I note further that Scheinin states in a 1991 article that while the “question of fundamental social rights remains a controversial issue in the Finnish constitutional debate”, such rights were important for “safeguarding the Nordic welfare state.” Scheinin, “European Integration”, supra note 28 at 57.

\[\text{\textsuperscript{117}}\] Miia Halme, “From the Periphery to the Centre: Emergence of the Human Rights Phenomenon in Finland” (2007) 18 Finnish Yearbook of International Law 257 at 273. See also van den Brandhof, supra note 5 at 191, who states that between 1946 and 1990, “there were a fairly large number of cases in which the Soviet Union interfered both in domestic and foreign affairs of Finland, initially on its own initiative, later usually after being consulted by the Finnish government.”

\[\text{\textsuperscript{118}}\] Halme, supra note 117 at 273.

\[\text{\textsuperscript{119}}\] Van den Brandhof, supra note 5 at 192.
“The country was compelled to find a new economic orientation, because exports to the Soviet Union, later Russia, decreased sharply over a short period with the result that many businesses had to scale down or close altogether. The Finnish government believed that the country should orientate more strongly towards Western Europe. [...]”

The entirely new situation that arose after 1990 made it possible for Finland to join the process of economic and political integration in Europe. In March 1992, following the Swedish Government which had lodged an application for accession to the European Union in 1991, the Government of Finland decided that it would likewise apply for membership of the EU. In both countries the application not only had an economic background but to a certain extent also a background of security politics. [...] On 1 January 1995 Finland then became a member of the European Union.

In this way, Finland has adopted a more independent position in relation to Russia.”

The process of Finland’s integration into the European Union included accession to the Council of Europe on 5 May 1989, ratification of the ECHR on 10 May 1990, and ratification of the European Social Charter on 29 April 1991.121

By 1990, Finland had been a State party to the ICCPR and the ICESCR for fifteen years, and was committed to the international human rights regime.122 However, while this commitment and Finland’s obligations under the Covenants played a role in the fundamental rights reform, membership of the Council of Europe and ratification of ECHR and the European Social Charter were the reform’s principal catalysts.123

7.1.1 The mechanics of the fundamental rights reform

In 1989, the Finnish government established a Fundamental Rights Commission to investigate the extent to which “international developments in the field of human rights necessitated a revision of Finland’s constitutional legislation”124 and to revise the fundamental rights provisions of the Constitution Act

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120 Ibid.
121 Finland also ratified the Revised European Social Charter on 21 June 2002.
122 Finland ratified the ICESCR and the ICCPR on 19 August 1975. Halme states that “[b]y the 1980s Finland had established itself as an integral participant in the international human rights regime, with a well-established record of membership in UN human rights treaty bodies as well as the Commission on Human Rights. Finland received favourable evaluation in its commitment to the human rights phenomenon, and in one evaluation from 1983 it was given the highest rating—together with only Denmark and New Zealand—in an effort at a worldwide comparison of civil and political rights.” Halme, supra note 117 at 273.
123 See for example Veli-Pekka Viljanen, supra note 28 at 54-55, who states that: “The overhaul of the Finnish fundamental rights system has been a topical issue ever since the early 1970s. The need for reform became more pressing as Finland joined the Council of Europe in 1989 and ratified the European Convention on Human Rights in the spring of 1990. This trend was further nourished by the growing interest in human rights issues towards the end of the 1980s.”
124 Van den Brandhof, supra note 5 at 194.
Amongst other matters, the instructions to the Commission were that international human rights treaties should be “a source of substantial inspiration in formulating the new constitutional provisions;” and that the Commission should “consider methods to strengthen the status of human rights treaties binding on Finland, within the Finnish legal order.” The government also instructed the Commission to include “provisions for the most important economic, social and cultural rights”, while taking into account “the chances of actually carrying these rights into effect.”

Prior to 1995, the Constitution Act 1919 guaranteed not only certain civil and political rights but also a right to work, a right to education, and the right to the necessary facilities to enable the speaking of both Finnish and Swedish. The fundamental rights reform extended the catalogue of constitutionally guaranteed CPR and ESCR, as well as modifying the formulation of some of those rights.

According to Scheinin, “the inclusion and formulation of social, economic and cultural rights into new Chapter II of the Constitution Act was the most debated issue in the reform. This discussion was, to a large degree, related to the feasibility of securing social benefits and services as so-called subjective (individual) rights and of giving constitutional status to such rights.” One of the reasons why the inclusion of additional constitutional guarantees of ESCR was controversial was no doubt the serious economic recession facing Finland at the time. In 1989 the Finnish economy slumped, and by the first half of the 1990s, 20% of the working population was unemployed. It was only in 1996 that the economy began to recover, and unemployment began to reduce gradually.

Despite the recession, the amended fundamental rights provisions of the Constitution Act 1919 (including the new provisions relating to ESCR) entered into force on 17 July 1995.

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125 Scheinin, “Human Rights in Finland”, supra note 56 at 275.
126 Scheinin, “European Integration”, supra note 28 at 46 [emphasis in original].
127 Ibid. at 47-48 [emphasis in original]. See also the “2004 Government Report”, supra note 4 at 18, which states that the reform “better harmonised” constitutional provisions on fundamental rights with the human rights guaranteed by international conventions.
128 Veli-Pekka Viljanen, supra note 28 at 57.
129 For a complete list of the CPR that the Constitution Act 1919 (supra note 25) guaranteed prior to the fundamental rights reform, see van den Brandhof, supra note 5 at 222.
130 Van den Brandhof, supra note 5 at 222.
132 Van den Brandhof, supra note 5 at 192.
133 Ibid.
7.2 Reasons for the constitutional status of ESCR: a summary

Finland’s relocation of itself within Europe and as part of the European regional human rights system led to Finland re-evaluating its domestic legal structures in light of not only its European obligations but also its other international human rights obligations. While prior to the fundamental rights reform Finnish law provided a certain level of protection for ESCR, particularly in ordinary legislation, this was clearly seen as insufficient.134

The fundamental rights reform and the subsequent incorporation of the updated catalogue of rights in the Constitution reflect a strong commitment by Finland to take its human rights obligations seriously and to achieve a greater level of consistency between the obligations of the Finnish state in international law and in domestic law. In relation to ESCR specifically, they also reflect Finland’s subscription to the theory that CPR and ESCR are indivisible and interdependent. However, what appears to be the non-justiciable nature of some constitutionally guaranteed ESCR would support an argument that Finland has not yet implemented that theory in full.

There is little to indicate that the enactment of an enhanced constitutional status for ESCR was intended to be transformative in relation to the level of enjoyment of ESCR within Finland (in contrast to, for example, the aspirations that led to the inclusion of ESCR as fundamental rights in the Brazilian Constitution). Instead, the aim appears to have been to safeguard and to improve a system that was already working relatively well.135

Finally, as I discuss further in the next Part, since the fundamental rights reform and the enactment of the Constitution, the Finnish government has apparently increased its focus on human rights and has defined the promotion of ESCR as one of its priorities. Human rights discourse is now integral not only to Finland’s domestic policy, but also to the way in which Finland conducts its international relations.136

134 As Scheinin states, “[i]n Finland and in the other Nordic countries many social benefits and services have been defined, in ordinary Acts of Parliament, as genuine individual rights the enjoyment of which does not depend on the discretion of administrative authorities and that are secured through access to an independent court as an appeal instance.” Scheinin, “Human Rights and the Welfare State”, supra note 131 at 33.
135 As Scheinin states in “Right to Housing in Finland”, supra note 13 at 240: “In general, the Nordic countries are known for their positive human rights record, which extends not only to traditional civil and political rights but also to economic, social and cultural rights.”
136 Halme, supra note 117 at 264.
8 PART VII: HUMAN RIGHTS AND FINNISH GOVERNMENT POLICY

In this Part, I refer to two government publications, the “2004 Government Report” and the “2009 Government Report”,\(^\text{137}\) to highlight aspects of former and current Finnish government policy in respect of human rights in general and ESCR in particular. Both documents emphasise Finland’s commitment to ESCR and refer to the steps that Finland is taking to advance ESCR at home and abroad. I also note some of the problems that exist in Finland with respect to ESCR, and the way in which the Finnish government appears to approach such problems.

8.1 2004 Government Report

The 2004 Government Report states that human rights are one of the Finnish government’s priorities in foreign policy.\(^\text{138}\) The Report stresses the need for the government’s human rights policy to be based on the same principles at the national and international levels,\(^\text{139}\) arguing that “[t]he modern list of fundamental rights in the Constitution of Finland, including a wide range of economic, social and cultural rights, increase the international credibility of Finland as a promoter of these rights.”\(^\text{140}\) An express aim of the government is stated to be “the effective national implementation of the provisions of all the human rights conventions binding on Finland.”\(^\text{141}\)

In addition, the 2004 Government Report states that one of the government’s aims is to strengthen the monitoring of human rights, and to “enhance an open attitude” towards human rights monitoring within the European Union and internationally.\(^\text{142}\) Finland seeks a “constructive dialogue”\(^\text{143}\) with bodies such as the CESCR, with the aim of “ensuring high-standard implementation of international human rights obligations in Finland.”\(^\text{144}\)

An example of Finland’s approach is set out in its fifth periodic report under the ICESCR. At paragraphs 157 and 158 of the report, the steps the state took to disseminate the CESCR’s concluding observations on Finland’s fourth periodic report under the ICESCR are stated as follows:

\(^{137}\) Respectively, supra notes 4 and 23.
\(^{139}\) Ibid.
\(^{140}\) Ibid. at 8.
\(^{141}\) Ibid. at 204.
\(^{142}\) Ibid. at 134.
\(^{143}\) Ibid. at 15.
\(^{144}\) “Fifth Periodic Report”, supra note 64 at 51.
“Immediately after the hearing by the Committee, the Ministry for Foreign Affairs held a press conference where the experts heard in Geneva told of the most important issues taken up in the hearing. The purpose of the press conference was to give the hearing publicity through the media, with a view to making citizens aware of it.

Three weeks after the adoption of the concluding observations of the Committee, the Ministry for Foreign Affairs communicated them in English and Finnish to all the ministries, requesting them to prepare a preliminary assessment in their sectors of administration within three months, and to give an opinion on what kind of measures should be taken in order to implement the recommendations given by the Committee. At the same time, the concluding observations were communicated, among others, to Parliament, the Parliamentary Ombudsman, the Chancellor of Justice, the Supreme Court and the Supreme Administrative Court, as well as to the trade unions and to a large number of non-governmental organisations.”

The 2004 Government Report devotes considerable attention to ESCR. It states that the indivisibility of CPR and ESCR is one of the main principles upon which the government’s human rights policy is based;146 and that CPR and ESCR are “equal, indivisible and interdependent”147 (although as discussed above, the constitutional recognition given to ESCR is not entirely consistent with these sentiments). The Report further states that a particular objective of the government is to enhance respect for ESCR by various methods,148 including strengthening the status of the ICESCR by seeking to increase the number of States parties to it (e.g. by raising the possibility of ratification or accession to the ICESCR with states that receive Finnish aid);149 and by providing financial resources for an expert to assist the CESCR.150

In addition, the 2004 Government Report argues that a perceived lack of certainty regarding the nature of ESCR under the ICESCR may be addressed by strengthening the role of the CESCR under the Covenant and providing it with jurisdiction to consider individual communications. The Report proposes that such a step would allow the CESCR to interpret the Covenant rights in the same way as the Human Rights Committee has done in the context of the individual communication procedure under the first Optional Protocol to the ICCPR.151 Accordingly, the 2004 Government Report sets out Finland’s commitment to establishing an individual communications procedure under the ICESCR.

146 Ibid. at 13. The other main principles are universality, non-discrimination, and transparency.
147 Ibid. at 197.
148 Ibid. at 16.
149 Ibid. at 200.
150 Ibid. at 201.
151 Ibid. at 200.
Ultimately, Finland along with other states reached an important milestone in achieving this objective: as noted in Chapter I, the United Nations General Assembly adopted the Optional Protocol to the *ICESCR* on 10 December 2008. On 24 September 2009, Finland signed the Optional Protocol.

### 8.2 2009 Government Report

The 2009 Government Report reiterates many of the statements made in the 2004 Government Report. In particular, it reaffirms the principles of universality, indivisibility, and interdependence as the foundations of Finland’s human rights policy.\(^{152}\)

In relation to ESCR, the 2009 Government Report states that one of the government’s aims is to “ensure the widest possible accession to the Optional Protocol [to the *ICESCR*]”\(^{153}\), and characterises the General Assembly’s adoption of the Optional Protocol in 2008 as “a major step forward.”\(^{154}\) In the 2009 Government Report, the government also commits to “work to reinforce the obligatory nature and the political importance of the [sic] economic, social and cultural rights so that they also in practice have equal status with civil and political rights.”\(^{155}\) The Report argues that:\(^{156}\)

> “There are differences between the implementation of economic, social and cultural rights and civil and political rights in terms of the funding required, the phasing of their realisation and the active promotion required by public authorities. Ultimately, however, the difference is not crucial: the monitoring and improvement of civil and political rights also require adequate funding and the active involvement of the authorities. The increasing complexity of social structures and global economic integration are likely to increase the interdependence of economic, social and cultural and civil and political rights.”

### 8.3 Problems relating to ESCR in Finland

In the 2004 Government Report, the Finnish government recognises that there are problems relating to the protection of human rights in Finland.\(^{157}\) Amongst other matters, the Report sets out concerns the CESCR has expressed about unequal access to social welfare and health care services in Finland, and the employment security of certain groups of workers.\(^{158}\)

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The 2009 Government Report also refers to a series of issues in relation to ESCR in Finland. These include the high proportion of fixed-term employment contracts in the national labour market;\(^{159}\) the low number of people with disabilities in Finland who are employed;\(^{160}\) differences between sectors of the population in the enjoyment of the right to health;\(^{161}\) long waiting lists;\(^{162}\) the failure to realise the right of all Finnish residents to adequate housing;\(^{163}\) and the unequal realisation of ESCR in respect of Roma, and the discrimination Roma face generally.\(^{164}\) The Report also details the measures that the government has taken to address these and other issues relating to ESCR.

The Reports demonstrate that there are continuing issues with regard to the enjoyment of ESCR in Finland. However, the government clearly recognises that such issues exist, and its apparent intention is to address those issues in a principled and transparent manner. Importantly, the government’s approach characterises such issues as human rights issues (rather than merely political issues), and therefore as requiring attention on that basis.

9 CONCLUSION

Although Finland ratified the ICESCR in 1975 and the Covenant has been part of domestic law since that date, the relevance of ESCR to law and policy seems to have been relatively limited until the 1995 fundamental rights reform. The granting of a constitutional status to a relatively broad range of ESCR has increased their visibility in Finland, and has led to a much greater integration of these rights into the functions of government and the law.\(^{165}\) It also seems to have contributed to and provided impetus for Finland’s promotion of ESCR internationally.

Significantly, the jurisdiction of the CLC, the courts and the Ombudsman with regard to ESCR appears to have provided an additional and important level of protection, while still affording a large margin of discretion to the legislature.\(^{166}\)

\(^{159}\)“2009 Government Report”, supra note 23 at 123.

\(^{160}\)Ibid. at 125.

\(^{161}\)Ibid. at 125.

\(^{162}\)Ibid. at 135.

\(^{163}\)Ibid. at 135.

\(^{164}\)Ibid. at 139.

\(^{165}\)Ibid. at 171.

\(^{166}\)In this regard, see also Scheinin, “Protection of ESCR in Finland”, supra note 51 at 280, who states “it may now already be concluded that within the judicial and non-judicial spheres, the attention given to economic and social rights is much greater than before the [1995 fundamental rights] reform.”

\(^{166}\)See also Scheinin, who evaluates the position now under the Constitution as follows (ibid. at 281): “The exclusion of a category of persons from the scope of a benefit, service or right is always problematic and requires careful examination and good grounds in order to be acceptable under the Constitution.”
Overall, Finland’s approach to ESCR domestically and internationally evidences a significant commitment to realising and promoting ESCR in accordance with its national and international obligations, while at the same time retaining much of Finland’s traditional emphasis on parliamentary supremacy. The Finnish model strikes an innovative balance between strong rights and majority rule by elected representatives, and demonstrates how a system which had already achieved considerable success in providing for the interests upon which ESCR are based may be reinforced.
Chapter 5
ESCR in South Africa

1 INTRODUCTION

In Part I of this chapter, I describe the ways in which South Africa’s Constitution recognises ESCR and the mechanisms it provides for the protection of those rights. In Part II, I summarise the principal judgments of South Africa’s Constitutional Court [CC] relating to the Constitution’s ESCR to illustrate some of the issues that have been litigated under those provisions and way in which the CC has interpreted them. In Part III, I discuss the differences and similarities between the ESCR in the Constitution and in the ICESCR. In doing so, I refer to and critique aspects of the CC’s jurisprudence. In Part IV, I expand my critique of that jurisprudence and comment on positions that other scholars have taken in respect of it. In Part V, I briefly explain why ESCR were included in the Constitution.

2 PART I: CONSTITUTIONAL RECOGNITION AND PROTECTION OF ESCR

2.1 Preamble

The Constitution’s preamble recalls the period of apartheid and sets out the objectives of the Constitution. In it, South Africans “recognise the injustices of our past”, and adopt the Constitution to, amongst other aims, “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”; and “[i]mprove the quality of life of all citizens and free the potential of each person.”

2.2 Chapter I: Constitutional values and supremacy

Section 1 states the values upon which South Africa is founded under the Constitution. These values include “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”; 2 and “[s]upremacy of the Constitution and the rule of law.” 3

Section 2 provides that the Constitution is supreme law, and states that “law or conduct inconsistent with [the Constitution] is invalid, and the obligations imposed by it must be fulfilled.”

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2 S. 1(a) of the Constitution.
3 S. 1(c) of the Constitution.
2.3 Chapter II: the Bill of Rights

2.3.1 Dignity, general obligations and application

Chapter 2 declares South Africa’s Bill of Rights. Under section 7(1), “human dignity, equality and freedom” are affirmed. Section 10 reinforces this guarantee, stating “[e]veryone has inherent dignity and the right to have their dignity respected and protected.” Section 7(2) expressly obliges the state to respect, protect, promote and fulfil the declared rights.

Section 8(1) declares that the Bill binds all state institutions including the judiciary. Section 8(2) provides for the Bill’s horizontal application, stating that its provisions bind both natural and legal persons “if, and to the extent that, [they are] applicable, taking into account the nature of the right and the nature of any duty imposed by the right.” In addition, section 8(4) states that a legal person is entitled to the rights in the Bill to the extent that such rights are applicable to that person.

2.3.2 CPR

The Bill of Rights affirms a wide range of CPR. These include the right to life;\(^4\) a right to freedom and security;\(^5\) a right to freedom of expression;\(^6\) a series of “political rights” (such as the right to take part in political activities, to vote and stand for public office);\(^7\) the right to have access to independent and impartial tribunals for dispute resolution;\(^8\) and rights pertaining to arrested, detained and accused persons (such as the right to remain silent following arrest).\(^9\)

2.3.3 ESCR

The Bill of Rights also entrenches a series of ESCR (some of which could also be classified as CPR or which apply equally to the CPR included in the Bill).

Section 9(1) provides for the equality of all before the law, while section 9(2) defines equality as including “the full and equal enjoyment of all rights and freedoms.” Unfair discrimination is prohibited on a non-exhaustive list of grounds. The grounds expressly referred to are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.\(^{10}\)

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\(^4\) S. 11 of the Constitution.
\(^5\) S. 12 of the Constitution.
\(^6\) S. 16 of the Constitution.
\(^7\) S. 19 of the Constitution.
\(^8\) S. 34 of the Constitution.
\(^9\) S. 35 of the Constitution.
\(^{10}\) Ss. 9(3) and 9(4) of the Constitution. National origin is a notable exception from this list.
Section 13 prohibits forced labour. Section 22 declares that every “citizen” has the right “to choose their trade, occupation or profession freely.” Section 23(1) provides that “everyone has the right to fair labour practices;” and section 23(2) lists a series of labour rights, such as the right to form and join a trade union, and to strike. Section 18 recognises a general right to freedom of association.

Section 26 concerns the right to housing. Section 26(1) proclaims that everyone has the right “to have access to adequate housing;” while section 26(2) provides that the state must “take reasonable legislative and other measures” to realise this right progressively within its available resources. Section 27 is similarly formulated. Section 27(1) declares the right of everyone to have access to health care services, sufficient food and water, and social security. In accordance with section 27(2) these rights are to be progressively realised by the state, once again subject to resource availability. Section 27(3) states that no one may be denied emergency medical treatment.

The Bill accords children a special status. Section 28 lists a series of rights exclusively applicable to them. These include rights to “basic nutrition, shelter, basic health care services and social services.”

The right of everyone to education is set out in section 29. Section 29 includes an unqualified right to basic education, and a right to further education which the state must make progressively available “through reasonable measures”. The Bill also establishes wide-ranging rights to language and culture.

Section 24 declares the right of everyone to an environment that is not harmful to their health or well-being and the right to have the environment protected. Section 25 sets out a right to property and the circumstances in which property may be expropriated (including a requirement that compensation be paid for any expropriation).

2.4 Limitations

Section 7(3) of the Constitution provides that the guaranteed rights are subject to the limitations set out in section 36 (the general limitations provision) or as otherwise stated in the Bill of Rights (e.g. section 25 provides that no one may be deprived of property “except in terms of law of general application”).

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11 S. 28(1)(c) of the Constitution.
12 See ss. 30 (Language and Culture); 31 (Cultural, religious and linguistic communities) and 6 (setting out the official languages of South Africa (Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu); stating obligations in respect of those languages; and establishing a Pan South African Language Board with the following functions: (a) the promotion and creation of conditions for the development and use of all official languages, the Khoi, Nama and San languages, and sign language; and (2) the promotion and guarantee of respect for all languages that South African communities use, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telugu, and Urdu; and languages used for religious purposes in South Africa, including Arabic, Hebrew and Sanskrit).
Section 36 states that the enumerated rights may be limited only by law and only to the extent that “the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” In deciding whether a limitation meets these conditions, all relevant factors must be taken into account including the nature of the right; the importance of the limitation’s purpose; the limitation’s nature and extent; the relationship between the limitation and its purpose; and “less” (as opposed to least) restrictive means to achieve the purpose.

2.5 Interpretation of the Bill of Rights

The Constitution imposes a series of obligations concerning the Bill’s interpretation. Section 39(1)(a) stipulates that in construing the guaranteed rights, a court, tribunal, or forum must “promote the values that underlie an open and democratic society based on human dignity, equality and freedom.” In interpreting ordinary legislation and in developing common or customary law, these bodies must promote the Bill’s “spirit, purport and objects”. Interpreters of the Bill must also consider international law and may consider foreign law.

2.6 Standing and remedies

The Constitution has an expansive approach to standing. The following persons may bring proceedings alleging that a constitutional right has been breached or that such a breach is threatened: “anyone acting in their own interest [which presumably includes a person represented by counsel]; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.”

In addition, members of the National Assembly (which together with the National Council of Provinces makes up Parliament) may apply to the CC for a declaration that all or part of an Act of Parliament is unconstitutional. Also, as discussed below, the President may refer bills to the CC.

The Constitution is similarly expansive in relation to remedies. Section 38 provides that where a court finds that a constitutional right has been infringed or threatened, the court “may grant appropriate relief,

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13 S. 39(2) of the Constitution. Note also that s. 39(3) provides: “The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”
14 Ss. 39(1)(b) and (c) of the Constitution.
15 S. 38 of the Constitution.
16 S. 42 of the Constitution.
17 S. 80(1) of the Constitution. S. 80(2) stipulates that an application under s. 80(1) must be supported by at least one third of the National Assembly’s members, and be made within 30 days of the Act in question receiving presidential assent.
including a declaration of rights.” Section 172(1)(a) and (b) state that a court adjudicating on a constitutional matter must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency; and “may make any order that is just and equitable”. Such orders may include an order “limiting the retrospective effect of the declaration of invalidity”\(^\text{18}\); or “suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”\(^\text{19}\) If a court declares that a law or any conduct is unconstitutional it may also grant temporary relief to a party to the proceedings.\(^\text{20}\)

### 2.7 Constitutional amendments and Presidential assent

Section 74 sets out the requirements for constitutional amendments. Section 74(1) provides that a bill may amend section 1 (which declares the fundamental values of the Constitution) or section 74(1) itself if the bill is passed with at least a seventy-five percent majority in the National Assembly and with the support of at least six provinces of the National Council of Provinces. The Bill of Rights may be amended by a bill passed with the support of least two-thirds of the National Assembly and with the support of at least six provinces of the National Council.\(^\text{21}\)

However, before any proposed constitutional amendment which has been passed in accordance with section 74 enters into force, the President must assent to it.\(^\text{22}\) Section 79 provides that if the President has reservations about the constitutionality of a bill passed by Parliament (whether a constitutional amendment or otherwise), he or she may refer it back to the National Assembly (and where applicable, the National Council) for reconsideration. If following such reconsideration the bill is returned to the President for assent, the President may either assent to the bill or refer it to the CC for a determination on the bill’s constitutionality. If the CC rules that a bill is constitutional, the President must assent to the bill and sign it. The effect of presidential assent is that the bill becomes an Act of Parliament. The Act enters into force on the date it is published or on the date provided for in the Act.\(^\text{23}\)

### 2.8 The Constitutional Court

The CC is the highest court in all matters relating to the Constitution.\(^\text{24}\) While inferior courts may declare that, amongst other matters, an Act of Parliament is unconstitutional, any such declaration has no effect

\(^{18}\) S. 172(b)(i) of the Constitution.

\(^{19}\) S. 172(b)(ii) of the Constitution.

\(^{20}\) S. 172(2)(b) of the Constitution.

\(^{21}\) S. 74(2) of the Constitution. The requirements for constitutional amendments which do not affect the Bill of Rights, section 1, or section 74(1) of the Constitution are set out in s. 74(3).

\(^{22}\) S. 74(9) of the Constitution.

\(^{23}\) S. 81 of the Constitution.

\(^{24}\) S. 167(3) of the Constitution.
until the CC confirms it. The CC also has exclusive jurisdiction to determine the constitutionality of any proposed constitutional amendment.

2.9 State institutions supporting constitutional democracy

Section 181 of the Constitution lists six institutions which are responsible for the strengthening of constitutional democracy in South Africa. They are the Public Protector; the South African Human Rights Commission [SAHRC]; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities [CRLC]; the Commission for Gender Equality [CGE]; the Auditor-General; and the Electoral Commission. All of these institutions are required to report to the National Assembly at least once a year.

The institutions that seem most directly relevant to the promotion and protection of ESCR are the SAHRC, the CRLC and the CGE. The SAHRC’s functions include the promotion of respect for human rights, as well as their protection, attainment and development. The SAHRC must “monitor and assess the observance of human rights in South Africa;” and require state organs to inform it on an annual basis about the measures they have taken to progressively realise the constitutional rights to housing, healthcare, food, water, social security, education and the environment. The SAHRC also has broad powers, including a power “to take steps to secure appropriate redress where human rights have been violated.”

The purpose of the CRLC is to promote respect for the rights of cultural, religious and linguistic communities. It may report any matter that falls within its mandate to the SAHRC. The CGE’s functions include the promotion of respect for gender equality and the attainment of that equality.

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25 S. 167(5) of the Constitution.
26 S. 167(4)(d) of the Constitution.
27 The Public Protector’s duties appear akin to those of an Ombudsman. Ss. 182(1)(a) to (c) of the Constitution provide that, amongst other powers, the Public Protector may investigate any conduct within the state that is alleged to be improper, report on that conduct and “take appropriate remedial action.” S. 182 provides that the Public Protector “must be accessible to all persons and communities.” The extent of the Public Protector’s role specifically in relation to ESCR is unclear. The functions of the Auditor-General and the Electoral Commission are set out in ss. 188 and 190.
28 Ss. 184(1)(a) to (c) of the Constitution.
29 Ss. 184(3) of the Constitution. It is unclear, however, what steps the SAHRC has taken in pursuance of these duties. For example, there are no reports available on the SAHRC’s website (online: South African Human Rights Commission <http://www.sahrc.org.za>).
31 Ss. 185(1) and (3) of the Constitution.
32 Ss. 187(1) and (3) of the Constitution.
2.10 The relevance of the ICESCR to the domestic legal order

Chapter 14 of the Constitution establishes a series of rules relating to international agreements, including when such agreements become binding in domestic law. However, despite the significant commitments South Africa has made in the Constitution in relation to ESCR, and while it signed the ICESCR on 3 October 1994, it has yet to ratify the Covenant. The reasons for this are not clear.

However, the ICESCR is still relevant to South African domestic law as an interpretative tool, and the CC has referred to the Covenant and the CESCR’s General Comments in interpreting the Constitution. As set out above, section 39(1)(b) of the Constitution requires courts interpreting the Bill of Rights to consider international law. In addition, section 233 provides that in interpreting any legislation, courts must prefer any reasonable interpretation of that legislation that is consistent with international law over any other inconsistent interpretation. The reference to international law in both sections is not limited to international law binding on South Africa.

3 PART II: THE CC’S JURISPRUDENCE ON ESCR

In this part, I summarise what appear to be the CC’s leading judgments on ESCR to date.

3.1.1 Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996

In this judgment [the Certification judgment], the CC had to decide whether a text submitted to it by South Africa’s Constitutional Assembly (a body established under the Interim Constitution enacted as part of the transition from apartheid to democracy, and whose responsibility it was to draft a new

33 See in particular s. 231(4) of the Constitution, which states: “Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”


constitution for the country) complied with a comprehensive set of “Constitutional Principles” [CPs] set out in the Interim Constitution. The Interim Constitution gave the CC this function.

One of the CPs, CP II, provided that all “universally accepted fundamental rights, freedoms and civil liberties” had to be included in the new constitution as “entrenched and justiciable provisions.” Amongst other submissions, various parties argued that the inclusion in the text of the rights of access to housing, health care, sufficient food and water, social security and basic education (which became sections 26, 27 and 29 of the Constitution), and the socio-economic rights applicable exclusively to children (now included in section 28) contravened CP II. This was on the basis that socio-economic rights were not justiciable.

The CC found that this submission was misconceived. In its opinion, socio-economic rights were not “universally accepted fundamental rights” and therefore CP II did not require that they be justiciable (i.e. CP II neither mandated nor prohibited their inclusion). The CC also stated that in any case it considered that the rights were justiciable “at least to some extent”. In its opinion:

“[M]any of the civil and political rights entrenched in the [the Constitutional Assembly’s text] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion. In the light of these considerations, it is our view that the inclusion of socio-economic rights in the [text] does not result in a breach of the CPs.”

Objectors also alleged that the inclusion of these rights contravened CP VI. This CP required that there be a separation of powers between the legislature, executive and the judiciary. It was submitted that these rights would lead to the courts encroaching upon the powers of the legislature and executive, particularly because they would result in the courts making decisions about how the national budget should be allocated. The CC also dismissed this objection, reasoning that:

“It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who

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37 For a comprehensive summary of the reasons for the Interim Constitution, the CPs, the Constitutional Assembly and the role of the CC in certifying the text drafted by the Constitutional Assembly, see paras. 5-21 of the Certification judgment, supra note 35.
38 S. 73 of the Interim Constitution.
39 Certification judgment, supra note 35 at para. 78.
40 Ibid. at para. 77.
formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers."

3.1.2 Soobramoney v. Minister of Health, Kwazulu Natal

In Soobramoney,\footnote{1997] 12 B. Const. L.R. 1696 (S. Afr. Const. Ct.) [“Soobramoney”].} the appellant was a diabetic who also suffered from ischaemic heart disease and cerebro-vascular disease. In 1996, he had a stroke and his kidneys failed. He required regular renal dialysis to survive and sought treatment from Addington Hospital in Durban.

The hospital declined to treat the appellant. A specialist testifying on the hospital’s behalf stated that it did not have sufficient resources to treat all patients with chronic renal failure. Because of the limits on the hospital’s resources, it had established guidelines in relation to treating patients with the appellant’s condition. Under the guidelines, the primary factor relevant to whether a sufferer of chronic renal failure was admitted to the dialysis programme was whether the person was eligible for a kidney transplant. The appellant was not so eligible, as the guidelines also stated that patients suffering from the other conditions the appellant had (i.e. ischaemic heart disease and cerebro-vascular disease) would not be given a transplant. Consequently, the appellant did not qualify for dialysis treatment.

The appellant paid for private dialysis treatment until he could no longer afford to do so. He then sought a court order requiring that the hospital admit him to its dialysis programme. At the heart of the appellant’s case was a submission that the right not to be refused emergency medical treatment under section 27(3) of the Constitution had to be interpreted in light of the right to life in section 11. The appellant argued that interpreted in this way section 27(3) entitled a person to life-saving treatment at the state’s expense if he or she was unable to pay for that treatment. After the first instance court dismissed the appellant’s application, he appealed to the CC.\footnote{Ibid. at paras. 5-7.}

Chaskalson P, giving judgment on behalf of the majority, began by recording the Constitution’s transformative objectives. The judge stated:\footnote{Ibid. at para. 8.}

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform
our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.”

Chaskalson P also stated that the Constitution’s preamble expressed a constitutional commitment to address poverty and inequality. Sections 26 (right to access to housing) and 27 (right to access to healthcare, food, water and social security) were part of this commitment. However, the rights in sections 26 and 27 were dependent upon resources for their realisation, and limited to the extent that resources were unavailable. In the judge’s view, the right not to be denied emergency medical treatment in section 27(3) had to be interpreted in that context. The judge then stated:

“If section 27(3) were to be construed in accordance with the appellant’s contention it would make it substantially more difficult for the state to fulfill its primary obligations under sections 27(1) and (2) to provide health care services to everyone within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening.”

The judge also found that the section 27(3) right was intended to apply to emergency situations (e.g. treatment required as the result of a sudden catastrophe), rather than to ongoing illnesses such as that from which the appellant suffered. Accordingly, the judge held that the appellant had no basis for a claim under section 27(3).

Chaskalson P then considered whether the appellant’s right to healthcare services had been infringed. The judge reiterated that this right was subject to the availability of resources. Further, the trial judge had found that the hospital had insufficient resources to treat the appellant, and the appellant had not challenged this finding. Instead, the appellant submitted that the KwaZulu-Natal Department of Health was obliged to provide additional funds to the hospital to treat him and others suffering from the same condition.

The judge rejected this submission. The Department was in deficit, there were insufficient dialysis machines to treat all patients with chronic renal failure, and the machines were already being used to treat more patients than ideally they should be. The situation had led to the establishment of the guidelines which had been applied to the appellant. There was no allegation that the guidelines were unreasonable or had been applied other than fairly and rationally. In any event, the guidelines were reasonable as they

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44 Ibid. at paras. 9-10.
45 Ibid. at para. 11.
46 Ibid. at para. 19.
47 Ibid. at paras. 20-21.
48 Ibid. at para. 23.
were designed to maximise the benefit of the machines by prioritising the treatment of patients who could be cured. If the hospital were to treat the appellant, it would have to treat all others with the same or similar condition. That would lead to the collapse of the dialysis programme. It would also lead to significant strain on the health budget given the high cost of treating patients such as the appellant.49

On this basis, Chaskalson P dismissed the appellant’s application.50 In doing so, the judge stated:51

“...The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. 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.”

3.1.3 Government of the Republic of South Africa v. Grootboom and Others

This case52 was an appeal from a High Court order that the state provide Mrs. Grootboom and others (510 children and 390 adults) with adequate basic shelter or housing until they acquired permanent accommodation. The appellants were the organs of national, provincial and local government responsible for complying with the order.

Mrs. Grootboom and the majority of the other respondents had lived in Wallacedene, a squatter settlement in the Oostenburg municipality. Living conditions in the settlement were extremely poor. There was no water, sewage or refuse removal, the supply of electricity was minimal, and the land was partly waterlogged. Many of the respondents were on a municipal waiting list for housing, but the municipality could not say when they would be provided with housing. Some had already been waiting for seven years.

Due to these conditions, the respondents decided to leave Wallacedene and move to vacant privately owned land.53 The owner of the land obtained an eviction order against them, but they refused to leave. This was because they could not go back to Wallacedene as others had moved on to the sites they had formally occupied. Ultimately, the municipality forcibly evicted the respondents, destroying their homes

49 Ibid. at paras. 25-28.
50 See also the concurring judgments of Madala and Sachs JJ, who discuss in greater detail the implications of the right to life to the case before the CC.
51 Ibid. at para. 29.
53 Ibid. at paras. 7-8.
and possessions in the process. The respondents moved to the Wallacedene sports field and put up temporary structures. By this time, winter had begun.\(^5^4\)

The respondents requested that the municipality provide them with temporary accommodation. The municipality made the Wallacedene Community Hall available but it was not large enough to shelter all the respondents. The respondents then sought an order from the High Court, relying on sections 26 (right of access to adequate housing) and 28(1)(c) (right of children to basic shelter). The High Court granted that order in the terms set out above. The appellants appealed to the CC.

### 3.1.3.1 The CC’s judgment

#### 3.1.3.1.1 Progressive realisation and minimum core obligations

Yacoob J gave the CC’s unanimous judgment. In interpreting section 26 of the Constitution, the judge considered articles 11 and 2.1 of the ICESCR and the CESC’s General Comment 3 on progressive realisation and minimum core obligations.\(^5^5\) The judge held that the term “progressive realisation” in the Constitution had the same meaning as the CESCR had given it in its General Comment 3.\(^5^6\) However, Yacoob J rejected a submission that on the basis of the case before it the CC should interpret the Constitution as imposing a minimum core obligation on the state in relation to the right of access to adequate housing.\(^5^7\)

The judge noted that the CESCR had not specified the content of minimum core obligations in any detail. He further stated that the CC had not been provided with sufficient information to determine a minimum core for section 26(1) and that doing so would be highly complex. This was because “the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance.”\(^5^8\)

Instead, the issue to be determined was “whether the measures taken by the state to realise the right afforded by section 26 are reasonable.”\(^5^9\) While the concept of minimum core obligations could be relevant in some cases in determining whether the state had taken “reasonable” measures as required by section 26(2), there would have to be sufficient information before the CC for it to set such a minimum core.

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\(^{54}\) Ibid. at paras. 10-11.
\(^{55}\) Grootboom, supra note 52 at paras. 26-30; CESCR, General Comment 3, 5th Sess., E/1991/23(SUPP) (1990) [“General Comment 3”].
\(^{56}\) Ibid. at para. 45.
\(^{57}\) Ibid. at para. 32.
\(^{58}\) Ibid. at para. 33.
\(^{59}\) Ibid.
3.1.3.1.2 The right to adequate housing

Yacoob J went on to interpret section 26(1). In the judge’s view, it was implicit in section 26(1) that there was “a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.” In addition, realisation of the right would require that each person had access to land, appropriate services (e.g. sewage and water) and to a dwelling. Section 26(2) obliged the state to “create the conditions for access to adequate housing for people at all economic levels of our society;” and to “devise a comprehensive and workable plan” to achieve realisation of the right. Because the poor were particularly vulnerable, the state was required to provide them with special attention.

What the state had to do to comply with its obligations under section 26 would vary according to context (e.g. the needs of the person living in a rural locality may differ to those of a person living in a city). Section 26(1) also did not establish an unqualified right to access to adequate housing. Instead, under section 26(2), the state’s obligation was to take “reasonable legislative and other measures, within its available resources” to realise the right progressively.

In any constitutional challenge, the reasonableness of both the measures adopted and the way in which they were implemented would be assessed. However, Yacoob J stated:

“A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness.”

3.1.3.1.3 The state housing plan: compliance with obligations under section 26 of the Constitution?

The measures the state had adopted in relation to housing included national and provincial legislation, policy, a subsidy system, and public/private partnerships concerned with ensuring sufficient finance for housing. The judge found that these measures (including the allocation of considerable funds and the construction of a large number of houses) were significant, and that the state housing programme was

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60 Ibid. at para. 34.
61 Ibid. at para. 35.
62 Ibid.
63 Ibid. at para. 38.
64 Ibid. at para. 36.
65 Ibid. at para. 37.
66 Ibid. at para. 41.
“aimed at achieving the progressive realisation of the right of access to adequate housing.”\textsuperscript{67} Overall, Yacoob J considered that that state programme was a “major achievement”\textsuperscript{68} and constituted “a systematic response to a pressing social need.”\textsuperscript{69}

However, the principal housing legislation focused on providing access to permanent residential structures.\textsuperscript{70} It made no provision for temporary relief for people in emergency situations (e.g. people such as the respondents who had nowhere to reside).\textsuperscript{71} The issue then became whether the lack of such provision was reasonable.

The judge recorded that there was an acute housing shortage in the Cape Metro area in which the respondents lived, and that generally the housing situation in the municipality was “desperate”.\textsuperscript{72} Amongst other matters, informal housing had increased at significant rates and demand significantly outstripped supply.\textsuperscript{73} The Cape Metro council had, however, recognised the seriousness of the problem. Its response was the “Accelerated Managed Land Settlement Programme” [AMLSP]. This envisaged “the rapid release of land for families in crisis, with progressive provision of services.”\textsuperscript{74}

The AMLSP was an important step. Yacoob J found that, on its face, the AMLSP “meets the obligation which the state has towards people in the position of the respondents in the Cape Metro.”\textsuperscript{75} The AMLSP had not, however, been in place at the time the respondents were evicted and had no equivalent in the national housing programme.\textsuperscript{76} Also, it could not be implemented effectively without the national government providing financial resources. Apparently, for this to occur the national housing programme had to recognise an obligation to provide temporary relief.\textsuperscript{77}

The appellants argued that section 26 did not require the state to provide temporary relief and that imposing such an obligation would diminish its ability to implement the housing policy already in place.\textsuperscript{78} However, Yacoob J considered that given the scale of the housing problem and the time it would take for

\begin{itemize}
  \item \textsuperscript{67}Ibid. at para. 53.
  \item \textsuperscript{68}Ibid.
  \item \textsuperscript{69}Ibid. at para. 54.
  \item \textsuperscript{70}One of the relevant acts, the \textit{Housing Act 1997}, No. 107 of 1997 [HSA], referred to providing access, on a progressive basis, to “permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and potable water, adequate sanitary facilities and domestic energy supply.”
  \item \textsuperscript{71}Grootboom, supra note 52 at para. 52.
  \item \textsuperscript{72}Ibid. at para. 59.
  \item \textsuperscript{73}Ibid. at para. 58. The judge explained that while approximately 22,000 houses were built in the Western Cape per annum, demand was growing at approximately 20,000 family units per year.
  \item \textsuperscript{74}Ibid. at para. 60.
  \item \textsuperscript{75}Ibid. at para. 67.
  \item \textsuperscript{76}Ibid. at para. 63.
  \item \textsuperscript{77}Ibid. at para. 68.
  \item \textsuperscript{78}Ibid. at para. 52.
\end{itemize}
all to have access to affordable housing, section 26 obliged the state to make available some temporary relief to those in crisis situations.

### 3.1.3.1.4 The right of children to shelter: section 28(1)(c) of the Constitution

Section 28(1)(c) provides that every child has the right to “basic nutrition, shelter, basic health care services and social services.” The High Court had interpreted this section as requiring the state to provide children and their parents with shelter if the parents were unable to do so. The High Court also considered that this obligation was not subject to available resources.

Yacoob J noted that the High Court’s interpretation would allow parents who had children to trump the claims of all others without shelter, creating the danger that “[c]hildren could become stepping stones to housing for their parents instead of being valued for who they are.” In an attempt to resolve this difficulty, the judge interpreted section 28(1)(c) as imposing a primary obligation on a child’s parents or other family to provide shelter. The state’s obligation to provide shelter under the subsection was secondary, and would only apply where there were no parents or other family caring for the child. In this case, all of the children named as respondents were being cared for by their parents. Therefore, section 28(1)(c) was not relevant to the case.

### 3.1.3.1.5 The CC’s order

Yacoob J declared that at the time the respondents brought their application, the programme then in force in Cape Metro did not comply with section 26 of the Constitution because it failed to provide relief for those “desperately in need of access to housing.” The judge declared that section 26(2) required the state to “devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.” This programme needed to include “measures to provide relief to those in desperate need” and encompass but not necessarily be limited to the measures contemplated in the AMLSP. The beneficiaries of these measures would be those “who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.” The SAHRC, one of the amici curiae, would monitor the state’s compliance with the court order and report to the CC if necessary.

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79 Ibid. at para. 71.
80 Ibid. at paras. 77-79.
81 Ibid. at para. 95.
82 Ibid. at para. 96.
83 Ibid. at para. 99(2)(b).
84 Ibid.
Yacoob J also recorded that the respondents had accepted an offer which the appellants had made during the hearing to provide them with “temporary accommodation” (including a defined area of land and basic services) until the respondents could be housed under the AMLSP.\(^{85}\)

### 3.1.4 Minister of Health and Others v. Treatment Action Campaign and Others (No 2)

The appellants in this case\(^{86}\) were the national government’s Minister of Health and eight members of the provincial executive councils for health. The executive councils were responsible for the delivery of health services in South Africa’s provinces.

The main issue in the appeal was whether the state (i.e. the national government and the provincial councils) had acted unreasonably when it restricted the availability of an antiretroviral drug, nevirapine, in the public sector health system.\(^{87}\) The constitutional provisions relevant to the case were section 27(1) (right to have access to health care services); section 27(2) (the obligation of the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the section 27(1) right); and the rights of children under section 28(1)(c).

The broader context for the case was the HIV/AIDS pandemic in South Africa. The state had adopted various policy measures in response to the pandemic, one of which was a programme aimed at reducing mother to child transmission of HIV through the administration of nevirapine to HIV-positive mothers and their newborn babies.\(^{88}\) However, the state decided not to make nevirapine freely available in the public sector but rather to restrict it to two pilot sites in each province.

The pilot sites catered for about 10% of the births in the public sector (in other words, they were accessible to only a minority). The reason for restricting nevirapine to these sites was not due to the cost of the drug; in fact, the company that made nevirapine had offered it to the state free of charge for a five-year period.\(^{89}\) Instead, the state was concerned about its capacity to deliver a “comprehensive package” of treatment aimed at reducing mother to child HIV transmission throughout the public health system. It was also concerned about nevirapine’s safety, its efficacy in preventing HIV transmission, and the possibility of resistance developing to the drug. As a result, the state wished to conduct further research

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\(^{85}\) *Ibid.* at para. 91.


\(^{87}\) *Ibid.* at para. 2.

\(^{88}\) See *Ibid.* at 4, n. 5 which explains that the administration of nevirapine is as follows: a single tablet for the mother when labour begins, and a few drops for the baby within 72 hours after birth.

(apparently over a two-year period) at the pilot sites before making a decision about whether to make the drug generally available in the public sector.  

The “comprehensive package” to be delivered at the pilot sites included HIV testing and counselling; the administration of nevirapine where medically indicated; requesting HIV-positive mothers to give their babies formula as opposed to breast milk; providing vitamins and antibiotics to mother and baby; and monitoring the health of the children to evaluate whether nevirapine was in fact preventing transmission of HIV.

Against this, the Treatment Action Campaign [TAC] argued that even if the comprehensive package could not be delivered immediately to all, there was no rational basis for refusing to allow doctors in the public sector to provide all patients with nevirapine where the doctors considered that to be medically indicated (as opposed only to allowing doctors at the pilot sites to prescribe the drug). Amongst other reasons, this was because the drug was freely available in private sector. If a pregnant woman could afford a consultation with a private sector doctor and to pay for the drug, and if the doctor considered that she and her child should be prescribed it, both would have access to it.

3.1.4.1 The judgment of the CC

3.1.4.1.1 A minimum core?

Before addressing the main issue in the case, the CC dismissed a submission that there was an implicit right in section 27(1) to minimum core health care services. The CC stated that “[i]t is impossible to give everyone access even to a ‘core’ service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis.” While the CC allowed that the minimum core concept could “possibly” be relevant to assessing whether in a given case the state had adopted reasonable measures, it stated that section 27(1) did not “give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2).”

Further, the CC stated that courts in general were not “institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards [...] should be, nor for deciding how public revenues should most effectively be spent.” The courts were “ill-suited to

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90 Ibid. at paras. 10-11.  
91 Ibid. at para. 19.  
92 Ibid. at para. 35.  
93 Ibid. at paras. 34 and 38.  
94 Ibid. at para. 37.
adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation.\textsuperscript{95}

Accordingly, the CC’s position seemed to be that while it would not rule out the possible applicability of the minimum core concept to South African law, it would not define any right’s minimum core itself.

3.1.4.1.2 Were the restrictions reasonable?

While nevirapine would initially be available for free, the state was concerned that there would be costs related to the provision of formula for those mothers who could not afford the formula themselves and costs related to the additional services that would be required to deliver the “comprehensive package” nationwide.\textsuperscript{96} The CC accepted that such costs would arise. However, it found that they were only relevant to the provision of the “comprehensive package”. Providing a single dose of nevirapine to mother and child at the time the child was born would require only insignificant additional expenditure in the public health system.\textsuperscript{97}

The CC also found that even in the absence of the “comprehensive package”, administration of nevirapine at birth would prevent transmission in a significant number of cases even if, for example, a HIV-positive mother breast-fed her child following birth.\textsuperscript{98} The CC similarly dismissed the concern that resistance might develop to nevirapine. Even though there was “at most” a possibility that a resistant strain of HIV could manifest itself in a child treated with the drug, “[t]he prospects of the child surviving if infected are so slim and the nature of the suffering so grave that the risk of some resistance manifesting at some time in the future is well worth running.”\textsuperscript{99}

Finally, in the CC’s opinion there were no safety-related reasons why the drug should not be made generally available in the public sector for single-dose administration at birth.\textsuperscript{100} A specialist body in South Africa, the Medicines Control Council, had registered nevirapine and this meant that the Council was satisfied that the drug was safe and efficacious.\textsuperscript{101} The World Health Organisation had also

\textsuperscript{95} Ibid. at para. 38.
\textsuperscript{96} Ibid. at para. 48.
\textsuperscript{97} Ibid. at paras. 49 and 71.
\textsuperscript{98} Ibid. at para. 58.
\textsuperscript{99} Ibid. at para. 59.
\textsuperscript{100} Ibid. at para. 60.
\textsuperscript{101} Ibid. at para. 12.
recommended the administration of the drug to reduce mother to child HIV transmission. Finally, it was also relevant that the drug was available in the private sector.

Accordingly, the CC found that the state’s decision to restrict nevirapine to the pilot sites was unreasonable and therefore in breach of section 27(2). However, it did not find that it was unreasonable not to make the drug generally available. Instead, the CC considered that the state had acted unreasonably by not making the drug available outside of the pilot sites to doctors at public hospitals and clinics which had HIV testing and counselling facilities. While apparently these facilities were not universally available outside of the pilot sites, they were widely available.

Although the CC did not make any express finding that the state had also breached the right of children in section 28(1)(c) to basic health care services, it appeared to consider that these rights were relevant to the case and bolstered its conclusion that section 27(2) had been breached. The CC stated that section 28(1)(c) required the state to provide for children where parental or family care was lacking. In this case, the children affected by the restrictions, those born in public hospitals to HIV-positive mothers, were for the most part dependent upon the state to gain access to nevirapine as their mothers could not afford to pay for it in the private health system.

3.1.4.1.3 Relief

The CC issued a series of declarations and orders. These included an order that the state allow doctors in public sector hospitals to administer nevirapine for the purpose of reducing the risk of mother to child HIV transmission, where the attending doctor (acting in consultation with the facility’s medical superintendent) considered use of the drug to be medically indicated. The CC also required the state to take reasonable measures to extend testing and counselling facilities relevant to the administration of nevirapine throughout the public health sector.

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102 Ibid.
103 Ibid. at para. 80. As the CC stated at para. 68: “The fact that the [pilot] sites will provide crucial data on which a comprehensive programme for mother-to-child transmission can be developed and, if financially feasible, implemented is clearly of importance to government and to the country. So too is ongoing research into safety, efficacy and resistance. This does not mean, however, that until the best programme has been formulated and the necessary funds and infrastructure provided for the implementation of that programme, nevirapine must be withheld from mothers and children who do not have access to the [pilot] sites.”
104 Ibid. at paras. 88 and 95.
105 Ibid. at paras. 78-79.
106 Ibid. at para. 135 (orders 3(a) to (d)).
3.1.5  Khosa v. Minister of Social Development; Mahlaule v. Minister of Social Development

In Khosa,\textsuperscript{107} the applicants were citizens of Mozambique and permanent residents of South Africa. They challenged the constitutionality of laws which restricted eligibility for certain old age, disability and war veteran benefits [the social grant] and for particular child support benefits to South African citizens. All of the applicants were destitute and would have received the benefits in question but for their lack of South African citizenship.

Amongst other submissions, the applicants alleged that the impugned laws were inconsistent with the right of “everyone” to social security under section 27(1)(c); the right to equality and the prohibition against unfair discrimination provided for in section 9; and the right to respect and protection for one’s dignity set out in section 10.\textsuperscript{108} They also alleged that the restrictions constituted unjustifiable limitations in terms of section 36.

Because the cases raised similar issues, they were heard together. The first instance court declared the relevant statutes unconstitutional. The matter was then referred to the CC.\textsuperscript{109}

Before the CC the state conceded that the restrictions in relation to the child support benefits were unconstitutional.\textsuperscript{110} This was because they required that both the parent applying and his or her child be South African citizens (as opposed, for example, to requiring only that the child be a South African citizen). Their effect was, therefore, to deny benefits to some children who were South African citizens on the basis that their parent or parents were not. Therefore, while the CC still had to determine whether it agreed with the state’s concession (and ultimately it did), the main issue was whether restricting the social grant to citizens was unconstitutional.

Mokgoro J delivered the CC’s majority judgment.\textsuperscript{111} In the judge’s view, the restriction on eligibility for the social grant was \textit{prima facie} inconsistent with the right of “everyone” to social security.\textsuperscript{112} Therefore, the state had to show that the restriction was reasonable under section 27(2) and did not constitute unfair discrimination under section 9. To do this, the state had to demonstrate that the restriction was not irrational or arbitrary.\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{107} [2004] 6 B. Const. L.R. 569 (S. Afr. Const. Ct.) [“Khosa”].
\item \textsuperscript{108} \textit{Ibid.} at para. 38.
\item \textsuperscript{109} The reason for this was that ss. 167(5) and 172(2)(a) of the \textit{Constitution} required the CC to consider whether to confirm the first instance court’s declarations of unconstitutionality.
\item \textsuperscript{110} \textit{Khosa, supra} note 107 at para. 78.
\item \textsuperscript{111} Ngcobo and Madala JJ dissented in part.
\item \textsuperscript{112} \textit{Khosa, supra} note 107 at paras. 47 and 56.
\item \textsuperscript{113} \textit{Ibid.} at para. 53.
\end{itemize}
The state argued that the restriction provided an incentive for permanent residents to become citizens (which they could do after a five-year period) and that its primary duty was toward its citizens.\textsuperscript{114} Mokgoro J agreed that excluding some categories of persons such as temporary or illegal residents from benefits may be reasonable. However, the current restriction failed to distinguish between those who had made South Africa their home (and owed allegiance to the state as a result) and those who had not.\textsuperscript{115}

The state also submitted that its resources were insufficient to cover permanent residents in need.\textsuperscript{116} However, it did not have exact figures on how many permanent residents would qualify for the benefits if the restriction was removed, and therefore could only roughly estimate the additional cost it would incur. In any case, Mokgoro J found that even on the state’s estimates, the projected increase only amounted to an increase of 2% on the overall cost of benefits.\textsuperscript{117}

Finally, the state also argued that the restriction encouraged foreign nationals to be self-sufficient.\textsuperscript{118} Mokgoro J agreed that this was a legitimate goal, but considered it should be pursued through careful selection of permanent residents and imposition of conditions such as requiring guarantees from sponsors. Once permanent residency had been granted it would be unreasonable to deny assistance to a permanent resident who required it (taking into account, amongst other things, that permanent residents had to pay tax). In the words of Mokgoro J:\textsuperscript{119}

“Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times. The category of permanent residents who are before us are children and the aged, all of whom are destitute and in need of social assistance. They are unlikely to earn a living for themselves.”

Accordingly, Mokgoro J held that the restrictions on eligibility for the social grant and for the child support benefits were discriminatory, unfair, and not justifiable under section 36.\textsuperscript{120}

In making those findings, the judge noted that it was difficult to apply section 36 to sections 26 and 27, each of which contained their own internal limitations (the requirement to take reasonable measures to realise the guaranteed rights progressively within available resources). If, for example, a measure were reasonable in terms of section 26, it was difficult to see how it could be unreasonable and not justifiable

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\textsuperscript{114} Ibid. at para. 57.
\textsuperscript{115} Ibid. at para. 59.
\textsuperscript{116} Ibid. at para. 60.
\textsuperscript{117} Ibid. at para. 62.
\textsuperscript{118} Ibid. at para. 63.
\textsuperscript{119} Ibid. at para. 65.
\textsuperscript{120} Ibid. at para. 80.
under section 36, unless “reasonable” had a different meaning in both sections. It was also unclear what relevance section 36 could have if a measure were found to be unreasonable under section 26.  

However, the judge considered that she did not need to decide the issue. Even if sections 26 and 27 and section 36 did establish different thresholds of reasonableness or justifiability, the judge’s view was that the restrictions would fail to meet either.

3.1.5.1 Remedy

Having found that the impugned restrictions were unconstitutional, Mokgoro J resolved to read the words “or permanent resident” into the relevant legislation. The effect of this was to entitle permanent residents to claim the social grant and the child support benefits.

3.1.6 Jaftha v. Schoeman and Others; Van Rooyen v. Stoltz and Others

In this case, the CC had to determine whether a section of the Magistrates’ Courts Act 1944 [MCA], which provided for the sale in execution of debtors’ homes, violated the right to access to adequate housing.

The appellants owned properties of little monetary worth acquired with the assistance of a state subsidy. Both were poor and unemployed, and Mrs. Jaftha could not work due to health problems. Each had taken small loans from private moneylenders. Although they had repaid more than the principal they had borrowed, neither was able to satisfy their debts in full. This was because their debts dramatically increased over time due to interest and court fees as a result of legal action their creditors took against them. This non-payment allowed their homes to be sold pursuant to the MCA.

121 Ibid. at para. 83.
122 Ibid. at para. 84.
123 Ibid. at para. 98. Note that in “Adjudicating Social Rights”, supra note 34 at 100, Liebenberg advises that the “reading in” remedy, also used in Jaftha (discussed below) is “generally considered to be quite an intrusive remedy.” It could also have the potential to backfire. In Khosa, the effect of the reading in was to entitle the parent of a child to claim the benefits if the parent and the child were both either permanent residents or citizens and were otherwise eligible. However, this amendment still seemed to leave open the possibility that a child who was a citizen could be denied the advantages of the benefit if his or her parent was not a permanent resident or a citizen. Accordingly, while the court’s remedy would seem to narrow the class of child citizens who would be affected by the restriction, it did not seem to remove the possibility of at least some of those children missing out on the benefits as a result of their parents’ nationality.
125 No. 32 of 1944.
126 The cases of the two appellants, Maggie Jaftha and Christina Van Rooyen, had been consolidated as they dealt with the same issues.
127 Jaftha, supra note 124 at paras. 3 and 5.
128 Ms. Jaftha’s original loan was for R250. Although she had repaid some of the principal, her creditor obtained judgment against her for R632.45 including interest and costs. Ms. Jaftha made a number of payments against this sum, but was then hospitalised. After she left hospital, her creditor’s solicitors advised that her home was to be sold.
Under South African law, if a person who had received a state housing subsidy lost ownership of the property purchased with that subsidy through a sale in execution, he or she would be ineligible for other state-aided housing. Further, neither of the appellants had anywhere to live other than their homes.\footnote{129}{Ibid. at para. 12.}

Before the CC heard the case a settlement had been reached pursuant to which both women regained their homes.\footnote{130}{Ibid. at para. 8} However, they persisted with their challenge against the MCA. One of the reasons for this was that both women owed money to other creditors and had unsatisfied judgments against them for other debts. Therefore, it was possible that their homes could be sold again under the same legislation.\footnote{131}{Ibid. at paras. 9-11.}

Apparently, neither woman had knowingly encumbered her home. However, the MCA provided that if a creditor obtained judgment against a debtor and the debtor failed to satisfy his or her debt, the judgment would be enforceable against the “movable property” of the debtor. The MCA further provided that “if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then [the judgment shall be enforceable] against the immovable property.”\footnote{132}{Section 66(1)(a) of the MCA, supra note 125.} Under the MCA, sales in execution could occur in many cases without or with only little oversight by the courts (such as, for example, if a judgment against the debtor were entered by default).\footnote{133}{Jaftha, supra note 124 at para. 15.} Often, such sales could occur with the authorisation of only the court clerk.

The appellants’ case was that the right to access to housing imposed a negative obligation upon not only the state but also on private parties not to interfere unjustifiably with a person’s existing access to adequate housing.\footnote{134}{Ibid. at para. 17.} In their submission, the MCA expressly allowed such unjustifiable interference and was therefore inconsistent with the Constitution. The appellants also contrasted the state’s positive obligation to realise the constitutional right progressively with what they argued was its negative obligation not to interfere with the right. They submitted that the latter was immediately applicable in full.\footnote{135}{Ibid. at para. 32.}

The respondents (which included the national and provincial ministers of housing) argued that the MCA was constitutional. In particular, they submitted that it provided sufficient safeguards. The MCA allowed

\footnotesize{to meet her debt. To avoid this, the solicitors advised that she would have to pay R5,500 plus accrued interest. Mrs. Jaftha made two more payments of R300 and R200, but by that time according to the solicitors her overall debt had escalated to R7000. Ms. Jaftha was forced to vacate her home, and it was sold for R5000. Ms. Van Rooyen had bought vegetables on credit for approximately R190. She was also unable to repay her debt, and her home was ultimately sold for R1000 (see paras. 4 to 5 of the judgment).}
a debtor with “good cause” to petition a court to stay or set aside a warrant of execution. A debtor could also seek a court order providing for payment of the judgment debt in instalments.\textsuperscript{136}

Mokgoro J gave the CC’s unanimous judgment. In interpreting the right to access to housing, the judge referred to the right to adequate housing in article 11 of the \textit{ICESCR} and the CESCR’s General Comment 4 on that right.\textsuperscript{137} The judge focused on the CESCR’s identification of security of tenure as an important element of the right, and the linkages between dignity and adequate housing. Referring to South Africa’s past of “forced removals” and “racist evictions”, the judge agreed with the appellants that the constitutional right to access to housing created a negative obligation on the state not to interfere with a person’s housing without justification, and that this obligation was immediately applicable.\textsuperscript{138} Mokgoro J further considered that any act or law which permitted a person to be deprived of their housing limited that person’s right.

However, such a limitation could be justified under section 36. In analysing the \textit{MCA} against the section 36 criteria, Mokgoro J took into account that debt recovery had an important social function and that in many cases the only property of any worth that low-income people had was their homes. If these homes were excluded from sales in execution in all circumstances, money lenders could refuse to loan to such people. Further, creditors had a right to recover money owing to them and were not necessarily wealthy people themselves. Not being able to recover loans or to sell the property of defaulting debtors could leave creditors in financial difficulty.\textsuperscript{139} Against these factors, the judge weighed the considerable value (in both monetary and intangible terms) of having access to housing and the consequences for a low income person of losing that access. This was a particular consideration in cases such as the appellants where the loss of a state-subsidised home would disqualify the person from future state assistance.\textsuperscript{140}

Mokgoro J resolved that whether the sale of a debtor’s home to satisfy a debt would be unjustifiable would depend on the circumstances of the case in question and would require balancing the debtor’s and creditor’s respective interests. However, where an indigent debtor was concerned, the judge’s view was that “[t]here will be many instances where execution will be unjustifiable because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor.”\textsuperscript{141} Mokgoro J disagreed with the respondents’ submission that the legislation provided sufficient safeguards by allowing a debtor to seek relief from a court, stating that many indigent

\textsuperscript{136} \textit{Ibid}. at para. 19.
\textsuperscript{137} \textit{ICESCR, General Comment 4}, 6th Sess., E/1992/23 (1991) [“General Comment 4”].
\textsuperscript{138} \textit{Jaftha, supra note 124} at paras. 23-27 and 33.
\textsuperscript{139} \textit{Ibid}. at para. 37.
\textsuperscript{140} \textit{Ibid}. at para. 39.
\textsuperscript{141} \textit{Ibid}. at para. 43.
debtors would be unaware that they could do this. Even if they did, many would find the process too difficult. On that basis, the judge considered that the legislation was inconsistent with the right to access to housing.

3.1.6.1 Remedy

Given the various competing considerations, Mokgoro J decided that the appropriate remedy was to impose greater judicial oversight over the sale in execution process. Once a judgment had been obtained for a debt, and if there were insufficient movable property to satisfy the debt, the onus would be on the creditor to seek a court order for the sale of the debtor’s home. The court would make such an order if it was satisfied that it was appropriate to do so in all the relevant circumstances.

The judge set out a series of factors that the court would take into account in such a case. These included whether there were other reasonable ways of satisfying the debt (such as payments by instalment); whether the sale of the home would render the debtor and any family homeless; the needs of the creditor; the amount of the debt; the social value in ensuring that debtors repay their debts; and whether the debtor willingly put up his or her home as security (a factor which would ordinarily lead to a conclusion that a sale was justified).

The respondents submitted that the CC should suspend its order of validity to allow the legislature to remedy the legislation in accordance with the CC’s findings. However, Mokgoro J rejected this submission, resolving instead to read in wording to the MCA.

3.1.7 Mazibuko and Others v. City of Johannesburg and Others

This case concerned the section 27(1)(b) right to access to sufficient water. The applicants were poor residents of Phiri, an area in the Soweto township. The respondents included the City of Johannesburg [the City] and Johannesburg Water (Pty) Ltd [JWL]. JWL was wholly owned by the City, and was responsible for providing water services to Johannesburg’s residents.

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142 Ibid. at para. 47.
143 Ibid. at paras. 56-58.
144 Ibid. at para. 64. The judge inserted the italicised words to the relevant section: “[…] if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then a court, after consideration of all relevant circumstances, may order execution against the immovable property of the party against whom such judgment has been given or such order has been made.” Mokgoro J acknowledged that the amendment to the section was awkward. This suggests that a better course of action may have been to allow the legislature to enact an appropriate amendment.
The main issue in the case was whether the City’s policy regarding the quantity of free water that it would supply to residents was inconsistent with the right to access to sufficient water or with the Water Services Act 1997 [WSA]\(^{146}\) (enacted to implement and regulate the constitutional right to water).

The City’s previous policy had been to charge Phiri residents a flat rate for water supply. This rate assumed a monthly consumption of 20 kilolitres of water per household per month. However, actual consumption (which included water lost through significant leakages due to corroded piping) was approximately 67 kilolitres per month.\(^{147}\) In addition, many residents did not pay the flat rate.

JWL estimated that while a third of the water it purchased went to Soweto only one percent of its revenue came from the township.\(^{148}\) It determined that this situation had to be remedied, and devised a new policy to do so. It sought to implement the policy in Phiri.

The changes implemented through the policy included abandoning the previous flat rate and providing a series of differentiated entitlements. One level of entitlement was 6 kilolitres of free water monthly, which each household could receive through a tap installed in its yard. A household could also choose to have a pre-paid meter installed. This household would also receive 6 kilolitres of water free and would then be required to pay in advance for any additional water.\(^{149}\)

The City and JWL adopted the measure of 6 kilolitres as this was the minimum quantity prescribed under the WSA.\(^{150}\) Briefly, as well as there being a constitutional right to sufficient water, the WSA established a right of access to “basic water supply” which the relevant authorities were obliged to realise by taking reasonable measures. The WSA further defined “basic water supply” to mean “the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.”\(^{151}\) The Minister for Water Affairs and Forestry prescribed this minimum standard in regulations. It was “a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month.”\(^{152}\)

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147 Mazibuko, supra note 145 at para. 11.
148 Ibid. at para. 12.
149 Ibid. at para. 13.
150 Ibid. at para. 69.
151 Ibid. at para. 22.
152 Ibid. at para. 23.
3.1.7.1 The applicants’ case

Amongst other submissions, the applicants alleged that “sufficient water” for the purposes of section 27(1)(b) was 50 litres per person per day, and that 6 kilolitres per household per month was unreasonable and accordingly contrary to section 27(2). The applicants also submitted that the installation of the prepaid meters and the policy generally constituted retrogressive measures that were contrary to section 27(2).

3.1.7.2 The CC’s judgment

O’Regan J gave the CC’s unanimous judgment. The judge began by noting that section 27(1) did not give a right to demand immediate access to sufficient water. Instead, it required the state to take reasonable measures to realise the right progressively, within available resources. O’Regan J went on to hold that it was not for the CC to determine how much water constituted “sufficient water”. Instead, the CC’s role was to adjudicate on whether measures the state adopted to realise the right progressively were reasonable. The judge also stated that the CC would enforce the state’s positive obligations under the Constitution in “at least” the following ways:

“If government takes no steps to realise the rights, the courts will require government to take steps. If government’s adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From Grootboom, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions, as in Treatment Action Campaign No 2, the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.”

On this basis, O’Regan J rejected the applicants’ contention that the CC should find that “sufficient water” meant no less than 50 litres per person per day.

The judge also considered how the City and JWL had made the decisions they did in setting the policy and stated:

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153 Ibid. at para. 44.
154 Ibid. at para. 105.
155 Ibid. at para. 50.
156 Ibid. at paras. 60-63.
157 Ibid. at para. 67.
158 Ibid. at para. 71. See also para. 161, where O’Regan J stated: “When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate the policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should
“A reasonableness challenge requires government to explain the choices it has made. To do so, it must provide the information it has considered and the process it has followed to determine its policy. This case provides an excellent example of government doing just that. Although the applicants complained about the volume of material lodged by the City and Johannesburg Water in particular, which covered all aspects of the formulation of the City’s water policy, the disclosure of such information points to the substantial importance of litigation concerning social and economic rights. If the process followed by government is flawed or the information gathered is obviously inadequate or incomplete, appropriate relief may be sought. In this way, the social and economic rights entrenched in our Constitution may contribute to the deepening of democracy. They enable citizens to hold government accountable not only through the ballot box but also, in a different way, through litigation.”

O’Regan J then assessed the reasonableness of the policy against a series of grounds that the applicants had advanced, and found that it was reasonable. In the course of this analysis, the judge noted that the applicants had complained that the City had continued to modify its policy throughout the litigation. O’Regan J’s response was as follows:

“It may well be, as the applicants urge, that the City’s comprehensive and persistent engagement has been spurred by the litigation in this case. If that is so, it is not something to deplore. If one of the key goals of the entrenchment of social and economic rights is to ensure that government is responsive and accountable to citizens through both the ballot box and litigation, then that goal will be served when a government respondent takes steps in response to litigation to ensure that the measures it adopts are reasonable, within the meaning of the Constitution. The litigation will in that event have attained at least some of what it sought to achieve. […]

Having to explain why the Free Basic Water policy was reasonable shone a bright, cold light on the policy that undoubtedly revealed flaws. The continual revision of the policy in the ensuing years has improved the policy in a manner entirely consistent with an obligation of progressive realisation.”

O’Regan J also dismissed the applicants’ allegations that the policy was retrogressive and therefore unlawful. At the heart of the applicants’ contention was an argument that the change from the flat rate to

properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open.”

Ibid. at paras. 83-104. The applicants alleged that the policy was unreasonable on the following grounds: it provided 6 free kilolitres to rich and poor alike, rather than only to the poor; it was based on a per household allowance, not a per person allowance; it was based on an allegedly erroneous assumption by the City that it was not required to provide any free water to residents; the allowance was insufficient; and that the policy was not sufficiently flexible. The court disagreed with all of these allegations.

Ibid. at paras. 96 and 163.
the pre-paid meters interfered with what had then been their level of access to water. In rejecting this argument, the judge referred to a concession by the applicants that the previous system was unsustainable and needed to be changed. The judge also found that, in any event, the new system established by the policy was not retrogressive. Amongst other reasons, this was because the previous system required each resident to pay the flat rate and no water was meant to be supplied for free. The policy, on the other hand, provided a free entitlement of 6 kilolitres per month. On that basis, the judge appeared to consider that the policy constituted an improvement. The judge also considered that the fact that many did not pay for their water under the previous system was irrelevant. A flaw in the old system could not provide a basis for an argument that the policy was unfair or retrogressive.

Accordingly, the applicants’ case was dismissed.

4 PART III: THE CONSTITUTION AND THE ICESCR: SIMILARITIES AND DIFFERENCES

4.1 Immediately applicable and progressively realisable obligations

The Constitution’s division between obligations that are immediately applicable and those which the state is obliged to realise progressively is very similar to that of the ICESCR. For example, as in the ICESCR, the right to freedom from discrimination and various labour rights, such as the right to join and form a trade union, are not subject to progressive realisation. The Constitution also formulates the right to education in largely the same way as that right is formulated in the ICESCR: an unqualified right to basic education followed by obligations on the state to realise progressively the right to further education (although it is noteworthy that the constitutional right to further education is not expressly subject to available resources, as are the rights in sections 26 and 27).

As in the ICESCR, the rights of “everyone” to housing, health, food, and social security in the Constitution are all subject to progressive realisation. It is the case that the state’s obligation under sections 26 and 27 of the Constitution in relation to those rights is formulated differently from that set out in article 2(1) of the Covenant. The constitutional obligation is to take “reasonable legislative and other measures, within its available resources” to achieve progressive realisation; while under article 2(1) the state’s obligation is to take steps “to the maximum of its available resources” to achieve “progressively full realisation [...] by all appropriate means”, including legislative measures. However, while the

161 Ibid. at para. 135.
162 Ibid. at paras. 136-142.
constitutional obligation could be interpreted as being less strict than the Covenant’s “all appropriate means” obligation, the CC has not adopted such an interpretation. As set out above, the CC has found that progressive realisation has the same meaning that it does under the ICESCR.

Finally, as the CC stated in Mazibuko, while the section 26 and 27 rights do not have to be realised immediately, the state must take steps towards that goal immediately.\(^\text{164}\) This is the same obligation as that which applies to State parties under the Covenant in respect of the recognised rights.

### 4.2 Retrogressive measures

As is the case with the ICESCR, the Constitution does not expressly prohibit unjustifiable retrogressive measures. However, the CC seems to have accepted that such a prohibition is a necessary component of the obligation of progressive realisation. In Mazibuko, the CC dismissed the applicants’ contention that the policy at issue was unconstitutional because it was retrogressive. However, it did so because it found that the policy was not retrogressive, rather than finding that the state could adopt any retrogressive measure it deemed necessary. The CC’s citation of General Comment 3 in Mazibuko and Grootboom indicates that if the CC did find that a particular measure was retrogressive, it would assess the measure’s justifiability against similar criteria to that set out in the General Comment (or perhaps against the criteria set out in section 36 of the Constitution).\(^\text{165}\)

### 4.3 Different rights and different formulations of rights

Unlike the ICESCR, the Constitution expressly provides a right to “sufficient” food and water, as opposed simply to guaranteeing a right to “adequate” food as set out in article 11 of the ICESCR (which has the effect of leaving open the issue of whether the Covenant recognises a right to water). The environmental rights set out in section 24 of the Constitution have no equivalent in the ICESCR. In addition, the multiple rights to culture and language in the Constitution appear broader, more immediate, and more significant than the ICESCR’s “right to take part in cultural life”.

Further, while article 10(3) of the ICESCR obliges states to take special measures of protection and assistance on behalf of children, there is no parallel in the Covenant to the catalogue of children’s rights set out in section 28 of the Constitution. Unlike the rights in section 26 and 27, the section 28 rights are

\(^{164}\) Note also that s. 237 of the Constitution provides that “[a]ll constitutional obligations must be performed diligently and without delay.”

\(^{165}\) See also Liebenberg, “Adjudicating Social Rights”, supra note 34 at 84 who states that the “Court’s endorsement [in Grootboom] of the UN Committee’s […] views that ‘retrogressive measures’ require particular justification creates the basis for challenging cutbacks in social programmes.”
not subject to progressive realisation, although they are subject to the general limitations provision in section 36.

The extent of the section 28 rights is, however, unclear. In *Grootboom*, Yacoob J found that the state had no obligation to provide shelter on demand to children living with their parents even if their parents had no access to shelter. In *TAC* the CC largely retreated from that position, effectively stating that a child’s right to basic health care would be triggered if that child’s parents could not afford such care. In doing so, the CC did not explain how this interpretation of section 28 was consistent with its interpretation in *Grootboom* or what justification there was for reaching a different interpretation. The CC’s difficulty with section 28 indicates that while well-intentioned, imposing different and more concrete constitutional obligations relating to rights such as food, housing and health care in respect of children may lead to complications. This will be particularly so where the provision of a particular service or entitlement to a child cannot be divorced from provision (or non-provision) of that entitlement to the child’s parent.

The Constitution’s formulation of the right to health is less ambitious than that in the Covenant. The Constitution refers to the right to access to health care services, not the right to the “highest attainable standard of physical and mental health.” Also, rather than stating that everyone has the right to, for example, adequate housing, the Constitution refers in section 26 and 27 to rights “to have access to” resources such as health care services. However, these points noted, it is unclear what practical difference they make.

Interestingly, the Constitution appears to provide a lower level of protection for the right to work than the *ICESCR*. While section 22 provides for the freedom of citizens to choose their trade, occupation or profession freely, the Constitution does not require the state to realise progressively the right to work through measures such as training programmes (as provided for in article 6(2) of the *ICESCR*). Neither is there any express reference in the Constitution to the matters set out in article 7 of the Covenant, such as fair wages, safe and healthy working conditions, and limitation of working hours (although at least some of these matters are not doubt captured by section 23’s declaration that “everyone has the right to fair labour practices”).

**4.4 Minimum core**

In *Grootboom* the CC declined to determine what the minimum core of the right to access to adequate housing might consist of on the basis that there was insufficient information before the court to do so. In *TAC*, however, the CC seemed to go further, essentially dismissing the concept as irrelevant to litigation under the Constitution. Importantly, the judgment in *TAC* seemed to be based on a misunderstanding of the concept as elaborated by the CESCR.
In *TAC* the CC found that section 27(1) did not establish a positive right to a minimum core unlimited by resource constraints (i.e. the right in section 27(1) to health care services is limited by the reference to available resources and progressive realisation in section 27(2)). However, as the CESCR stated in General Comment 3 (which was in fact cited in *TAC*), the satisfaction of minimum core obligations under the Covenant is subject to resource constraints. A failure to fulfil a minimum core obligation will indicate that a State party is *prima facie* in breach of the Covenant, placing an onus on the state to demonstrate that it is making every effort to satisfy those obligations as a matter of priority. If the state discharges that onus, it will not be in breach. Therefore, under the *ICESCR* there is no absolute obligation upon the state to satisfy the minimum core, and consequently no right to demand that the minimum core be provided irrespective of resource constraints.

Understood in this way, the concept of minimum core obligations under the Covenant is consistent with the scheme set up under sections 26 and 27 of the *Constitution*. It would also seem to be an important device for promoting concentrated state action in respect of ESCR. Determination by the CC of minimum core obligations under the *Constitution*, in appropriate cases and guided by expert evidence, could positively assist the realisation of ESCR not only nationally but also internationally. This would be the case even if the CC defined minimum core obligations in broad terms.

This is not to deny that determining minimum core obligations would be complex. However, the CC rather seems to have given up without trying. One way forward would be to find that the definition of minimum core obligations by the state in the first instance (subject to review by the CC in concrete cases) constituted a “reasonable measure” that the state must take to comply with sections 26(2) and 27(2). This type of solution would seem to go at least some way to ameliorating the CC’s concerns relating to its proper role and the separation of powers.

### 5 PART IV: CRITIQUES OF THE CC’S JURISPRUDENCE

In this part, I first analyse the cases in which the CC has found against the state. I argue that while the outcomes in *TAC* and *Jaftha* are strongly defendable, the same does not apply to *Grootboom* and *Khosa*. Second, I refer to *Mazibuko* and explain why I consider that it demonstrates some of the key advantages of entrenched ESCR (even though the CC found in the state’s favour), while also suggesting that when assessing an alleged violation some caution is required in taking into account measures the state has adopted subsequent to the filing of proceedings. Finally, I comment on a number of other critiques of the CC’s jurisprudence.
5.1 TAC

The restrictions on nevirapine that were at issue in TAC did appear to be irrational. As the CC pointed out in its judgment, the cost of making the drug more widely available throughout the public sector was minimal. Further, the state’s concerns regarding safety and the possibility of resistance developing to nevirapine appeared to have little to no foundation (or in any event were not relevant to whether a single dose of the drug should be provided at birth).

Although the CC did not dwell on this point, there was a real injustice in the drug being freely available in the private sector to anybody who could pay for it, while being restricted to the minority in the public sector who were fortuitous enough to have access to the pilot sites. While delivery of the comprehensive package would have been ideal, the finding that administration of nevirapine even without any other treatment would prevent transmission in many cases made the state’s position appear illogical. This was especially so given evidence that approximately 70,000 children every year were infected with HIV in South Africa at and around birth.166

Overall, the CC’s judgment is a good example of the critical role that ESCR and judicial supervision of those rights can play in upholding fundamental values, promoting good public administration, and encouraging fairness.167 Most significantly, the CC’s intervention may have assisted in preventing a large number of children from being infected with HIV at birth.168

5.2 Jaftha

The CC’s judgment in Jaftha demonstrates the importance of a right to housing in domestic law. The existence of this right meant that the hardship Ms. Jaftha and Ms. Van Rooyen would experience if they lost their homes was a legally relevant consideration (unlike in Lawson v. Housing New Zealand, discussed in Chapter 2 of this thesis). In taking this hardship into account in its decision, the CC did not

166 TAC, supra note 86 at para. 19.
167 Note that in “Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited” (2007) 29 Hum. Rts. Q. 796, Marius Pieterse argues at 813 that the same result could have been achievable in TAC by “applying common-law administrative law principles.” This seems incorrect. For example, under common law administrative review a court would not have had the jurisdiction to make the orders that the CC made in TAC. Its only jurisdiction would have been to consider whether in deciding to restrict nevirapine’s availability, the relevant decision-maker took into account relevant or irrelevant considerations, erred in law, or acted unreasonably. Even if the court had identified an error, it could only have required the decision-maker to reconsider its decision, and the decision-maker would not necessarily have been prevented from making the same decision again.
168 In “Adjudicating Social Rights”, supra note 34 at 100, Liebenberg states that “[t]here can be little doubt that lives have been saved as a result of the litigation and surrounding mobilization.” See also Pieterse, supra note 167 at 189 who explains that the court’s judgment resulted “in the increased availability of Nevirapine in the public health sector”. He also states, however, that “the successful litigants had to institute contempt-of-court-proceedings to secure a consistent compliance with the order.”
award the right to housing an absolute or overriding status. Instead, the CC fashioned a remedy which reflected and sought to provide a heightened level of protection for the fundamental interests upon which the right to housing is based, while giving due consideration and weight to other significant considerations (such as the interests of creditors and the importance of encouraging debt repayment).

5.3 Grootboom

The *Grootboom* judgment is problematic. Although the respondents were living in awful circumstances, as Yacoob J stated they were “not alone in their desperation; hundreds of thousands (possibly millions) of South Africans live in appalling conditions throughout the country.” \(^{169}\) Also, at paragraph 14 of the judgment, Yacoob J records the High Court’s finding that the state was “faced with a massive shortage of available housing and an extremely constrained budget. Furthermore in terms of the pressing demands and scarce resources [the appellants] had implemented a housing programme in an attempt to maximise available resources to redress the housing shortage.” The CC did not overturn this finding or suggest that it was incorrect.

Instead, the CC’s judgment appears to have been based almost entirely on the fact that the Cape Metro council had developed the AMLSP\(^ {170}\) to respond to crisis situations. From that, the CC seems to have concluded that it was unreasonable not to include such a programme or others like it in the national housing programme. This was despite the fact that it apparently did not have any evidence about whether this could be achieved within available resources, or even what the state’s “available resources” for the purposes of section 26(2) of the *Constitution* were. Nor is there any analysis of the appellants’ submission that expending resources on such relief would detract from the other goals of the national housing programme.\(^ {171}\)

In addition, the CC did not seem to have any evidence about whether such a programme, designed for the circumstances prevailing in the Cape Metro, was required at the national level. Of course, it may well have been. However, the CC seems to have merely assumed this to be the case without any detailed evidence about housing needs in other parts of the country or the way in which the authorities were already responding to those needs elsewhere.

To the extent that the state could provide relief to those in desperate need without compromising what the CC had praised as its “systematic response” to the severe housing shortage in South Africa, then it is

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\(^{169}\) *Grootboom*, supra note 52 at para 80.

\(^{170}\) As defined above, AMLSP stands for “Accelerated Managed Land Settlement Programme”.

\(^{171}\) In this regard, see also Rosalind Dixon, “Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited” (2007) 5 Int’l J. Cont. L 391 at 410-411.
reasonable that it should do so. However, whether this was the case is not clear from the judgment. The court order could have been expected to have significant financial implications for the state and therefore potentially affect the achievement of its already established objectives concerning housing provision. Because of this, one might have expected a more comprehensive analysis of the costs and wider impact of providing temporary relief at the national level based on much more detailed information than what seems to have been before the CC.

Further, Yacoob J apparently did not consider in any depth the way in which the responsible authorities were implementing the national housing programme in the Oostenberg municipality and whether that was reasonable (including whether the authorities were complying with their legal obligations under the housing legislation already in place). This seemed a highly relevant issue, not least because the judge stated that on the evidence before him the municipality may not have complied with applicable housing legislation when it evicted the respondents.172

A narrower inquiry into implementation of the national housing programme may have been useful as it could have allowed a greater focus on the specific circumstances within the municipality. If the municipality was not complying with its legal obligations under the national housing programme already in place, a declaration to that effect combined with an order requiring the municipality to carry out specific, discrete duties may have been of greater assistance to the respondents and those living in the municipality in general. It may also have obviated the need to make a nationally applicable declaration on the basis of arguably insufficient evidence.173

In this respect, it is noteworthy that some four years after the delivery of the Grootboom judgment, the respondents’ living circumstances had improved either only marginally or not at all. It is unclear whether any of them were settled under the AMLSP or provided with permanent accommodation. A newspaper article published in 2004 stated that many of the applicants were living in shacks on land that had been christened Grootboom (and which was part of Wallacedene), with almost non-existent amenities.174 The article also stated that the SAHRC had advised the CC that the state had not fully complied with the court order. Sadly, in 2008 Ms. Grootboom died “homeless and penniless.”175 She was only in her forties.

172 Ibid. at para. 90.
173 A difficulty confronting the CC in this respect was that the respondents based their allegations entirely on ss. 26 and 28 of the Constitution rather than on specific provisions of the HSA (supra note 70) or other applicable legislation. However, given that the CC had jurisdiction to determine whether the state had implemented the measures it had legislated for this difficulty does not seem necessarily insurmountable.
174 See Bonny Schoonakker, “Treated with Contempt” Sunday Times (21 March 2004).
175 Pearlie Joubert, “Grootboom dies homeless and penniless” Mail & Guardian Online (8 August 2008), online: Mail & Guardian Online <http://www.mg.co.za>.
The limited or in some cases non-existent improvement in the respondents’ access to housing following the CC’s judgment is concerning. It suggests that one of real difficulties in the municipality may not be a lack of programmes, but a failure by the relevant authorities to implement them (including the AMLSP) and otherwise to comply with their legal obligations. In this regard, it is unclear why, if the state had failed to comply the CC’s order, the respondents’ lawyers did not seek to enforce the order by issuing contempt proceedings as occurred in the TAC case. Presumably this would have been an avenue that could have been pursued (as it was in the case of the appellants’ failure to provide the “temporary accommodation” promised to and accepted by the respondents during the hearing).

Overall, Yacoob J’s judgment could be accused both of trying to do too much without a sufficient evidential basis and also of doing too little for the respondents. As set out above, the CC found that the AMLSP would have been sufficient to meet the state’s obligations under section 26(2) of the Constitution provided that the programme was implemented reasonably and “with due regard to the urgency of the situations it is intended to address.” Given this, and with the benefit of hindsight, perhaps a better result would have been for the CC to have limited itself to setting aside the order of the High Court as wrong in law for the reasons set out in the judgment; making a finding that the municipality had illegally evicted the respondents and in so doing breached the right to access to housing; and ordering that the municipality pay damages to the respondents on that basis. In addition to awarding damages to the respondents, the CC could have ordered the municipality or the council to implement the AMLSP both in respect of the respondents and generally, and to fulfil the offer made to the respondents regarding the provision of temporary accommodation. Following this, the CC could have retained a supervisory jurisdiction over the municipality’s and council’s compliance with these orders.

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176 In this regard, see Dixon, supra note 171 at 414 to 415, who states that even following Grootboom (citations omitted) “the Cape municipality (one of the respondents in Grootboom ) announced in 2001 a plan to provide formal public housing to the thousands of people living in informal settlements along the road that connects the center of Cape Town with the airport, but it made no progress in implementing the plan for more than four years. In Gauteng, the local and provincial governments announced a plan in 2001 to provide water, sewerage, and electricity within two years to all of the residents living in the area of Diepsloot, an informal settlement just north of Johannesburg, but by July 2004, little progress had been made in providing water, sewerage, or electricity.”

177 Supra note 168. Joubert, supra note 175 records one of the lawyers for the respondents, Ismail Jamie, stating “I am sorry that we didn’t do enough following-up after judgement was given in [Irene Grootboom’s] favour. We should’ve done more.”

178 See Grootboom, supra note 52 at para. 5 in which Yacoob J states: “[S]ome four months after argument, the respondents made an urgent application to this Court in which they revealed that the appellants had failed to comply with the terms of their offer. That application was set down for 21 September 2000. On that day the Court, after communication with the parties, crafted an offer putting the municipality on terms to provide certain rudimentary services.”

179 Ibid. at para. 67.

180 Yacoob J in fact made such a finding at para. 88 of the judgment, but declined to grant relief on that ground as the respondents had not relied upon it in their pleadings.
The CC could also have found that there was a breach of the council and/or the municipality’s obligation in section 26(2) (as opposed to that of “the state” in general) to take reasonable measures due to the AMLSP not being in place at the time that the respondents brought their application. However, such a finding would need to be based on a careful consideration of the actions the council and the municipality were taking (or failing to take) at the time the respondents’ application was filed. Simply because an authority resolves to adopt a particular measure in response to a situation which has developed over time does not mean that the authority has acted unreasonably at all times prior to the adoption of the measure.

Resolving the case in this way would have allowed the CC to grant the respondents a remedy which recognised their situation, the need for its improvement, and the fact that it was their case that was before the court. At the same time, it would have met Yacoob J’s concern that the respondents should not be given a priority over others who were also without adequate housing.\textsuperscript{181} Perhaps, although this cannot be stated with any certainty, closer court supervision may have led to better outcomes for the respondents.

Also, rather than resulting in the CC arguably overextending itself, this method of resolution would have only involved the CC in supervising the implementation of the policy that the council had independently determined as appropriate for the circumstances prevailing in the area under its jurisdiction (a determination with which the CC agreed). To the extent that the council required additional funds from national government to implement its policy, that would have been an issue for the council to resolve (and one which in any case it had presumably considered prior to beginning its implementation of the AMLSP). Finally, this approach would still have allowed other parties who considered themselves to be in similar circumstances to apply to the courts for relief.

5.4 Khosa

The outcome in \textit{Khosa} also seems questionable. The majority judgment’s argument that it was unreasonable to limit social security benefits to citizens was not entirely convincing.

As Ngcobo J established in his partial dissent, there were relatively strong arguments in the policy’s favour. The limitation was not permanent or absolute, as permanent residents could apply for citizenship after five years. Further, the law allowed a permanent resident to apply for citizenship within the five-year period “in exceptional circumstances”; and also made provision for the definition of citizen to be extended in particular cases (something which had in fact been offered to and refused by the applicants, and would have entitled them to the benefits they wished to claim).\textsuperscript{182}

\textsuperscript{181} \textit{Ibid.} at para. 81.

\textsuperscript{182} \textit{Khosa}, \textit{supra} note 107 at paras. 115-118.
Ngcobo J also considered it relevant that countries such as the United States, Canada and Britain denied benefits to non-citizens.\textsuperscript{183} He found that overall the state’s reasons for limiting benefits to citizens (e.g. cost savings and encouraging permanent residents to be self-sufficient and to acquire South African citizenship) were compelling.\textsuperscript{184} Finally, the judge recorded that the applicants had been in South Africa since the 1980s, and could therefore have applied for citizenship but had not done so (nor stated why they had not).\textsuperscript{185} On that basis, the judge would have found the restriction in relation to the social grant benefit constitutional.\textsuperscript{186}

Accordingly, while there were grounds for disagreeing with the policy decision, the argument that the decision was unreasonable as a matter of law seemed harder to make.

In addition, it is arguable that at least the majority analysed the case on the wrong basis. As discussed above, the CC in \textit{Khosa} identified as an issue whether section 36 applied to the rights in section 26 and 27, and if so, in what way. As discussed in Chapter 1 of this thesis, very similar issues arise under the Covenant with regard to the relationship between article 2(1) and article 4.

First, as I argued in Chapter 1, while article 4 of the Covenant should apply to retrogressive measures and other limitations, it does not apply to decision-making by States parties about how or whether to progressively realise a right beyond its current level of realisation. This was because it would seem inconsistent with the more open-ended obligation of progressive realisation to subject every decision by States related to the ongoing development of rights to the article 4 standards.

This analysis would also apply with regard to the progressive realisation of the section 26 and 27 rights. Imposing the section 36 criteria on top of the section 26(2) and 7(2) reasonableness requirement would seem inconsistent with the apparent decision to allow the South African state a wide margin of discretion with regard to progressive realisation. Accordingly, an answer to the CC’s query regarding the applicability of section 36 to sections 26(2) and 27(2) would be that it has no application where the issue is whether the state has acted reasonably by deciding not to realise a particular right further in one way or the other.

Second, in \textit{Khosa} Mokgoro J analysed whether the exclusion of permanent residents from benefits was consistent with the section 27(1)(c) right of “everyone” to access to social security and with the state’s obligation under section 27(2). However, the issue in \textit{Khosa} was not whether the state had taken

\begin{itemize}
\item \textsuperscript{183} \textit{Ibid.} at para. 124.
\item \textsuperscript{184} \textit{Ibid.} at paras. 126 and 130.
\item \textsuperscript{185} \textit{Ibid.} at para. 131.
\item \textsuperscript{186} \textit{Ibid.} at paras. 134 and 135. Ngcobo J agreed that the state’s concession that the restrictions in relation to the child support benefits were unconstitutional was properly made.
\end{itemize}
reasonable measures to realise the right to social security progressively. Instead, it was whether permanent residents were entitled as a matter of law to the benefits that the state had made available to citizens. Indeed, the argument of the state was not that it had taken sufficient measures to meet its obligation of progressive realisation in respect of the right to social security of permanent residents. Its argument was that permanent residents were not constitutionally entitled to the benefits in question.\textsuperscript{187}

That being the case, the issue was whether the state’s differentiation between permanent residents and citizens was justifiable (or put another way, whether the state’s limitation of the right to citizens was inconsistent with the \textit{Constitution}). Given that, section 27(2) was not engaged at all. This reasoning would seem to be reinforced by the fact that the CC did not find that the state also had an obligation to take reasonable measures to extend the benefits in issue over time to other groups, such as temporary workers.

The only relevant consideration for the CC, therefore, should have been whether the state’s differentiation satisfied the section 36 criteria (assuming that the reference to “unfair discrimination” in section 9 refers to differentiation which does not meet the requirements of section 36). While the application of section 36 instead of the reasonableness criteria in section 27(2) may not have made any difference to the outcome of the case, it would have been the correct course to follow as a matter of law.\textsuperscript{188}

Finally, the CC’s identification of this issue indicates that if there is both a general limitations clause and specific obligations of progressive realisation in a constitution, it may be desirable to state expressly whether the limitations criteria apply to rights which are subject to progressive realisation; and if so, in what way.

\subsection*{5.5 Mazibuko}

In \textit{Mazibuko}, the CC upheld the policy of the City of Johannesburg and its company, JWL, regarding water supply. As the judgment stresses, this case illustrates how entrenched ESCR can positively affect policy. As part of their response to the litigation, the City and JWL continued to improve their policy based upon the constitutional right to sufficient water and the corresponding rights set out in the WSA. Such improvements must have benefited Johannesburg residents.

\textsuperscript{187} \textit{Ibid.} at para. 50. Mokgoro J states: “The state did not suggest that the exclusion of permanent residents was a temporary measure, nor did it argue that the exclusion was an incident of attempts by it progressively to realise everyone’s right of access to social security. The state’s case is rather that non-citizens have no legitimate claim of access to social security […]”

\textsuperscript{188} In his partially dissenting judgment, Ngcobo J assessed the limitation primarily from the perspective of s. 36 (\textit{ibid.} at para. 113 of the judgment). However, the judge also considered that s. 27(2) was relevant to the case (see para. 102 of the judgment).
In future policy design, whether about water supply or other matters which affect constitutional rights, the possibility that litigation may be brought should contribute to ensuring that constitutional rights are taken into account in policy formulation and implementation, and that efforts are made to cater for those rights. It also seems reasonable to conclude that the potential for litigation would incentivise policymakers to ensure that their decisions are evidence-based so that they may be justified in court if necessary. Indeed, South African scholars have acknowledged “the positive impact of the Constitutional Court’s socioeconomic rights judgments on the formulation and implementation of socioeconomic policies and [have commended] the manner in which these judgments have lent credibility to the state’s social reform efforts […].”

However, some of O’Regan J’s comments regarding the City and JWL’s modification of the policy at issue could be interpreted as suggesting that an original breach or unreasonableness arising from a particular act or omission may be cured by progressive development or improvement over time (even during proceedings). If this was suggested, it would appear incorrect. In general terms, the fact that an originally unreasonable measure has been improved would seem to be relevant to whether there was an ongoing violation (or conversely whether the state was continuing to meet its obligation of progressive realisation) and to assessing the damages arising from any violation. It would not, however, seem to be relevant to whether a violation had occurred at all.

### 5.6 Further critiques of the CC’s jurisprudence

There are many other critiques of the CC’s jurisprudence. I address a number of these in more detail below.

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189 Pieterse, supra note 167 at 810. Prior to the enactment of the Constitution, in “Beyond a Charter of Luxuries: Economic Rights in the Constitution” (1992) 8 S.A.J.H.R 464 at 471, Etienne Mureinik argued that entrenched and judicially reviewable ESCR would “improve the quality of government, because any decisionmaker who is aware in advance of the risk of being required to justify a decision will always consider it more closely than if there were no risk. A decisionmaker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully discard all the alternatives to the decision contemplated.”

190 O’Regan J did not in fact make such a finding in Mazibuko. The judge accepted that the applicants were entitled to a determination regarding lawfulness of the policy as it was at the time proceedings were issued. Her finding was that the impugned policy was reasonable at all relevant times.

191 See, for example, Pieterse, supra note 167 (which includes summaries of other critiques levelled by scholars against the court’s work in relation to ESCR); and Liebenberg, “Adjudicating Social Rights”, supra note 34 at 90 to 91. For a specific critique of the CC’s judgment in Soobramoney, supra note 41, see Craig Scott and Philip Alston, “Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney’s Legacy and Grootboom’s Promise” (2000) 16 S.A.J.H.R. 206. Their discussion of the Grootboom case is, however, limited to the High Court judgment. The article was published before the CC’s judgment was released.
5.6.1 Lack of rights definition

A common complaint appears to be that the CC’s reasonableness review does not give the section 26 and 27 rights sufficient content. This complaint seems justified. The CC has done little to articulate the scope of the Constitution’s ESCR and this is arguably a failing of its jurisprudence to date. Greater definition of each right’s content by the CC (in appropriate cases and on the basis of expert evidence) would assist people to understand what their rights are and to demand them. It would also provide useful guidance for the authorities responsible for realising the rights. Finally, additional definition of the rights would also seem critical in ensuring that alleged violations are properly adjudicated upon.

Definition of the rights beyond what is expressly stated in the Constitution would increase certainty. In the case of rights subject to progressive realisation, it would also provide the state, the public and the judiciary with identifiable criteria against which to measure that realisation. The risk of the CC trespassing on the prerogatives of the legislature and executive in undertaking this task would be low. While further definition of the rights by the CC would assist the state to determine the ultimate objectives in relation to ESCR, it would still be largely for the state to resolve how to achieve those objectives and the pace at which to achieve them.

Precise definition of what would constitute full realisation of each constitutionally guaranteed ESCR may not be desirable. For example, in Mazibuko the applicants submitted that the CC should declare that “sufficient water” for the purposes of section 27(1)(b) meant 50 litres per person per day. The CC declined this invitation. One of the reasons that O’Regan J gave for this refusal was that fixing a specific quantity might result in undesirable rigidity, as needs might vary over time and context. This seems a sensible response, especially because the amount of water required to meet the guarantee of “sufficient water” is likely to be affected by the identity of the right-holder. For example, an individual’s entitlement will be less than that of a university and could well be less than that of a company (depending on the company’s size).

However, the CC could define further rights such as the right to sufficient water without engaging in precise quantification of what would amount to full realisation. For example, there would seem to be no reason why the CC should not articulate at a broad level the content of the right to sufficient water as the CESCR has done in its General Comment 15 (which sets out requirements such as availability, quality, non-discrimination and accessibility). One way of doing this would be to make express findings that

192 See, for example, Pieterse, supra note 167 at 812.
193 Mazibuko, supra note 145 at 51.
194 Ibid. at 57.
elements of the WSA definitions (e.g. the references to quality and quantity sufficient to support life and personal hygiene) constituted part of the constitutional right. The CC could then consider whether there were any other elements that should be included. Further, establishing a minimum core on the basis of expert evidence of the right to sufficient water in relation to natural persons should not be a task beyond the CC. While what constitutes full realisation could fluctuate, the essential minimum that a person requires would seem much less likely to change.

The CC could also set out, once again in broad terms, the elements of other rights such as the right to adequate housing (minimally defined in *Grootboom*) or the right to social security. Clearly, the CESC’s General Comments on these rights would be relevant to such a task, as would any definitions of such rights in national legislation. Indeed, it is surprising that the CC did not mention General Comment 4 on the right to housing in *Grootboom*196 nor General Comment 14 on the right to health197 in TAC.

At this stage, however, the CC seems reluctant to assume such a role. In *Mazibuko* O’Regan J considered that “ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right.”198 This was “in the first place” a task for the legislature and the executive who were “best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.”199 O’Regan J also stated that the Constitution’s rights would acquire content through the state adopting measures to realise them, with the courts having jurisdiction to assess the reasonableness of the state’s determination of that content.200

There are a number of difficulties with these statements. First, while the CC or other courts may not frequently order the state to take certain measures to realise a right (although in some cases such as TAC they will have to do so), a court adjudicating on a section 26(2) or 27(2) claim should have an understanding of what constitutes the range of reasonable measures that could be taken to realise the right in question. If it does not, the court’s assessment of the reasonableness of the measures adopted by the state will take place in something of a vacuum.

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196 As discussed above, the CC did refer to General Comment 4 (*supra* note 137) in *Jaftha* (*supra* note 124). However, this was primarily to emphasise the importance of security of tenure. The CC did not otherwise discuss the extent to which the CESC’s statements in that Comment were applicable in South Africa.
198 *Mazibuko*, *supra* note 145 at 61.
Second, deciding whether the state has taken reasonable measures is a separate issue from determining a right’s scope or content. O’Regan J’s approach seems not to recognise this and to collapse what should be a two-stage inquiry into a single inquiry. Rather than assessing the scope of the right in sections 26(1) or 27(1), and then moving to assess the reasonableness of the state’s measures under sections 26(2) or 27(2), O’Regan J appears to suggest that stage 1 might be largely abdicated to the state, with stage 2 being only concerned with assessing the reasonableness of the state’s measures to achieve whatever definition it has adopted of the right.

O’Regan J does say that the judiciary will be able to assess the reasonableness of the state’s determinations regarding the content of any particular right. However, this does not seem to take into account the possibility that the state may have not attempted to define for itself what a certain right requires. Even if the state has done so, it is once again unclear how the reasonableness of its definition could be properly and fully evaluated without the court itself making at least a broad determination of what the right means. Finally, and to go full circle, how can the court assess the reasonableness of the state’s measures if it has not made some decision for itself about what the scope of the right is?

While attempting to determine precisely and definitively the scope of each constitutionally guaranteed ESCR may be beyond the CC’s capacity and in any event undesirable, establishing at least the parameters of each right to a greater extent than the CC has already done seems highly important. By not doing this, the CC arguably deprives itself and others of external and independent standards against which to assess the state’s conduct.

These points made, it seems unlikely that the above considerations have escaped the CC. The judgment in TAC, for example, must have been influenced by an understanding of what the CC considered the right to access to health services to require. The same applies to Mazibuko and even more so to Grootboom. Articulating that understanding in greater detail would not result in the CC taking over duties properly reserved for the legislature or executive; indeed, it must have been contemplated that the broadly drafted constitutional rights would have to be further defined by the courts. Rather, it would make the CC’s decision-making more transparent and its precedents easier to follow in subsequent cases and in the design of policy.

### 5.6.2 “Failure” to require the provision of entitlements

Another criticism of the CC’s jurisprudence is that it does not lead to the imposition of an obligation on the state to provide a particular entitlement. This complaint fails to take into account cases such as

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201 See, for example, Pieterse, supra note 167 at 812.
In \textit{TAC} and \textit{Khosa}, the CC’s order required the state to provide nevirapine more widely than it had done, and in \textit{Khosa}, the order required that social security benefits be made available to permanent residents.\(^{202}\) This critique may also be grounded in what could perhaps be characterised as an unrealistic expectation about the differences that such rights could make in a society with significant and ongoing problems and the powers of a court to relieve those problems.\(^{203}\) In this regard, the role that the entrenchment of ESCR has had in highlighting iniquities, in improving policymaking, and in inciting academic and popular discussion of and engagement with ESCR (all of which may be expected to improve the CC’s jurisprudence over time and the profile of ESCR within South Africa) also sometimes seems to be underemphasised.

\section*{6 \hspace{1em} PART V: THE REASONS FOR INCLUDING ESCR IN THE CONSTITUTION}

The preamble to the \textit{Constitution} makes it clear that one of the \textit{Constitution’s} main purposes is the transformation of South African society. The CC has also expressly recognised the \textit{Constitution’s} transformative aims in judgments such as \textit{Soobramoney}.\(^{204}\)

The entrenchment of ESCR was seen by its proponents as having a critical role to play in this process.\(^{205}\) Those in favour of constitutionally recognised ESCR included the African National Congress, which argued that the acknowledgement of ESCR as basic and enforceable human rights (subject to progressive realisation) would have a critical role to play in overcoming not only “poverty such as you might find in any country, but [also in responding] to the social indignities and inequalities created as a direct result of

\footnotesize\begin{itemize}
\item \(^{202}\) In this regard, see Liebenberg, “Adjudicating Social Rights”, \textit{supra} note 34 at 84.
\item \(^{203}\) For example, Pieterse, \textit{supra} note 167 at 810 states that some scholars “have largely expressed disappointment with the failure of the Court’s jurisprudence in this area to live up to the transformative potential of the rights that it claims to vindicate”; and at 812 that the court’s inquiry is “neither concerned with evaluating the vitalness and urgency of socioeconomic needs, nor necessarily demanding their satisfaction.” However, as Liebenberg, “Adjudicating Social Rights”, \textit{supra} note 34 at 90 recognises, “[t]he Court’s preference for systemic programmatic and legislative remedies probably has its origin in the prevalent difficulty in adjudication of ensuring that the relief given to particular litigants is not inequitable to other social groups or results in unforeseeable distortions in social and economic planning.”
\item \(^{204}\) See also the judgment of Ngcobo J in \textit{Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism Ltd and Others}, [2004] 7 B. Const. L.R. 687 (S. Afr. Const. Ct.) where the judge stated the following at para. 74: “The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one ‘in which there is equality between men and women and people of all races’. In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it. […]”
\item \(^{205}\) Liebenberg, “Adjudicating Social Rights”, \textit{supra} note 34 at 75.
\end{itemize}
State policies under apartheid." In addition, others argued that inclusion of ESCR in the Constitution was vital for ensuring its legitimacy and longevity. As Haysom wrote:

“[F]or a constitution to have a meaningful place in the hearts and minds of the citizenry, it must address the pressing needs of ordinary people. It cannot be seen to institutionalise and guarantee only political/civil rights [...] it must promise both bread and freedom. If it does not do so, it will find no lasting resonance amongst the true guardians of the constitution-which are not the courts but the citizens.”

There was, however, considerable opposition to the entrenchment of ESCR in Constitution from some quarters. Indeed, the South African Law Commission went so far as to state that constitutionally protected ESCR would “prove to be judicially futile, and may plunge the country into a serious political crisis.”

Ultimately, however, the Constitutional Assembly responsible for drafting the Constitution decided that entrenched ESCR did have a place in the new constitutional order and included them in the text submitted to the CC. This decision survived the certification process; as discussed above, the CC dismissed submissions that the inclusion of ESCR was contrary to the Constitutional Principles set out in the Interim Constitution.

Since its entry into force, the Constitution has been amended sixteen times. None of those amendments have been to the Constitution’s provisions on ESCR.

7 CONCLUSION

The inclusion of ESCR in the Constitution is entirely consistent with its transformative objectives. A failure to recognise the fundamental interests that stand behind ESCR at a constitutional level would have

206 ANC Constitutional Committee, A Bill of Rights for a New South Africa (Belville: Centre for Development Studies, 1990) at ix.
207 Nicholas Haysom, “Constitutionalism, Majoritarian Democracy and Socio-Economic Rights” (1992) 8 S.A.J.H.R. 451 at 454 (emphasis in original). In this regard see also Mureinik, supra note 189 at 465, who describes those in favour of giving constitutional status to ESCR as arguing that “[a] bill of rights containing only first-generation rights would be perceived to be elevating luxuries over necessities, and that would discredit it as a charter of fundamental values. In the mind of the majority, it would make the bill of rights a charter of luxuries.”
209 Chanock, supra note 208 at 417.
diminished the Constitution’s status as the embodiment of the new South Africa. The absence of ESCR would have left it incomplete.

In drafting the constitutionally guaranteed ESCR, the Constitutional Assembly was clearly inspired by the Covenant and the way in which its rights are expressed. However, the drafters of the Constitution did not simply copy from the Covenant. Where they deemed it necessary to formulate a right differently to ensure that it would function in the particular circumstances prevailing in South Africa, they did so. This shows that a concern about ESCR because of the way that they are expressed in the ICESCR does not need to be a reason for not giving effect to such rights in national law. While any expression of ESCR in national law must be consistent with their nature, a legislature retains a wide discretion to choose the definitions that are most appropriate for its country’s circumstances.

The fears that granting ESCR a supreme law status in South Africa would lead to disaster have not materialised. Neither have the courts been flooded with claims. Instead, constitutionally entrenched ESCR have had beneficial impacts not only in particular cases but also in policymaking.

South Africa’s ESCR jurisprudence will continue to develop over time, assisted by the considerable national and international debate it inspires. It will also remain an important point of reference for other jurisdictions and international law. The judgments of South Africa’s courts on ESCR claims provide further evidence that courts can and should have a role in protecting ESCR. In addition, they allow others to analyse and discuss on a more informed basis what that role should be, where the difficulties lie, and how they should be remedied.
Chapter 6
A Critique of the Opposition to ESCR

1 INTRODUCTION

In this chapter, I critique a series of arguments that have been advanced against the recognition of ESCR as human rights. I do not attempt to do this comprehensively, as this task has already been carried out by other scholars. Instead, I focus on what appear to be the principal contentions in the field and explain why they are mistaken or overstated.

In Part I, I discuss assertions that ESCR undermine or are incompatible with CPR, and that because ESCR require resources for their realisation, they are lesser rights than CPR. In Part II, I consider arguments that the indeterminate nature of ESCR makes them unsuitable for adjudication, that providing judges with jurisdiction over such issues is contrary to democratic principles, and that courts are ill-equipped for such adjudication. I conclude in Part III by setting out some of the main benefits that can flow from ESCR litigation; benefits which those who oppose ESCR generally overlook in their critiques.

2 PART I: A THREAT TO CPR OR SECOND-CLASS RIGHTS?

Various commentators have argued that ESCR pose a threat to CPR or that they are lesser rights than CPR. These positions appear to be advanced on a range of fronts, a number of which I critique below.

2.1 The risk of ESCR weakening CPR

Neier contends that if strong CPR are to be maintained, these rights must mean exactly the same thing everywhere in the world. In the case of ESCR, however, “if you are talking about one country with extensive resources and one that is very poor, there is not going to be the same right to shelter or to health care.” Where the interests that ESCR represent are concerned, this is appropriate because “countries should deal with these matters in different ways depending upon their resources.” However, in Neier’s view, it is dangerous to “introduce the idea” that human rights may be guaranteed at different levels depending on a state’s development because “it is not going to be possible to prevent that from carrying

3 Ibid. at 3.
over into the realm of civil and political rights.” States such as China or Zimbabwe (the two examples Neier uses) could rely on such an argument to justify a failure to provide the same CPR as are provided in a developed country. Neier’s position therefore is that recognition of “so-called economic and social rights” as human rights puts CPR at risk.

Neier’s argument is flawed in various ways. First, and even though Neier was writing in 2006, he ignores the fact that progressive realisation was introduced as a legal concept at least as long ago as 1976 (that being the year that the ICESCR entered into force) and there are now 160 States parties to the Covenant. The concept cannot now be withdrawn. More importantly, in the 34 years since the Covenant entered into force the risk to which Neier refers does not seem to have materialised.

Second, if China, Zimbabwe or any other state were to make an argument along the lines that Neier fears, the principal issue would be whether the state in question was bound by any international CPR instruments such as the ICCPR. If it were, then the simple response would be that the ICCPR does not recognise resource limitations as a legitimate justification for failing to ensure the rights set out in it. At the same time and depending on the state in question and the prevailing circumstances, the international community could accept that while resource limitations may not provide a legal justification for insufficiently guaranteeing CPR, resources are required to realise such rights (a point I return to below). To the extent that the international community wished, for example, that the state improve its court system or the conduct of its police force so they were more consistent with CPR, the international community could consider making resources available to the state for those purposes.

Third, Neier’s argument is based upon a false premise about the nature of CPR. CPR do not have the same meaning in every state, and their meaning evolves over time. In response to an argument similar to Neier’s regarding the allegedly invariable or absolute nature of CPR, van Hoof states:6

> “Although the [European Convention on Human Rights] applies to a region consisting of a comparatively homogeneous group of States, it has nevertheless been interpreted by the European Commission and the European Court of Human Rights so as to deny the existence of a uniform European standard applicable to all cases. In other words, the fact that the content given to a particular right or freedom protected by the Convention may deviate markedly from one contracting State to the other has not been judged to be incompatible with the Convention.”

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4 Ibid.
5 Ibid. at 2.
Holmes and Sunstein also point out that the scope of the rights of suspects, accused and incarcerated persons under the United States’ Constitution “contract and expand as the American judiciary is sometimes more, sometimes less deferential toward the executive branch’s war on crime.”\(^7\) They note that the Rehnquist Court\(^8\) reinterpreted and reduced many of the criminal procedure rights that the Warren Court had established.\(^9\) In relation to the constitutional guarantee of free speech in the First Amendment to the Constitution, Holmes and Sunstein state that\(^10\) “[t]he meaning of free speech in the United States began to evolve in the 1790s and has been developing ever since. Its scope, at any given time, has always depended upon changing interpretations by a changing Court.”\(^11\)

Finally, rather than promoting strong CPR, Neier’s position that CPR must mean the same in every place risks reducing the level at which those rights have to be guaranteed to the lowest common denominator. As Blanchard J recognised in Taunoa \textit{v. Attorney-General} (a New Zealand case concerning degrading and inhumane treatment of prisoners), more may be required of particular countries than internationally recognised minimums. In the judge’s words:\(^12\)

> “First, the application of ss 9 and 23(5) \[of the New Zealand Bill of Rights Act 1990\] to particular cases will be influenced by the jurisprudence under the overseas human rights instruments. But in some instances a New Zealand court may consider it appropriate to require of New Zealand authorities a higher standard of behaviour than might have been required in the case in question under, for instance, the ICCPR. That is because, in this country, more may be required of persons in authority than adherence to minimum standards that can realistically be applied and enforced internationally.”

This is of course very similar to the understandings and expectations that inform the concept of progressive realisation under the \textit{ICESCR}.

\(^7\) Stephen Holmes and Cass R. Sunstein, \textit{The Cost of Rights} (New York: W.W. Norton & Company, Inc., 1999) at 81-82. See also Cass R. Sunstein, \textit{The Second Bill of Rights} (New York: Basic Books, 2004) at 123, where Sunstein lists a large number of dramatic changes in the meaning of the United States Constitution over the years. For example, he states “[i]n 1900, it was clear that the Constitution permitted racial segregation. By 1970, it was universally agreed that racial segregation was forbidden. In 1960, the Constitution prohibited sex discrimination. By 1990, it was clear that sex discrimination was almost always forbidden. […] In 1910, the Constitution prohibited maximum hour and minimum wage laws. By 1940, it was clear that the Constitution permitted maximum hour and minimum wage laws.”

\(^8\) The United States’ Supreme Court under Chief Justice William Rehnquist (1986-2005).

\(^9\) The United States’ Supreme Court under Chief Justice Earl Warren (1953-1969).

\(^10\) Holmes and Sunstein, \textit{supra} note 7 at 110.

\(^11\) In this regard, note also Elias CJ’s judgment in Taunoa \textit{and Ors v. Attorney-General and Anor} [2007] NZSC 70 [“Taunoa”] in which the Chief Justice stated at para. 93 (citations omitted): “What amounts to inhuman treatment evolves. It turns on ‘today’s … concepts’. It would accordingly be wrong to be categorical about types of treatment that may amount to a breach of s 9 or art 7, as indeed the [United Nations] Human Rights Committee has declined to be.”

\(^12\) \textit{Ibid.} at para. 179.
2.2 ESCR may introduce compromise into CPR adjudication

Neier also contends that ESCR are dangerous because in his view they legitimate trade-offs in the area of human rights. ESCR do this because “you can only address economic and social distribution through compromise.” Similar to his argument set out above, Neier’s concern is that putting ESCR and CPR “on the same plane”\(^\text{13}\) will lead to compromise also being acceptable where CPR are concerned. Neier argues:

“[…] compromise should not enter into the adjudication of civil and political rights. I do not want a society to say that it cannot afford to give individuals the right to speak or publish freely, or the right not to be tortured. Instead, I want to be able to argue as strenuously as possible for these rights and say it does not matter what your other concerns are.”

Neier’s position seems to be based upon a misunderstanding of both ESCR and CPR. First, ESCR are not simply matters for negotiation. Indeed, the whole point of affirming ESCR as legally binding human rights is to attempt to ensure that they have a priority over less fundamental interests. While it is the case that the obligations of States parties under the \(\text{ICESCR}\) are flexible to a degree, all States parties are obliged to take steps to realise progressively the recognised rights within maximum available resources, not to discriminate, and not to adopt unjustifiable retrogressive measures. Most states could not justify a failure to meet at least minimum core obligations in respect of those rights.

Further, the extent to which ESCR may be limited due to resource constraints or outweighed by other priorities depends on which ESCR one is considering. For example, the right to basic education free of charge under the Finnish Constitution constitutes a guaranteed minimum. If it is not provided, the Finnish state will be in breach of the Constitution. The same applies to the right to indispensable subsistence and care under the same document.

Second, it is clear that even in relation to certain CPR, it cannot be argued that all “other concerns” do not matter. In the case of some rights, such as the right to freedom of expression, certain restrictions will be permissible. For example, under the \(\text{ICCPR}\) the right of a person to speak freely may be balanced against and even outweighed by other interests.\(^\text{14}\) In addition, recognising that such limitations are possible in relation to some CPR does not detract from the non-derogable nature of other CPR, such as the right not to be subjected to torture. Any action which is inconsistent with a non-derogable right will be

\(^{13}\) Neier, \textit{supra} note 2 at 3.

\(^{14}\) Arts. 19(2) and (3) of the \textit{ICCPR} provide: “2. Everyone shall have the right to freedom of expression […]. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.”
unjustifiable, and the fact that certain restrictions may be legitimate where other CPR are concerned will be irrelevant.

Accordingly, it is highly unlikely that the general recognition of ESCR as human rights (something which has already occurred to a significant extent, including in countries such as South Africa which recognise immediately applicable CPR and progressively realisable ESCR in the same constitution) could lead to compromise being acceptable in relation to CPR to any greater extent than is already permissible. That this is the case is emphasised by the fact that Neier does not cite a single instance in which any of the issues he raises have actually materialised.

### 2.3 ESCR as second-class rights

A further argument against ESCR, that such rights do not have the same qualities as CPR and therefore cannot share an equal status with them, relies on similar claims to those which Neier makes. Essentially, the reasoning appears to be that ESCR create positive obligations which cannot be realised in the absence of adequate resources. The resource dependency of ESCR means they cannot be guaranteed in full and at all times, and their content will differ from state to state according to each state’s resources. In contrast, CPR are allegedly absolute or invariable and only impose negative duties. Rather than requiring the state to provide, they simply require it to refrain from certain acts. The negative nature of CPR means that they are cost-free (or are very low cost) and that they can be “equally ensured in all countries, rich or poor [...]”. Because of these differences, ESCR either cannot be classified as human rights or are “second-class rights”.

I have already addressed above the idea that CPR are invariable. Further, as discussed in the previous chapters of this thesis, it is difficult to delineate neatly between the two categories of rights (some rights can be classified both as ESCR and CPR), and ESCR have negative aspects as well as positive aspects. For example, the obligation to respect ESCR requires the state not to interfere unjustifiably with a person’s enjoyment of their ESCR. I now turn to the contention that CPR are only negative rights which do not require positive action by the state for their realisation. It is demonstrably incorrect.

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16 Van Hoof, supra note 6 at 103 (explaining this line of argument).

17 That said, even the obligation not to interfere may require positive action. In the absence of legislation and a court system, how could it be determined whether a state has interfered unjustifiably with a protected ESCR or not?
The fact is that all rights including CPR have positive elements. All rely upon publicly funded institutions to create the conditions in which they can be realised. All require the taking of positive measures, including the enactment of legislation, monitoring, and enforcement.\footnote{Holmes and Sunstein, supra note 7 at 44.}

For example, the electoral rights in section 12 of the \textit{New Zealand Bill of Rights Act 1990} [NZBORA] cannot be exercised in the absence of adequately supervised elections paid for with public funds.\footnote{See in this regard Vierdag, supra note 15 at 82.} The minimum standards of criminal procedure set out in section 25 of the NZBORA, including the right to a fair and public hearing by an independent and impartial court, require the establishment and maintenance of a costly court system. The section 24(f) right of a person charged with an offence to receive legal assistance without cost “if the interests of justice so require”, and if the person does not have access to sufficient funding, cannot be realised in the absence of a legal aid system.\footnote{See also Langford, supra note 1 at 30.} The right of prisoners to be treated humanely and with respect for their dignity, as set out in section 23(5) of the NZBORA, requires significant expenditure to ensure that prison guards are adequately trained and minimum standards (e.g. of cleanliness, medical care, and food) are maintained in prison.\footnote{In “Reclaiming Economic, Social and Cultural Rights” (1993) 1 Waikato L. Rev. 141 at 152-153, Paul Hunt provides a table setting out the New Zealand Government’s expenditure on various CPR. Although Hunt’s table is not exhaustive and dates from 1993, it nonetheless illustrates that “the realisation of civil and political rights is neither a cost-free exercise nor one requiring only modest state expenditure.” Hunt estimates a total expenditure of $NZ213.32 million, including $NZ59.51 million on “Administrative Services to Courts and Tribunals”, $NZ49.11 million on “Administration of Court Sentences of Imprisonment” and $NZ56.60 million on legal aid.} The protection of rights such as the right to property (not expressly guaranteed in the NZBORA but otherwise provided for in a range of other legislation) require the establishment and ongoing funding of not only the courts and the prisons but also a police force.\footnote{See further Holmes and Sunstein, supra note 7 at 60-64 discussing the costs of property rights in the United States. Amongst other figures, the authors cite the following: “In 1992, direct expenditures in the United States for police protection and criminal corrections ran to some $73 billion […]” Note also that the current Minister of Finance in New Zealand, Bill English, recently forecast that the Department of Corrections would become the largest government department in New Zealand in two or three years in terms of the number of directly employed employees, outstripping the Ministry of Social Development and the Inland Revenue Department. This was because Corrections was going to have to employ more staff to cope with an expected increase in the prison muster. In addition, stating that the Ministry of Justice, the Police and Corrections would need “to find” $400 million from their existing budgets in the next three years to cope with the projected increase in the muster, the Minister warned that costs would continue to rise if more punitive justice measures were implemented. The Minister was quoted as stating: “Every time you ask for harsher penalties, that shortfall gets bigger. You are part of the driver of the costs. Lock another person up that’s another $90,000 (a year) plus another $250,000 capital (spending).” See Derek Cheng, “Corrections to become monster department” \textit{New Zealand Herald} (2 July 2010), online: New Zealand Herald <http://www.nzherald.co.nz>.}

\footnote{See also Langford, supra note 1 at 30.}

Indeed, although lack of political will plays an important role, resource and capacity constraints in developing states mean that there are considerable difficulties in guaranteeing CPR and many other rights to the same level as they are guaranteed in developed states. This point informs Blanchard J’s reasoning
(referred to above) that states such as New Zealand may be held to higher than minimum international standards. There are also inequalities in this respect within developed states, and all over the world, the wealthy are better able to protect and enforce their rights than the poor.\textsuperscript{23} As a result, CPR are imperfectly realised in many if not all places.\textsuperscript{24}

Accordingly, the characterisation of ESCR as purely positive and CPR as purely negative is erroneous. It cannot provide a basis for denying ESCR an equal status with CPR.\textsuperscript{25}

Finally, it seems perverse to use cost or the degree of difficulty in realising a particular interest as the determining factors of whether that interest qualifies as a human right. The principal issue in any such evaluation must instead be whether the realisation or protection of the interest is necessary for the preservation of human dignity. Of course, the cost of guaranteeing the interest and the differing ability of states to do so will be relevant considerations and may indicate that an interest is not in fact fundamental. Such considerations cannot, however, be conclusive. If they were, very few interests could be defined as human rights.

### 2.4 A threat to individual liberties?

In “Economic, Social and Cultural Rights: Time for a Reappraisal”, Robertson argues that the ESCR set out in the \textit{ICESCR} are incompatible with “individual liberties”. He states:\textsuperscript{26}

“At the deepest level it is evident that the thinking underlying the pursuit of economic and social rights is based on a view of society as an organisation designed and directed for specific purposes. This is clearly inimical to a free society which does not itself have any purpose beyond providing a secure framework for individuals to pursue their own purposes. A free society in which interactions were determined freely by the actors might or might not result in the aims described as ‘economic and social rights’. To (attempt to) ensure that such aims are achieved, the free society must be replaced to some extent by a directed society in

\textsuperscript{23} Holmes and Sunstein at 119 and 128-130.

\textsuperscript{24} \textit{Ibid.} at 129. Holmes and Sunstein state: “Exorbitant information costs sometimes make the price of protecting even the most precious rights prohibitively high. Although the right to be free from unreasonable searches and seizures is constitutionally guaranteed [in the United States], it is violated every day in practice. The politics of budget-making is one reason why. Not only is the right to private property financed by the community, but the indisputably nonabsolute character of that right is a function of, amongst other factors, cost. What would it take to ensure that the rights of owners were never violated? The degree to which property rights are actually enforced varies with historical circumstances, political resolve, and state capacities, including meagre or bountiful state revenues.”

\textsuperscript{25} See also Langford, \textit{supra} note 1 at 30-31. As Langford contends, while it may be argued that some ESCR require greater expenditure for their realisation than CPR, this is “a matter of degree rather than substance.” One might also argue that the greater the amount of public funds involved, the greater the need there is for rigorous checks and balances, including a jurisdiction for the courts.

which individuals are compelled to channel at least some proportion of their efforts to the achievement of goals which they have not freely chosen. [...] 

[It will become clear from this paper as the rights enumerated in the ICESCR [sic] are examined, that many, as conventionally interpreted, can only be achieved at the expense of restricting corresponding individual liberties.”

Robertson further proposes that “literature on the right to property clearly demonstrates that the pursuit of economic and social rights is incompatible with the enjoyment of this classical right.”

There are five central difficulties with Robertson’s arguments. First, ESCR are already realised to a considerable extent in many countries including New Zealand. Such realisation has not prevented the enjoyment of strong property rights in New Zealand or in other countries such as the United Kingdom, Australia, Canada, and Finland. Indeed, the recognition of ESCR as well as a right to property in the Finnish and South African Constitutions demonstrates that these rights are not incompatible.

Second, Robertson does not identify any right recognised by the ICCPR (which represents the international community’s consensus on what are the fundamental civil and political liberties) which ESCR would limit or restrict. Therefore, it is difficult to understand why he considers that the realisation of ESCR necessarily leads to the restriction of any individual liberty recognised internationally as a right.

Third, it is not clear that there are points of conflict between the ICESCR and the ICCPR properly interpreted and implemented. If a State party to both instruments were to attempt to realise a right in the ICESCR in a way which violated the ICCPR, the ICCPR’s derogation and limitation provisions would not permit such action. For example, a State party could carry out its obligation to monitor under the ICESCR (discussed in Chapter 1 of this thesis) in a way which conflicted with an individual’s right to privacy under article 17 of the ICCPR (e.g. by gathering information about individuals in an overly intrusive or unreasonable way or failing to protect an individual’s personal information adequately). However, while this could occur, the ICESCR would not require or mandate such action, and it would in any case be impermissible under the ICCPR.

Fourth, Robertson does not provide any comprehensive definition of what he means by a “free society”. More importantly, however, the society the international community set as a standard in the ICCPR and

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27 Ibid. at 71.
28 See arts. 4(1) and 5(1) of the ICCPR.
the ICESCR is not a “free society”, but a democratic society.\textsuperscript{30} In a democratic society, the party or parties in power direct the state for specific political purposes, within limits established by law. That is what they are elected to do. Further, the government of the day almost inevitably requires individuals to contribute to goals that they do not freely choose. Indeed, it could only be otherwise if a party were elected to government with 100% support from the population, and that total support continued throughout the party’s entire period in office.

Fifth, while the ICESCR does require the state to redistribute wealth in certain cases, this already occurs to a greater or lesser extent in every society with a system of taxation (which also provides the funding for the “secure framework” to which Robertson refers). One of the reasons for this redistribution is to increase the freedom of those requiring assistance.\textsuperscript{31} The widespread existence of this type of redistribution in developed states demonstrates that it is commonly considered as a legitimate restriction on the right to property.\textsuperscript{32} Therefore, in requiring redistribution where that is necessary to realise ESCR, with redistribution in any case being subject to the Covenant’s limitation provisions, the ICESCR does not introduce any novel restriction.

Finally, the ICESCR does not require a State party to redistribute wealth in a way which would, assessed objectively, destroy or significantly impair the generative capacity of the society as a whole (in fact it would prohibit such action). Instead, it requires concentrated action focused on the realisation of ESCR. A strong public sector is vital for achieving this goal, as is, at least in the case of New Zealand, a strong private sector. A combination of the two is perfectly permissible under the ICESCR.

2.5 Summary

The opposition to the recognition of ESCR as human rights discussed above is based on not only a misunderstanding of ESCR but also of CPR. It relies on a caricature or misrepresentation of ESCR which is then contrasted with a largely incorrect and unsophisticated account of CPR. No evidence is offered to

\textsuperscript{30} For evidence of this, see for example arts. 14(1), 21, 22(1), and 25(b) of the ICCPR, and arts. 4, 8(1)(a), and 8(1)(c) of the ICESCR. Art. 13(1) of the ICESCR refers to education which enables “all persons to participate in a free society”. However, this is best interpreted as a reference to a democratic society.

\textsuperscript{31} See Jonathan Boston, “Redesigning New Zealand’s Welfare State” in Jonathan Boston and Paul Dalziel, eds., The Decent Society? Essays in Response to National’s Economic and Social Policies (Auckland: Oxford University Press, 1992) 1 at 9, who argues: “An alternative argument might be that a large public sector increases the degree of coercion and reduces liberty […].” But no evidence supports this proposition. Many countries with small state sectors are highly illiberal, while many of those countries with large state sectors, such as Germany, Norway and Sweden, are amongst the most democratic and liberal in the world. To be sure, a higher level of public expenditure requires more tax revenue to be raised, and this in turn implies less freedom for those who are forced to pay. However, if the additional revenue facilitates greater redistribution to the poor, this will enhance the freedom and opportunities of those who gain.”

\textsuperscript{32} In this regard, it is also noteworthy that as Robertson points out (supra note 26 at 71), the ICCPR does not recognise a right to property.
demonstrate that ESCR have caused the difficulties to which Neier and Robertson refer, despite their widespread recognition in instruments such as the Covenant, national constitutions and ordinary legislation. Accordingly, such opposition is of little substance.

3 PART II: ESCR AS JUSTICIABLE RIGHTS?

I now discuss some of the central arguments against recognition of ESCR as justiciable rights.

3.1 Too vague or indeterminate?

One of the principal allegations made against ESCR is that they are too vague or indeterminate to be suitable for adjudication in a court. What, for example, constitutes “adequate” housing? What does a state have to do to meet its obligations in respect of the right to social security? What level of education is sufficient to comply with the right to education?

While some of these issues may well be complex (and appear even more so in the abstract), resolving them is not beyond the capacity of a court. A court adjudicating upon such issues would not be doing so in a vacuum, but rather against a set of facts and within a national and international context. Many interpretative aids would be available to the court, some of which I now discuss, and a national ESCR jurisprudence would develop over time. In addition, as I explore in more detail below, CPR are also indeterminate but are nonetheless justiciable in many jurisdictions. The same applies to many other justiciable legal concepts set down in ordinary legislation. Once these factors are taken into account, the argument that ESCR are too indeterminate to be justiciable appears weak.

3.1.1 Interpretative aids

3.1.1.1 The CESCR’s General Comments

The work that the CESCR has done its General Comments on most of the rights set out in the ICESCR has been directed precisely at addressing the types of questions set out above. Through its General Comments the CESCR has given considerable guidance to States parties regarding the nature of their obligations under the Covenant. In adjudicating on, for example, an allegation that a state has breached

33 See Scott and Macklem, supra note 1 at 45 (explaining the argument, and then rebutting it).
34 As Scott and Macklem argue (ibid. at 73-84 (citations omitted)): “Moreover, the fact that social rights suffer from a lack of precision should not be overstated. Over the past decade, the United Nations has invested considerable energy in developing the idea of a multilayered obligations structure that may potentially be generated for any right, whether it be a civil liberty or a social right.” Scott and Macklem were also writing in 1992. Since that time, there has been considerable normative development of ESCR, by the CESCR and other United Nations institutions, such as the Special Rapporteurs, by national courts, and through the work of academics.
the right to adequate housing, a court could receive important guidance from the CESCR’s General Comment on that right.

### 3.1.1.2 Domestic legislation and parliamentary materials

If a court had jurisdiction to consider an allegation that, for example, a breach of the right to adequate housing had occurred, this would be because legislation to that effect had been enacted in domestic law (unless perhaps the state’s legal system were monist). In considering how to formulate such rights in domestic legislation, the legislature would have had to consider international definitions of the rights and relevant jurisprudence from other jurisdictions, as well as any national standards applicable to the rights or the interests and values which they represent. The legislature’s work in this respect (the *travaux préparatoires*, or in New Zealand’s context, parliamentary materials such as select committee reports and parliamentary debates), including the records of its decision-making and the reasons why it adopted a particular formulation, would then be available to any court having to interpret such rights following their enactment. The parliamentary materials could provide important indications to the court regarding the legislature’s intentions as to the rights’ content.

Further, in enacting such legislation, there would be nothing preventing the legislature from defining ESCR in greater detail than they are defined in, for example, the *ICESCR*. As well as being the approach Brazil adopted in respect of some of the social rights guaranteed in its Constitution, this has been done in relation to some CPR in New Zealand. For example, rather than simply affirming the right to a fair trial and nothing more, section 25 of the *NZBORA* sets out “minimum standards” of criminal procedure. These minimum standards include the right to a fair and public hearing by an independent and impartial court; the right to be tried without undue delay; and the right to be presumed innocent until proved guilty according to law. There is no reason why such minimum standards could also not be devised and listed in respect of the right to adequate housing, or for other ESCR, such as the right to social security or education. Doing so would clarify the nature of the rights and their scope.

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35 See, for example, the rights to education (arts. 6 and 205-214) and social security (arts. 6 and Chapter 2 of Part VIII) of the Brazilian Constitution.

36 S. 25 of the *NZBORA* also affirms the following rights: “(d) The right not to be compelled to be a witness or to confess guilt: (e) The right to be present at the trial and to present a defence: (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution: (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty: (h) The right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both: (i) The right, in the case of a child, to be dealt with in a manner that takes account of the child’s age.”
3.1.1.3 Expert evidence and national and international standards

As in any litigation, a court adjudicating upon an allegation of ESCR breach would no doubt hear expert evidence. In the case of, for example, an allegation that the state had violated the right to education, the court could receive expert evidence on what constitutes adequate education both nationally and internationally (similar to the evidence regarding special education led in the New Zealand case Attorney-General v. Daniels, discussed in Chapter 2 of this thesis). The court could also be guided by standards already in place, such as those set out in ordinary legislation concerning education and applicable guidelines or policy.

Further, if the allegation was not that the state was failing to fulfil a protected right, but was failing to protect it or respect it (e.g. a case similar to Lawson v. Housing New Zealand, also discussed in Chapter 2, or Jaftha, discussed in Chapter 5), the nature of the court’s inquiry could simply be whether the impugned action or omission affected the plaintiff’s right by diminishing the level at which the plaintiff enjoyed that right; and if so, whether the action or omission was justifiable. In such a case, the level of the plaintiff’s enjoyment of the right (a simple factual inquiry) would provide the relevant standard against which to consider whether the state’s action affected the right or not. If it did, the second stage of the inquiry would require the court to apply the type of limitations analysis that many courts have applied in respect of measures which limit CPR (and which the South African Constitutional Court applied in Jaftha in respect of the right to adequate housing in the South African Constitution).  

Hunt provides a useful example of how national standards already in place could guide a court adjudicating on ESCR. He states:

“In April 1991, the New Zealand Government introduced cuts in welfare. According to the Human Rights Commission, the reduced rates brought some beneficiaries below the Treasury’s own ‘income adequacy’ levels. If New Zealand law provided that individuals have a right to an adequate standard of living, why could a court not declare that the cuts were unlawful because they violate this right? No doubt, among the evidence before the court would be the Treasury’s ‘income adequacy’ figures.”

\[37\] In Chapter 2 of this thesis, I provide an example of how such a limitations analysis could have been carried out in Lawson v. Housing New Zealand had there been a justiciable right to adequate housing.

\[38\] Hunt, supra note 21 at 156 (citations omitted). Hunt goes on to argue at 156-157 that in such a case “[t]he role of the court would not be to formulate economic or other policies; it would be to ensure the government initiative was consistent with previously agreed social rights. Such a function is not conceptually different from a court deciding whether or not prison overcrowding violates the prohibition against ‘cruel and unusual punishment’; or whether a ministerial decision is ultra vires for Wednesbury unreasonableness.”
3.1.1.4 Jurisprudence

The content of newly entrenched or constitutionalised ESCR could initially be relatively uncertain. However, over time the nature of the rights and their scope would be clarified (as is occurring in South Africa and Finland, for example), and certainty would progressively increase as it does following the introduction of any new law. In this regard, Scott and Macklem point out:39

“The specific shape and contour of a right is the result of years of repeated applications of practical reasoning to facts at hand. The lack of precision associated with many social rights should not be held up as a justification for their nonentrenchment. On the contrary, nonentrenchment is to a very large extent the reason for the lack of precision. Historical, ideological, and philosophical exclusions of social rights from adjudicative experience have resulted in a failure to accumulate experience that would render the imprecision of social rights less and less true as time goes on.”

3.1.2 CPR may also be vague or indeterminate

While it is the case that the scope of ESCR may be uncertain, the same is true of CPR. In the abstract, the content of the right to freedom of expression and the extent of permissible limitations upon it are no clearer than, for example, the right to social security.40 Obviously, if a court were now to consider whether a particular action or omission violated a person’s right to freedom of expression, determining the content of that right would be more straightforward than deciding the scope of the right to social security. However, that would only be because the court could draw on extensive international and

39 Scott and Macklem, supra note 1 at 72-73. In an article written in 1978, Vierdag (supra note 15 at 95) concluded that the ESCR in the Covenant “were of such a nature as to be legally negligible.” This was because Vierdag considered that amongst other matters it was unclear that the Covenant’s art. 2(1) obligations could be “sufficiently determined.” In a response to Vierdag, van Hoof points out that (supra note 6 at 102) “this would seem to be putting the cart before the horse. Once it has been established that rules are legally binding, as are those contained in the treaty like the Covenant, they cannot readily be assumed to be empty shells. Rather, (international) lawyers should first try to deduce whatever obligations may be found from the rules concerned, even if these are vaguely formulated. To the extent that this is not possible, efforts should be made to elaborate more detailed rules and have them accepted by the States concerned. Finally, if the system of implementation pertaining to the rules concerned proves unsatisfactory, ways and means should be sought in order to enhance its effectiveness. If such a point of departure is not adopted, the allegedly negligible legal nature of rights such as those contained in the economic, social and cultural rights Covenant is likely to be made into a self-fulfilling prophecy.”

40 Langford, supra note 1 at 30. In this regard, see for example, Etienne Mureinik, “Beyond a Charter of Luxuries: Economic Rights in the Constitution” (1992) 8 S.A.J.H.R 464 at 469 who argues: “The reach of most constitutional rights, even those of the first generation, is far from self-evident. Consider again freedom of speech. Would the constitutional entrenchment of that right prohibit a law that restrained defamatory speech? On the face of it, such a law would appear to conflict with freedom of speech. But does it follow automatically that the law would be struck down?” See also Jeremy Waldron, “A Right-Based Critique of Constitutional Rights” (1993) 13 Oxford J. Legal Stud. 18 at 26 who states that: “[…] First Amendment doctrine in America is concerned to the point of scholasticism with the question of whether some problematic form of behavior that the State has an interest in regulating is to be regarded as ‘speech’ or not. (‘Is pornography speech?’ ‘Is burning a flag speech?’ ‘Is topless dancing speech?’ ‘Is pan-handling speech?’ ‘Is racial abuse speech?’ and so on.)”
perhaps national jurisprudence regarding the right. It would not be because the right to freedom of expression is inherently more certain than the right to social security.

Even CPR which on their face seem capable of straightforward definition, such as the right not to be subjected to torture, degrading treatment or other inhumane treatment,\textsuperscript{41} may in fact give rise to difficult questions of interpretation. For example, in \textit{Taunoa v. Attorney-General}, Elias CJ stated:\textsuperscript{42}

\begin{quote}
“There is no simple test for whether conditions amount to inhuman treatment. As the words used suggest, treatment which does not comply with s 9 [of the \textit{NZBORA}] must be seriously deficient. It must be ‘grossly disproportionate’ rather than merely ‘excessive’. [...] The assessment of severity is contextual. In application to sentenced prisoners, it depends upon such considerations as: whether the measures seriously diminish human dignity because they are not ‘necessary’, whether the measures go beyond what is inherent in a legitimate form of treatment or punishment, and whether it is a purpose of the treatment to debase or humiliate.”
\end{quote}

The complexity of the tests to which Elias CJ refers is emphasised by the fact that reasonable persons may disagree on the results of applying them. In \textit{Taunoa v. Attorney-General}, there was considerable divergence between the opinions of the Supreme Court justices on whether the conduct in question constituted torture or cruel treatment.\textsuperscript{43} Similarly (but in relation to a different case), Goldstein states that “\[i\]n practice, interpreting such otherwise undefined terms as ‘cruel, inhuman or degrading punishment’ poses such difficulties that charges of British use of torture in Northern Ireland in 1971 were unanimously confirmed in a 1976 decision of the European Commission of Human Rights but rejected by thirteen to four vote in 1978 by the European Court of Human Rights.”\textsuperscript{44} That these sorts of disagreements can occur even in relation to the right not to be tortured or cruelly treated demonstrates that the scope of many if not all CPR remains fluid and open to interpretation.

Of course, establishing that not only ESCR but also CPR may be indeterminate to a degree does not mean that the issue disappears. If one’s position is that courts should not be empowered to review state action

\begin{footnotes}
\textsuperscript{41} See ss. 9 (which states “[e]veryone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment") and 23(5) (which provides that “[e]veryone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person") of the \textit{NZBORA}. See also art. 7 of the \textit{ICCPR}.

\textsuperscript{42} Taunoa, supra note 11 at para. 91 (citations omitted).

\textsuperscript{43} See the judgment of Elias CJ at paras. 95 and 105 (finding that all the appellants had suffered a breach of their s. 9 rights); the judgment of Blanchard J, who makes the opposite finding in respect of all but one of the appellants (at paras. 215 and 216); and the judgments of Tipping and McGrath JJ, who considered that none of the appellants had been victims of a s. 9 breach (at paras. 275, 283, 341 and 362) (all in Taunoa, supra note 11). Note that the issue of whether the impugned conduct violated s. 23(5) of the \textit{NZBORA} was not formally before the Supreme Court (although all of the Supreme Court justices stated that they agreed s. 23(5) had been violated). The lower courts had found that such violations had occurred and there was no appeal from those findings.

\end{footnotes}
and legislation against broadly defined human rights standards, then the fact that the scope of both ESCR and CPR can be uncertain is not a strong argument for justiciable ESCR. On the other hand, however, if it is accepted that CPR should be justiciable, then the same status cannot be denied to ESCR on the grounds that the latter are vague or open-ended.

Finally, it is worth noting that tests the courts have developed for determining whether certain conduct breaches a CPR (devised on the basis that the terms in which the particular right is expressed in the applicable legal instrument offer an insufficiently detailed standard against which to judge the impugned conduct) do not seem far removed from the type of tests that could be applied to assess an allegation of ESCR breach. For example, in *Taunoa v. Attorney-General* Elias CJ stated:

“The ‘minimum level of severity’ looked to by the European Court is met for the purposes of the Eighth Amendment if the treatment results in the ‘deprivation of a single, identifiable human need’. It is met if conditions of imprisonment, alone or in combination, ‘deprive inmates of the minimal civilised measure of life’s necessities’ according to the ‘contemporary standards of decency’. In Canada, too, measurement by contemporary standards of decency has been used by the Supreme Court. So, in Smith (a case of excessive penalty), the Supreme Court approved the test earlier proposed by Laskin CJ that whether punishment is cruel and unusual within the meaning of the Charter turns on ‘whether the punishment prescribed is so excessive as to outrage standards of decency’. These measures I consider are appropriate too in considering the application of s 9 of the New Zealand Bill of Rights Act.”

If a court can determine whether certain treatment breaches the right not to be subject to cruel or degrading treatment by applying “contemporary standards of decency”, there is no reason why a court could not decide whether, for example, a person’s housing met “contemporary standards” of adequacy. Indeed, deciding what such contemporary standards were in relation to housing could be a considerably more objective exercise than determining what constituted prevailing standards of decency. There must also be little to no conceptual difference between “the minimal civilised measure of life’s necessities” and minimum core obligations under the Covenant.

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45 Against such a position, note Langford’s argument (*supra* note 1 at 30 (citations omitted)) that “[...] it is arguable that ‘open-textured framing’ of all human rights is to be favoured: ‘courts are able to respond adequately to individual circumstances and historical developments in concretising their meaning over time.’”

46 In this regard, see Professor John Smillie, “Who Wants Juristocracy?” (2006) 11 Otago L.R 183 at 191 and 193. The Professor’s primary position is that the NZBORA should be repealed and the New Zealand Parliament should “take care not to fall into the trap again of attempting to regulate behaviour by enacting vague open-ended standards that leave judges with virtually unconfined discretion at the point of application.” However, the Professor’s alternative position is that if the NZBORA is to be retained it should include ESCR.

47 *Taunoa*, *supra* note 11 at para. 92 (citations omitted).

48 In “Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?” (2004) 98 Am. J. Int’l L. 462 at 464, Michael J. Dennis and David P. Stewart state: “[ESCR] present genuinely different and, in many respects, far more difficult challenges than do civil and political rights. However arduous it may be to determine in practice when
3.1.3 Uncertainty in New Zealand domestic legislation

In addition to the CPR set out in the NZBORA, New Zealand domestic legislation already recognises a wide range of indeterminate but nonetheless justiciable legal concepts. I provide two examples below.

Section 6 of the Resource Management Act 1991 [“RMA”] requires all persons exercising functions and powers under the Act “in relation to managing the use, development, and protection of natural and physical resources” to “recognise and provide for”, amongst other matters, the “preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development.”

In determining an allegation that section 6 has been breached, the presiding court must resolve a wide range of matters which are open to interpretation and often highly contested. These include what constitutes the relevant “environment” in relation to a specific proposed development, the state of that “environment” including its “natural character”, which national or regional standards or other planning instruments regarding the coastal environment are relevant, and how such standards affect the case in question. Also, the court often has to take into account expert evidence regarding the impact of the proposed development on the “environment”. This evidence may conflict, and when this occurs the court is required to decide which evidence it prefers. However, despite these uncertainties and complexities, the New Zealand courts have decided numerous cases involving this section.

The same applies to areas of competition law. For example, section 47(1) of the Commerce Act 1986 provides: “A person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.” In any case concerning an allegation that, for example, a company will breach section 47(1) if it acquires a certain business, the court has to determine what constitutes the relevant “market”. The court must also make a hypothetical comparison between the likely state of competition should the acquisition proceed and the certain rights—for example, freedom of expression, or freedom of thought, conscience, and religion—are sufficiently protected, it is a much more complex undertaking to ascertain what constitutes an adequate standard of living, or whether a state fully respects and implements its population’s right to education or right to work. Vexing questions of content, criteria, and measurement lie at the heart of the debate over ‘justiciability’, yet are seldom raised or addressed with any degree of precision.” For the reasons set out in the main text (both above and below), I disagree. Further, it seems problematic to state that there is a lack of precision on one side of the debate while at the same time basing one’s argument that ESCR are more complex than CPR on a highly abstract assertion.


50 For examples of some of the highly complex issues that can arise in applying s. 6 of the RMA and the way in which the courts have dealt with them, see Freda Pene Reweti Whanau Trust v. Auckland Regional Council (9 December 2005) CIV-2005-404-356 (N.Z.H.C.) at paras. 61-84.

51 Commerce Act 1986 (N.Z.), 1986/5 [“Commerce Act”].
likely state of competition if it does not.\textsuperscript{52} All of these matters are abstract to a degree, subject to interpretation, and usually cannot be resolved without expert evidence from economists (and experts may and do disagree). Nevertheless, none of these apparent difficulties have proved insurmountable. The courts have resolved allegations of breach of section 47(1) on multiple occasions.\textsuperscript{53}

Given that the courts have been able to determine litigation regarding rights and obligations such as those set out in section 6 of the \textit{RMA} and section 47(1) of the \textit{Commerce Act}, there is no reason to think that they could not do the same in relation to ESCR.

\textbf{3.2 The legitimacy and capacity of courts to adjudicate on ESCR}

It has also been contended that courts are not the appropriate forum for determining whether a state is complying with its obligations in relation to ESCR.\textsuperscript{54} This argument is advanced on the basis that there is not necessarily one right way to realise ESCR;\textsuperscript{55} and many competing considerations need to be taken into account in making decisions about which interests to prioritise and how scarce public resources should be allocated at any particular point in time. These decisions, which are ultimately matters of social and economic policy, are properly for elected representatives. They have access to better information than would the courts, as they can draw on the expertise of the state bureaucracy. Further, if the electorate does not agree with their representatives’ decisions, they can vote them out of office.

Judges on the other hand are not elected in most states and are therefore generally not responsible to voters. This means that they should not have the power to dictate to government how it should spend taxpayer dollars. Indeed, providing judges with such a jurisdiction is contrary to democratic principles as it breaches the separation of powers. Further, state decisions concerning ESCR and any judgments on those decisions will almost always affect many more people than those before the court. This means that if courts are given jurisdiction to adjudicate on ESCR, they will have to consider impacts on third parties and attempt to factor them into their judgments. However, judges are not experts in policy and in any proceedings the principal role of the court is to decide the dispute between the parties. Accordingly, courts are institutionally ill-equipped for ESCR adjudication.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{52} See, for example, \textit{New Zealand Bus Limited and Ors. v. Commerce Commission} [2007] NZCA 502 at para. 47 [“\textit{New Zealand Bus}”].
\item \textsuperscript{53} See for example, \textit{New Zealand Bus}, supra note 52, \textit{Woolworths Limited and Ors v. Commerce Commission} (29 November 2007) CIV 2007-485-1255 (H.C.), and the authorities referred to in those judgments.
\item \textsuperscript{54} See, for example, Neier, \textit{supra} note 2 at 1-2 and Langford’s description and critique of these arguments (\textit{supra} note 1 at 31-37).
\item \textsuperscript{55} Mureinik, \textit{supra} note 40 at 466-467.
\item \textsuperscript{56} See Langford, \textit{supra} note 1 at 30-31 and Scott and Macklem, \textit{supra} note 1 at 43-47.
\end{itemize}
I critique this line of argument below. I first consider the nature of ESCR review. I then discuss the degree to which courts already have jurisdiction to make orders which require state expenditure and which may have effects on third parties, and the ways in which such effects may be brought to the court’s attention in a specific case. Because the extent to which a court adjudicating upon ESCR may be seen as taking over functions traditionally reserved for the legislature or executive depends in large part on the remedies the court is empowered and chooses to grant, I also consider the remedies that could be available for ESCR violations. I conclude by noting that issues relating to the capacity and legitimacy of courts to undertake ESCR adjudication may be of less relevance in the New Zealand context than they are in a supreme law system.

3.2.1 The nature of ESCR review

In any case in which it is alleged that an act, omission or law violates justiciable ESCR, the role of a court is likely to be one of evaluating the impugned conduct or law against the standards of the relevant right; or, where the issue is whether a limitation to a particular right is justified, against any applicable limitations provision. In either scenario, the court’s role would be to review what the state had chosen to do or not to do against a legal measure enacted by the legislature. Accordingly, the court would be acting principally as a reviewer of either state policy or law as opposed to acting as a policy or lawmaker.

The differences between these roles can be illustrated by discussing a number of hypothetical cases stated by Neier. The author puts forward these scenarios to support his argument that certain issues which concern ESCR can only be resolved through the political process, and that the allocation of a society’s resources “should not be settled by some person exercising superior wisdom, who comes along as a sort of Platonic guardian and decides this is the way it ought to be.” Neier reasons:

“One person needs a kidney transplant to save her life, another needs a heart-bypass operation, and still another needs life-long anti-retroviral therapy. All of these are life-saving measures, but they are expensive. Then there is the concern about primary health care for everyone. If you are allocating the resources of a society, how do you deal with the person who says they need that kidney transplant or that bypass or those anti-retroviral drugs to save their life when the cost of these procedures may be equivalent to providing primary health care for a thousand children? Do you say the greater good for the greater number, a

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57 Of course, whether this would be the case in any particular state would depend on the form in which ESCR were recognised in that state’s domestic legislation.
58 Mureinik, supra note 40 at 470.
59 Neier, supra note 2 at 2.
60 Ibid.
utilitarian principle, and exclude the person whose life is at stake if they do not get the health care that they require? I do not believe that is the kind of thing a court should do.”

Once again, Neier’s analysis appears to stem from a misunderstanding. In relation to the first issue he raises, namely choosing between whether to fund a kidney transplant, a heart-bypass operation or anti-retroviral therapy, it would not be for a court to make any primary decision about which interest to prioritise. In any specific case, a state authority would have already made a decision which would then come before the court by way of a challenge brought by an affected person or persons. Also, in a particular case (at least in a developed state) it seems reasonable to assume that the court would not be reviewing a decision to fund one of the three treatments. Instead, the main issues would likely be whether the relevant authority’s decision to fund only a certain number of each was justifiable and whether the decision not to fund the treatment required by the plaintiff or plaintiffs was justifiable in terms of the right to health as recognised in domestic law.

There is no reason why a court could not evaluate both of these decisions, applying an appropriate margin of discretion. At the broadest level, the court’s inquiry would be whether the relevant authority’s policies were consistent with the right to health of the plaintiff or plaintiffs; that right being defined in the context of the right to health of all other rights-holders. Although it is impossible to say in the abstract what all of the relevant considerations would be in such an assessment, the court could consider factors such as whether the policies were fair (e.g. non-discriminatory), rational and rationally applied to the plaintiffs (similar to the approach South Africa’s Constitutional Court took in Soobramoney and TAC).

In engaging in such an inquiry, it is reasonable to assume that the court would recognise that resources were limited, that difficult decisions had to be made, and that such decisions should generally be left to administrators (in relation to deciding how best to spend the funds allocated) and medical professionals (in relation to deciding who should get treatment). However, if for example the evidence before the court demonstrated that the authority was funding 50 kidney transplants but only 10 courses of anti-retroviral therapy, the court could require that the authority explain its rationale for that allocation of funds, given its limiting effect on the right to health of affected individuals. Alternatively, if the evidence demonstrated that a plaintiff or plaintiffs had been denied treatment while other patients had received it, the court could evaluate the reasons for that denial in light of all the relevant circumstances. In doing so, the court would be carrying out standard judicial functions.

In relation to the second issue that Neier raises regarding prioritising between expensive procedures and primary health care, the nature of any inquiry by a court into such issues would be likely to be essentially

61 Of course, a legislature could specifically grant the courts such a jurisdiction, but this would be highly unusual.
the same as that described above. A court would no doubt be reluctant to interfere in the executive’s decision-making regarding how much funds to allocate to different areas of the health sector or to health services overall. That said, if for example evidence before the court demonstrated that the state was funding numerous expensive treatments while sectors of the population were without primary health care, then a prima facie issue would arise about whether the state’s conduct was consistent with the right to health of the population not in receipt of primary health care. The court could review the state’s justification for such resource allocation as well as the steps that the state was taking to address the needs of those who did not have access to primary health care. This review could be undertaken with reference to, for example, the elements of the right to health set out in the CESCR’s General Comment 14, such as availability and accessibility, and the minimum core obligations imposed by that right.

If, once again applying an appropriate margin of discretion, the state could not provide a rational justification for its failure to fund primary health care, the court could require the state to remedy the situation (I discuss the types of remedies courts may be empowered to award in ESCR cases below). Provided that the court exercised its remedial discretion with care, it is difficult to see why such a result would be undesirable or improper. To the contrary, the ability to invoke judicial review in such a situation would seem entirely appropriate given the interests at stake. Rather than acting as a “Platonic guardian”, the court would be exercising democratically conferred powers to protect fundamental interests, following a finding that the state’s executive institutions were not adequately recognising or protecting those interests. This is of course the role that many courts have in relation to CPR.

3.2.2 State expenditure

Decisions which courts make in determining allegations of ESCR violations may require the state to make additional expenditure. The outcome in the Khosa case (in which the South African Constitutional Court found that the state’s decision to exclude permanent residents from eligibility for certain benefits

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62 In General Comment 14, 22nd Sess. E/C.12/2000/4 (2000) at 4, the CESCR defines this element as follows: “Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party’s developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.”

63 The CESCR defines “accessibility” as including, amongst other matters (ibid): “Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:
   (i) Non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds. […]”

64 Ibid. at 12-13.
breached the constitutional right to social security)\(^{65}\) is an example of this. The effect of the judgment was to make all permanent residents eligible for the benefits in question. This meant that the state would have had to make available the resources required to assess any applications by permanent residents for such benefits and would have had to pay the benefits to those who met the relevant criteria. These resources would not then have been available for other purposes.

However, the reality is that this situation will arise whenever a court issues an order which requires state expenditure. Many courts already have the jurisdiction to make such orders in relation to CPR, a point the South African Constitutional Court emphasised in the Certification judgment discussed in Chapter 5 (indeed, the outcome in Khosa could have been reached by relying solely on the prohibition against unfair discrimination).\(^{66}\) For example, courts are often empowered to award damages against the state for CPR breach, and those damages have to be paid from public revenue. Judgments that states have unreasonably delayed bringing an accused to trial placed “incentives on the state to increase the capacity of the judicial system by building new courts and hiring extra judges and staff.”\(^{67}\) Decisions upholding the right to due process have “increased the costs of administrative tribunals immensely.”\(^{68}\) To ensure the rights of prisoners “[c]ourts have ordered that prisons be built to relieve overcrowding and that committees be established to carry out programs of institutional reform laid down by the courts.”\(^{69}\)

The effect of all of these judgments was to require the state to direct resources to the fulfilment of rights which could not then be applied to other purposes. Indeed, in most jurisdictions with justiciable CPR such expenditure is required even in the absence of specific judgments: the state must expend resources to realise guaranteed CPR so that it can reduce the risk of costly proceedings being brought against it.

\(^{65}\) See Chapter 5 for a discussion of this case.

\(^{66}\) See also Northern Regional Health Authority v. Human Rights Commission [1998] 2 N.Z.L.R. 218 (H.C.). In this case, the health authority (a Crown-funded body whose responsibilities included purchasing health services on behalf of the public) implemented a policy according to which it declined to contract with general practitioners [GPs] who did not have New Zealand undergraduate medical qualifications. One of the main reasons for the policy was the authority’s concern that there were too many GPs in its region, and that it needed to limit its expenditure on GP services. According to the authority, it would have incurred some $80 million in additional expenditure had it not implemented the policy. The New Zealand High Court, however, found that the policy breached the right to freedom from discrimination on the grounds of national origin and was therefore unlawful. The court considered that the authority could achieve its aims through other non-discriminatory methods (i.e. viable alternatives were available which would not lead to human rights violations) and accordingly the indirect discrimination that the policy caused was unjustifiable. Clearly, the judgment could have had important financial ramifications for the authority and required it to expend public funds that it could have otherwise allocated elsewhere.

\(^{67}\) Scott and Macklem, supra note 1 at 48. See further their discussion of judgments of the European Court of Human Rights regarding the obligations of the state to ensure the timely administration of justice (both in civil and criminal settings).

\(^{68}\) Ibid. at 50.

\(^{69}\) Ibid. at 61.
Judges also make orders in other areas of law which require the expenditure of public funds. Holmes and Sunstein state that in the United States, “[w]ithout paying serious attention to possible alternative uses of scarce taxpayer dollars, for instance, American judges regularly compel big-city governments to dole out millions of taxpayers’ dollars in tort remedies.” The same point would apply in relation to tort remedies in New Zealand or indeed to any other remedy with financial implications that a court orders against the state. Finally, as discussed in Chapter 2, in New Zealand judges are already able to adjudicate upon aspects of ESCR under legislation such as the *Injury Prevention, Rehabilitation, and Compensation Act 2001* [IPRCA]. They often issue judgments under that legislation which have cost implications for the state.

Accordingly, the jurisdiction that courts already have in relation to CPR and other legal rights specifically envisages that unelected judges will make orders which require the state to expend funds. This is presumably because of the legislature’s decision (whether through a positive act of legislation or a decision not to overturn any relevant common law) that the rights in question are of such importance that provision must be made to meet their costs notwithstanding other demands on public resources. This logic is plainly applicable to ESCR.

### 3.2.3 Taking into account effects on third parties

Judgments which have the effect of altering law or policy or which require the state to expend resources may indirectly affect third parties. However, at least in common law jurisdictions which operate on the basis of precedent, judges are accustomed to considering how their interpretations of the law and any remedy they order in the context of a specific dispute may affect all other persons subject to the law or with relevant interests. Further, there are various ways in which judges can be assisted in this task. In a case concerning ESCR, the state would no doubt bring evidence regarding such effects or interests, including expert evidence. Other parties with relevant interests could also be permitted to participate in the proceedings. This occurs regularly in, for example, resource management litigation in New Zealand where the effects of a proposed development or other use of resources may affect the legally recognised

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70 Holmes and Sunstein, *supra* note 7 at 225.
72 In this regard, see also Herman Schwartz, “Do Economic and Social Rights Belong in a Constitution?” (1995) 10 Am. U. Int’l L. & Pol’y 1233 at 1236 who comments that “[…] some social rights that require courts to order affirmative remedial measures involve only traditional judicial functions. The right to safe working conditions is a good example. Courts [in the United States] enforce this right all the time in statutory, common law, and even constitutional cases.”
73 See also Lon L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harv. L. Rev. 353, who states at 397: “There are polycentric elements in almost all problems submitted to adjudication.”
interests of parties other than the developer and the relevant state authority. The court could also appoint amicus curiae, as the South African Constitutional Court did in TAC and Mazibuko.74

In addition, if the court considered that it could require additional expertise, whether to resolve the dispute before it satisfactorily or to be certain that it had given due consideration to the potential wider effects of its decision, expert lay members could be appointed to assist the court (or legislation could provide that in any ESCR case there must be at least one lay member on the bench). Provisions to this effect already exist in New Zealand in relation to litigation under the Commerce Act75 and the Human Rights Act.76

In some ESCR cases, the court’s decision-making regarding what remedy to award if it finds a violation could involve more complex considerations than in others, particularly because of the potential repercussions for third parties. Grootboom, in which the South African Constitutional Court had to design a remedy for litigants whom it had found to be victims of a rights-violation without granting them an unfair priority over others also in desperate need, is an example of such a complicated case. However, in any particular case the risk of significant error will be reduced if the court is aware of the difficulties and takes them into account to the greatest extent possible in determining an appropriate remedy. As courts are generally trusted to make reasonable determinations regarding remedies in all other adjudication, there is no reason why they should not be similarly trusted in relation to ESCR.77

74 Of course, the greater the number of parties before the court and the larger the volume of evidence, the longer and more resource intensive any particular trial will be. However, as Langford points out (supra note 1 at 35), “the volume of evidence and the time of trial [in ESCR cases] pale in comparison to cases in the area of corporations, anti-trust or property law.”

75 See ss. 77 and 78 of the Commerce Act, supra note 49. S. 77 requires amongst other matters that a person appointed as a lay member under the Act be “qualified for appointment by virtue of that person’s knowledge or experience in industry, commerce, economics, law, or accountancy.”

76 S. 126 of the Human Rights Act 1993 (N.Z.), 1993/82 [“HRA”] states that in certain cases, matters brought to the High Court under the HRA must be heard by a High Court judge and 2 additional persons appointed from a panel selected by the Minister of Justice in accordance with s. 101 of the HRA. The members of the panel, who do not all have to be lawyers, are also eligible to serve on the Human Rights Review Tribunal [HRRT] (essentially the first instance tribunal under the HRA, as discussed in Chapter 2 of this thesis). In selecting the panel, s. 101 requires the Minister to have regard to: “the need for persons included on the Panel to have between them knowledge of, or experience in,—

(a) different aspects of matters likely to come before the Tribunal:
(b) New Zealand law, or the law of another country, or international law, on human rights:
(c) public administration, or the law relating to public administration:
(d) current economic, employment, or social issues:
(e) cultural issues and the needs and aspirations (including life experiences) of different communities of interest and population groups in New Zealand society”.

77 In this regard, see Fuller, supra note 73 at 398 who states: “[...] concealed polycentric elements are probably present in almost all problems resolved by adjudication. It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.”
3.2.4 Remedies

The remedies that a court could be empowered to grant in relation to ESCR include the power to issue a declaration (which could render legislation unconstitutional as in South Africa and Brazil or alternatively could be non-binding), to decline to apply unconstitutional legislation in the case before the court (as may occur in Finland), to award compensation, to issue injunctive relief, and to rewrite laws (as in South Africa). I discuss the nature of the court’s jurisdiction in respect to each of these remedies in more detail below.\(^78\)

In issuing a declaration, the court would identify ESCR-inconsistent conduct or legislation (no doubt having heard evidence about potential effects of doing so).\(^79\) Generally speaking, however, it would then be for the state, not the court, to decide how to modify its conduct or applicable legislation so as to comply with relevant ESCR. The range of options open to the state in relation to the particular issue that came before the court could be narrower, but it would be for the state to elect which option to choose from those still available (as would essentially also be the case if the court were to elect not to apply ESCR-inconsistent legislation to the specific case before it without striking down that legislation).

In deciding which action to take going forward, the state would be responsible for evaluating all relevant considerations including budgetary constraints and the interests of third parties.\(^80\) Further, if the declaration were not formally binding in relation to legislation, the legislature could decide to retain the inconsistent legislation.

Accordingly, where relief in ESCR adjudication is limited to a declaration, the risk that courts may be seen to be interfering unduly in the prerogatives of the legislature or the executive or exceeding their capacities is considerably reduced. In general terms, such a remedy allows decision-making to remain largely under the control of elected representatives, with the court’s role being to ensure that such decision-making stays within constitutional bounds.

\(^78\) Note that a court could also be empowered to issue interim relief in ESCR cases. In “The Challenges of Crafting Remedies for Violations of Socio-Economic Rights” in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 46 at 56, Kent Roach states: “One possible way to combine individual and systemic relief is to obtain individual relief on an interlocutory or emergency basis while seeking more systemic relief after a trial on the merits. In some eviction cases in particular, courts might be persuaded to preserve the status quo and prevent irreparable damage by stopping the eviction on an interim basis while the ultimate relief after trial might be to develop an appropriate housing program.”

\(^79\) As Roach notes, if there were a concern that an immediate declaration of invalidity could unduly affect the legitimate interests of groups not before the court, a suspended or delayed declaration of invalidity could be used to safeguard the position of those groups while the state rearranged its affairs (ibid. at 55).

\(^80\) *Ibid.* at 53.
Of course, in some instances the effect of finding that certain conduct or legislation breaches a protected right may not leave the state with any real discretion. In *Khosa*, for example, the only constitutional option available to the South African state as a result of the Constitutional Court’s judgment was to extend eligibility for the benefits in question to permanent residents; and in the Brazilian *Município de Santo André* cases, the effect of the Federal Supreme Court’s judgment was to require the state to provide free crèche and pre-school education (although in reaching this decision, the Court was doing no more than enforcing the plain text of the Brazilian Constitution). However, it will not always or even necessarily frequently be the case that a declaration leaves the state with no room to move.

As well as issuing a declaration, a court could decide to impose an award of damages (assuming that such a jurisdiction existed) where those found to have suffered a violation of their rights could prove relevant loss or where the court wished to condemn the conduct at issue in stronger terms. In deciding whether to award damages and the quantum of such damages, a court would be likely guided by long-established principles, including those developed in CPR adjudication. Obviously, a damages award would create an enforceable demand on public resources, and may expose the state to claims from other persons not parties to the litigation but in the same situation as the successful litigants. However, this occurs whenever a court imposes a remedy for breach of a right.

The revision of laws by a court is in a different category to either declaratory or monetary relief. It is a much more invasive remedy (although if the legislature has empowered a court to grant such relief, then generally speaking the use of that power cannot be defined as a breach of the separation of powers). As discussed in Chapter 5, the South African Constitutional Court exercised this remedy in *Khosa* and *Jaftha*. It was unclear in both cases whether the remedy was required to safeguard the position of the successful parties, and there would seem to be a significant risk of unintended consequences in amending legislation without going through the normal legislative process. In addition, the issuing of such a remedy would seem to expose the court unnecessarily to accusations of overreaching (other than perhaps in situations where the legislature has repeatedly failed to take action within a reasonable time to remedy legislation found to be inconsistent with protected rights).

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81 In this regard but at a more general level, see Langford who states (*supra* note 1 at 32): “[T]he argument on separation of powers is typically overstated. If courts have been constitutionally empowered to judicially review the realisation of social rights then they are simply doing their constitutional job, fulfilling the task of their branch.” While Langford’s statement is correct when applied to a situation in which such constitutional empowerment has already occurred, it does not deal with the objection based on the separation of powers against granting courts any jurisdiction to adjudicate on ESCR.

82 It is perhaps noteworthy in this regard that the South African Constitution does not expressly grant the Constitutional Court with a jurisdiction to revise laws. Instead, the Court has inferred such a power from its jurisdiction in s. 172 of the Constitution to grant any relief that “is just and equitable.”
Injunctive relief may also be considered invasive, and formulating appropriate orders may pose significant challenges for the court as well as requiring it to determine to a considerable extent the course of action the state should take. However, where a state illegally fails or refuses to comply with declaratory relief, such a remedy may be necessary, as may the retention by the courts of a supervisory jurisdiction over the state’s implementation of its orders.\textsuperscript{83}

Accordingly, the degree to which a court may direct the state to take certain action in respect of ESCR (or whether any order it makes has that effect) will depend upon the remedies the legislature empowers it to grant, the specific facts of the ESCR cases that come before it, and the way in which the state reacts to any declaration or other order that the court makes. To the extent that there are concerns about the separation of powers in ESCR adjudication, it is open to the legislature to take those concerns into account in determining which remedial powers to bestow upon the judiciary if it decides to enact justiciable ESCR (while at the same time being aware of the need for CPR and ESCR to have an equal legal status). The executive may also decide to regulate its conduct so that situations do not arise in which courts are required to issue more intrusive remedies to ensure respect for ESCR.

3.2.5 The New Zealand context

Much of the criticism directed against justiciable ESCR appears to assume that such rights would or do constitute part of supreme law. As discussed in Chapter 2, however, in New Zealand the courts have no power to strike down ordinary legislation or to decline to apply legislation for inconsistency with the CPR in the NZBORA or for any other reason.\textsuperscript{84} Therefore, if ESCR were included in the NZBORA but the core features of the statute otherwise stayed the same, Parliament could legislate contrary to those rights or override any judicial precedent in relation to them if it considered that the best course of action in the circumstances. The ESCR themselves could be amended by simple majority.

This means that many of the concerns set out above may be of much less relevance in the New Zealand context than they are in states with supreme law constitutions.\textsuperscript{85} Unlike in jurisdictions such as Brazil or South Africa, ESCR could be justiciable and share an equal status with CPR in New Zealand without Parliament losing the right to have the last say over any matters relating to ESCR. This was of course one

\textsuperscript{83} Roach, supra note 78 at 54.

\textsuperscript{84} As also discussed in Chapter 2 of this thesis, such a jurisdiction does exist in respect of subordinate legislation.

\textsuperscript{85} As discussed in Chapter 4 of this thesis, Finland’s constitutional model, based on preventative and abstract review by its parliamentary Constitutional Law Committee, provides another example of how counter-majoritarian concerns may be ameliorated. For a discussion of the advantages of the NZBORA and other Commonwealth Bills of Rights over the United States’ model, see Stephen Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 49 Am. J. Comp. L. 707 at 744-748 in particular.
of the points that informed the Justice and Law Reform Select Committee’s recommendation that the NZBORA should include a range of ESCR. 86

3.3 Summary

The scope of ESCR may be uncertain and the rights themselves may give rise to complex issues. However, ESCR shares this characteristic with CPR and with many other legal concepts. Moreover, there are many ways in which this uncertainty may be reduced or overcome, including in particular by allowing national courts to adjudicate upon ESCR. Denying ESCR a justiciable status on the basis that they are indeterminate is to deny these rights one of the primary mechanisms by which such indeterminacy may be decreased. Further, it is open to a legislature enacting justiciable ESCR to define such rights in greater detail than has been done in, for example, the ICESCR.

Providing the courts with jurisdiction to adjudicate upon ESCR may lead to positive orders being made against the state, but this is no different to what occurs in many other fields of the law. ESCR adjudication may also give rise to concerns about judicial capacity and the separation of powers. However, many of these concerns appear to be based on a misunderstanding of what a court’s role in relation to justiciable ESCR would or could be and the power of the legislature to determine that role. They also seem not to take into account the ability of the court to hear evidence from a range of parties and to appoint expert lay members. Finally, as I now discuss in Part III below, the experiences of Brazil, South Africa and Finland provide evidence that justiciable or otherwise binding ESCR can make highly positive contributions to a democracy.

4 PART III: THE BENEFITS OF JUSTICIABLE ESCR

Not only are many of the critiques of ESCR overstated, but they also regularly fail to recognise any of the benefits of ESCR adjudication. I consider a number of these benefits below.

4.1 Policy formulation and implementation

As discussed in Chapter 5 in relation to the South African Constitutional Court’s judgment in Mazibuko, justiciable ESCR can provide important incentives for evidence-based policy and for focused and timely policy implementation. This is because they provide a mechanism by which the state may be required to

86 See Chapter 2 of this thesis. As pointed out in that chapter, however, it is unclear from the committee’s report exactly what legal status it envisaged ESCR as having in the NZBORA.
justify its position in detail, something which many states are often not required to do in relation to social or economic policy. Mureinik captures all of these points in the following passage:87

“[I]f the government is confident of the economic case [for any particular programme or policy], let it make it in court, where it can be exposed to scrutiny. If the government could adduce economic [and any other relevant] evidence and argument to make a plausible case, the court would have to uphold the programme. A central deficiency of the present order is that the economic case for a government programme, if it is made at all, is made at the level of slogan and newspaper headline, and, occasionally, at the not much less superficial level permitted by the constraints of parliamentary procedure. Nothing requires the case to submit to searching scrutiny. Even if constitutional review of the kind suggested here proved to have no substantive bite at all—even, that is, if it resulted in the annulment of not a single programme—the procedural benefits would be immense. The knowledge that any government programme [which was relevant to or which affected ESCR] could be summoned into court for searching scrutiny would force its authors closely to articulate their reasons for dismissing the objections and the alternatives to the programme, and precisely to articulate the reasons that link evidence to decision, premises to conclusion. The need to articulate those reasons during decisionmaking would expose weaknesses in the programme that might force reconsideration long before the need arose for judicial challenge.”

4.2 Mitigating democratic failure

Justiciable ESCR can provide an avenue for individuals or groups which are unable to make themselves heard in a majoritarian democracy to pursue the legitimate demand that their ESCR be protected and realised. One of the fundamental justifications for justiciable CPR is that they provide a measure of protection for “minorities” when the majority or the dominant sector of society fails to recognise or violates their rights.88 The same logic applies to ESCR.

The Brazilian cases discussed in Chapter 3, regarding the provision of free medication for indigent HIV/AIDS sufferers and requiring the state to provide pre-school education to children from low-income families (those being the children that use the primary public education system in Brazil), illustrate the importance of justiciable ESCR. The democratic political system had failed to provide for the fundamental rights of the people those cases concerned. Without the courts, those people would have had no remedy.

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87 Mureinik, supra note 40 at 472-473.
88 See also Langford, supra note 1 at 33, who notes: “In some cases, the ‘minority’ might actually constitute the numerical majority—many political systems are dominated by a certain gender or political or social class, corruption and entrenched systems of political patronage. These defects of elective democracy are fairly patent. Complementary accountability mechanisms are needed to ensure that the effect of exclusion from elective processes does not result in a denial of human rights.”
The same applies to many of the South African cases. If the Constitutional Court had not intervened in *TAC*, for example, apparently irrational behaviour by the state could have continued for a considerable period of time. Many preventable cases of mother to child HIV transmission could have occurred.

Finally, as discussed in Chapter 4, the Finnish courts and the Constitutional Law Committee have applied the subsistence rights in the Finnish Constitution to prevent the state from denying the minimum benefits necessary for a dignified life to groups who could not provide for themselves. This was clearly the right result, particularly given Finland’s status as an advanced industrialised democracy. However, constitutionally protected ESCR were required to achieve it.

### 4.3 The advantages of concrete cases

ESCR adjudication provides an opportunity for not only the court but also the state to understand how its decisions are affecting the ESCR of groups or individuals in the context of specific cases.

Of course, there are other ways for the state to acquire or to be confronted with information of this nature. These include evaluation and monitoring of the effects of policies on their intended beneficiaries, and the parliamentary process (in which opposition parties may highlight alleged failings or gaps in the government’s legislative or policy agenda). However, while the state may choose to dismiss or to pay little attention to the results of policy evaluation and monitoring and the opposition’s protests, a judgment cannot legally be ignored. The adversarial process is also likely to be more conducive to a detailed examination of a specific case or group of similar cases than, for example, a wide-ranging quantitative or even qualitative survey may permit. Judicial adjudication (particularly if the bench is comprised of a number of members, including lay members) is likely to be seen as impartial or at least as more impartial than many reports produced for the state or the allegations of opposition parties.

In addition, while there is a risk that courts may base their decisions on incomplete information and unforeseen consequences may flow from judgments, the same risk exists in policy and lawmaking. In some situations, the focus that litigation brings to a particular issue, including the investment of considerable time and resources, may mean that the information before the court is more reliable and comprehensive than that which was available to policymakers and legislators.

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89 Langford, *supra* note 1 at 35.

90 In this regard, see Scott and Macklem, *supra* note 1 at 37-38. As they state (citations omitted): “[T]here are limits to how well any supervisory body, no matter how democratic, diligent, or expert, can determine whether policies and laws respect human rights without having the benefit of real-life detail that individual petitions provide. Such petitions have the effect of drawing attention to personal circumstances that reveal failures and problems unknown to or avoided by those responsible for drafting legislation. […] Court cases in conjunction with media publicity generated by a free press keep the plight and pain of marginalized members of the community on the political agenda. A court provides a forum for relating debates over fundamental values to individual concrete cases. It is an
Finally, ESCR adjudication is concerned with whether a state is fulfilling its human rights obligations in specific cases. This means that in evaluating an impugned state action such as a policy, a court may consider not only whether the policy is being implemented fairly and rationally, but whether it is consistent with ESCR guarantees. The judicial application of ESCR standards to a policy may bring a quite different and valuable perspective to a particular issue than that which might be gained from, for example, an evaluation seeking to determine whether the policy is succeeding according to its own terms.\textsuperscript{91}

5 \hspace{1em} CONCLUSION

ESCR represent fundamental interests and values. In the absence of compelling reasons to the contrary, they should have the same status as CPR; that is, they should be recognised as justiciable human rights. The arguments against ESCR discussed above are not compelling, and are often based on erroneous understandings of not only ESCR but also CPR. The difficulties and uncertainties of ESCR are not as significant as is sometimes suggested, and indeterminacy is a feature that CPR and many other justiciable legal concepts share. South Africa, Brazil, and Finland demonstrate that constitutionally guaranteed and enforceable ESCR can have significant and positive effects.

In some states, some ESCR may appropriately be subject to progressive realisation. However, as the South African experience demonstrates, this does not mean that such rights must or should be non-justiciable. Instead, it is clear that the courts can play an important and productive role in supervising both progressive realisation of ESCR and ensuring respect for levels of realisation which have already been obtained.

ESCR are only lesser rights than CPR in some states because a political decision has been made to confine them to this status. There is nothing inherent in ESCR which requires that this lesser status be maintained.

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\textsuperscript{91} See also in this regard Elizabeth McLeay, “Housing Policy” in Jonathan Boston and Paul Dalziel, eds., \textit{The Decent Society? Essays in Response to National’s Economic and Social Policies} (Auckland: Oxford University Press, 1992) 169 at 182. Writing just before the state housing reforms referred to in Chapter 2 of this thesis, McLeay argued that the Housing Corporation of New Zealand’s advisory role to government had been “inhibited in that it could advise and warn, but in the end had to tailor its advice to government to keep within narrow policy parameters. The value of HC advice was also diminished by the prevalence of the belief in bureaucratic ‘capture’; advice when critical was interpreted as protective of the status quo.”
Chapter 7
The Reasons for Enhancing the Status of ESCR in New Zealand

1 INTRODUCTION

The overall aim in this thesis has been to consider the legal status of ESCR in New Zealand, whether that status should be enhanced, and if so, what some of the options might be. In Part I of this last chapter, I recap the conclusions I reached in Chapter 2 regarding ESCR’s status in New Zealand. I then argue that this status needs to change. ESCR are insufficiently protected by the law in New Zealand, there is a need for additional protection, and the justifications given for maintaining the status quo are not compelling. The experiences of Brazil, South Africa and Finland show that constitutional recognition of ESCR is not only possible, but also that it can be beneficial.

To support my position that the status of ESCR should be improved in New Zealand, I also refer to the events that led to the drafting of the ICCPR and the ICESCR and to what appears to be one of the sources of inspiration for the ICESCR: President Roosevelt’s Second Bill of Rights. I argue that the principles informing Roosevelt’s Second Bill and the Covenant should also inform New Zealand’s decision-making about ESCR.

In Part II, I discuss the ways in which ESCR could be better recognised and protected in New Zealand’s legal system. My principal recommendation is that ESCR be incorporated into the NZBORA, and at the end of the chapter I set out an amended NZBORA which includes a wide range of ESCR. I also provide a brief commentary about the clauses I propose and highlight a range of other matters that would require additional consideration if the NZBORA were amended in the way I suggest.

2 PART I: THE LEGAL STATUS OF ESCR IN NEW ZEALAND AND THE NEED FOR CHANGE

2.1 The current situation

Although the New Zealand government recognises internationally that persons under its jurisdiction are entitled to ESCR, it refuses to make the same recognition in domestic law. With the limited exceptions of the right to freedom of association, the right to freedom from discrimination, and certain minority rights, ESCR are not included in the NZBORA. As a result, and unlike CPR, free-standing ESCR generally cannot be invoked in New Zealand’s courts. ESCR also have a significantly lesser influence than CPR on
law, policy-making and statutory interpretation. While the NZBORA expressly affirms New Zealand’s commitment to the ICCPR and that instrument is relied upon in domestic rights litigation, the ICESCR is largely an irrelevancy.

ESCR appear to be little understood by the New Zealand legal profession, and little known by the New Zealand public. It is also reasonable to assume that there is only a low level of familiarity with ESCR within government. Consequently, decisions which affect ESCR are generally not seen as impacting upon human rights interests, either by government or by those affected.

2.2 Should the status of ESCR in New Zealand be enhanced?

The differences between the recognition of ESCR and CPR in New Zealand’s legal system as set out above provide a strong basis for arguing that the legal status of ESCR in New Zealand should change. For all intents and purposes, ESCR are not rights in New Zealand, and this means that there is a significant gap in New Zealand law. Further, for the reasons I now discuss, the need to close this gap is real rather than merely theoretical.

2.2.1 The need for greater protection for ESCR

As explained in Chapter 2, the NZBORA was promoted on the basis that CPR were insufficiently protected in New Zealand. However, there was no fear when Sir Geoffrey Palmer presented the White Paper on “A Bill of Rights for New Zealand” to Parliament in 1985 (or throughout the parliamentary process that ultimately led to the enactment of the NZBORA in 1990), that CPR were in significant danger. The White Paper stated that “[n]o Government and no Parliament we are likely to have in New Zealand in the foreseeable future are going to attempt to sweep away basic rights.”1 Instead, it was argued that there was a need to protect against incremental erosion of CPR and to put in place “safe systems” before any emergency arose.2

However, while it was no doubt correct in 1985 that CPR were not under any real threat in New Zealand, the same could not be said for ESCR.

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2 Ibid., at 27, para. 4.10 and 31, para. 4. 24.
2.2.1.1 The social revolution

On 11 June 1984, the Labour party was elected to government, replacing the National government then in power. At the time, public sector debt, inflation, and unemployment were all rising in New Zealand. A currency crisis, related to the pre-election disclosure that Labour intended to devalue the dollar if elected, and apparently worsened by the outgoing Prime Minister’s refusal to comply with the incoming government’s request that the dollar be devalued, created additional instability. Changes in economic and social policy were necessary.

The Labour government, however, went well beyond a programme of moderate reform. Instead, soon after its election it set about implementing radical neoliberal reforms of New Zealand’s state institutions and its economy, at great speed. National continued this agenda after defeating Labour in the 1990 election (and the Lawson v. Housing New Zealand and Attorney-General v. Daniels cases discussed in Chapter 2 occurred in or arose out of this context). In 1993, The Economist described these reforms as “more radical than any other industrial country’s […].” In New Zealand, the period was referred to as one of revolution.

2.2.1.1.1 Retrogressive reforms

At the time, and now, there was considerable debate about whether such drastic reforms were required and would be (or have been) beneficial in the long term. However, there is no doubt that the reforms were retrogressive in terms of the extent to which ESCR were realised in New Zealand in 1984, in relation to, for example, the rights to work, to social security, to an adequate standard of living including

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3 The Labour party had traditionally been a progressive, left-leaning party. National was traditionally conservative and right-leaning.
4 Jane Kelsey, The New Zealand Experiment: a World Model for Structural Adjustment? (Auckland: Auckland University Press with Bridget Williams Books, 1997) at 24 and 29-30. See also Paul Dalziel, “National’s Macroeconomic Policy” in Jonathan Boston and Paul Dalziel, eds., The Decent Society? Essays in Response to National’s Economic and Social Policies (Auckland: Oxford University Press, 1992) 19 at 20, who states that “[i]n the lead up to the [1984] election, there had been a sustained flow of funds out of the country as people anticipated a devaluation… by 14 July New Zealand was in danger of running out of overseas credit.” According to Dalziel, Labour’s decision to devalue the currency by 20 percent (as forecast before the election) “solved the country’s immediate foreign exchange crisis” but “was not the end of the government’s macroeconomic problems.”
5 Kelsey, supra note 4 at 2, describes the reform agenda as being based around the fundamentals of “market liberalisation and free trade, limited government, a narrow monetarist policy, a deregulated labour market, and fiscal restraint […].”
6 Ibid. at 33. See also Tim Hazledine and John Quiggan, “No More Free Beer Tomorrow? Economic Policy and Outcomes in Australia and New Zealand since 1984” (2006) 41 Australian Journal of Political Science 145 at 152, who state: “The speed with which the reform program was implemented is truly astounding. Of the 104 reforms listed by Bollard, Lattimore and Silverstone (1996) between 1984 and 1991, 65 were completed or well underway by the end of 1988.”
7 The Economist (16 October 1993) 20, cited in Kelsey, supra note 4 at 8.
8 Ibid. at 323. See also Hazledine and Quiggan, supra note 6 at 152, who refer to the reformers as “revolutionaries.”
adequate food, clothing and housing, and to education. The following statistics (which are not exhaustive by any means) evidence this regression.⁹

In the 1960s, full employment was “the central plank of economic and social policy.” However, after 1984, “the goal of full paid employment […] was treated by policymakers as unattainable, unaffordable and undesirable.”¹⁰ Unemployment in the general population, seen as the natural consequence of a dynamic economy,¹² rose from 3.8 percent in 1985 to 7.7 percent in 1990 and to 11.1 percent in 1991.¹³ Figures for Māori (the indigenous people of New Zealand) and Pacific Islanders were much worse. This was largely due to heavy Maori and Pacific Island dependency on unskilled wage labour, traditionally provided by the state. When that work was cut back dramatically, Māori and Pacific Islanders suffered disproportionately and severely.¹⁴ Referring to June 1991 figures, Dalziel states:¹⁵

“The Household Labour Force survey unemployment rate for Māori was 27.1 per cent (the European rate was 7.7 per cent; the Polynesian rate was 28.6 per cent). It is not easy to imagine what having more than one in four workers unemployed does to a community, but for comparison, note that at the height of the Great Depression, the United States unemployment rate peaked at just under 25 per cent in 1933. That experience seared the psyche of the whole nation, and led to a range of institutional and policy reforms to prevent its recurrence.”

Income inequality grew, as did poverty.¹⁶ Between 1989 and 1992, “the number of New Zealanders estimated to be living below the [unofficial] poverty line rose by at least 35 percent.”¹⁷ As the number of people on benefits grew (almost doubling between 1984 and 1990), the value of benefits was reduced.¹⁸ In December 1990, soon after National defeated Labour in that year’s election, the government announced “core benefit rate cuts of up to 25 per cent and tighter welfare eligibility rules [which] removed $1.275 billion from the social welfare budget in a full fiscal year […].”¹⁹ The government

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⁹ For a full account, see Kelsey, supra note 4. See also the CESCER, Concluding observations of the Committee on Economic, Social and Cultural Rights: NEW ZEALAND, 24th, 25th and 26th Mtgs., E/C.12/1993/13 (1994) at para. 11, where the CESCER notes that “restrictive economic and social policies then in place” had affected “the realization of economic, social and cultural rights, particularly of the most vulnerable groups of society.”

¹⁰ Kelsey, supra note 4 at 24.

¹¹ Ibid. at 259.

¹² Ibid. at 173.

¹³ Ibid. at 260. By 1994 unemployment had dropped back to 9.5 percent.

¹⁴ Ibid. at 283-284.

¹⁵ Dalziel, supra note 4 at 211.

¹⁶ Kelsey, supra note 4 at 271.

¹⁷ Ibid. at 10. As Kelsey points out at 273, New Zealand has no official poverty line.

¹⁸ Ibid. at 273 and 279.

¹⁹ Dalziel, supra note 4 at 19 and 32. According to Bob Stephens (“Budgeting with the Benefits Cuts” in Jonathan Boston and Paul Dalziel, eds., The Decent Society? Essays in Response to National’s Economic and Social Policies
implemented these changes despite advice that not only would they cause financial hardship, but also could intensify the economic recession then being experienced due to their impact on consumer incomes and consumption. This impact was considerable, as “[b]eneficiaries in the bottom 20 percent [in terms of household income across the country] experienced a reduction of between 13 and 30 percent of disposable income.”

Substantial cuts in education ($380 million) and health ($192 million) were also announced and later implemented.

In addition, the government began to charge for services which it had previously provided for free, or to increase charges, as part of a generalised “user pays” policy. This included fees for tertiary education, which the government significantly increased in 1990. A result of this is reflected in New Zealand’s second periodic report to the CESCR, which refers to concern “that young people are emerging from the tertiary sector with high levels of debt. It has been argued that this high level of debt is contributing to high emigration levels of young graduates as wages in New Zealand are not sufficiently high to assist in student loan debt repayments.”

A considerable increase in social distress became evident. Between 1974 and 1990 the rate of male suicide rose by 288 percent, “with the greatest increase in the late 1980s.” Between 1991 and 1993, the Salvation Army registered a 1117 percent rise in the use of its food parcel service. Boston and Dalziel, writing in 1992, stated that “large numbers of disadvantaged New Zealanders [were having to] rely on voluntary agencies to satisfy their basic food and clothing needs”, something which in their opinion was neither necessary nor morally or socially acceptable. They further recorded that “not since the Great Depression has New Zealand witnessed such evidence of social deprivation and hopelessness, nor such high levels of unemployment.”

(Auckland: Oxford University Press, 1992) 100 at 106 and 109), the tighter eligibility conditions for benefits generally came into effect from March 1991, while the cuts were implemented from 1 April 1991.

20 Stephens, supra note 19 at 110-111. See also Dalziel, supra note 4 at 32-33.
21 Kelsey, supra note 4 at 277.
25 Kelsey, supra note 4 at 295.
26 Ibid. at 292.
27 Ibid. at ix.
28 Ibid. at viii.
2.2.1.1.2 A lack of evidence-based policy

In a range of areas, ideology rather than evidence seemed to be the significant driver in policy-making. Writing in regard to the National government elected in 1990, Boston and Dalziel considered that “it appears that at least in some instances (e.g. housing and health care), decisions have been influenced too much by elegant, yet unproven, theories and too little by well-established practice or carefully designed experiments.” In Boston’s view, some of the “radical changes” in areas such as income support, healthcare, housing, and tertiary education were “founded neither on sound theory nor on sound empirical evidence.”

Kelsey further argues:

“Decisions on funding cuts and eligibility levels were based on either ideology or arbitrary ceilings on government funding. For example, the age until which students were deemed dependent on their parents for means-tested student allowances was set at 25 years by calculating backwards from the amount government was prepared to allocate. The level of benefit cuts in 1991, supposedly designed to increase incentives, was pure guesswork by the Treasury. The Minister of Social Welfare admitted that decisions on benefit levels were based on instinct and expediency, not empirical research. ‘Quite frankly, the research I rely on is the marketplace. If the marketplace cannot pay, there is no such thing as an arbitrary, isolated, adequacy level....’”

In some cases where research was carried out on the effects of the changes, it came too late. An example Kelsey provides was the Department of Social Welfare announcing in 1994 that it intended to commission research on whether beneficiaries had enough income to live on. However, it was unlikely that this research would be available until 1996, some five years after the 1991 benefit cuts.

There are also indications that the government’s economic case was made at the level of slogan rather than fact. For example, in 1990 National’s Minister of Finance, Ruth Richardson, advised Parliament that “at the heart of the problems” confronting the new government was the “crushing burden of government spending”, and that New Zealand’s “wealth creators” were burdened by ‘punitive tax levels’. However, according to a 1992 article by Rudd:

“Contrary to popular perceptions and ministerial pronouncements, New Zealand governments have never been ‘big spenders’ compared to the majority of OECD countries. [...] From the evidence available,

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29 Ibid. at x.
31 Kelsey, supra note 4 at 277-278.
32 Ibid. at 278.
33 Cited in Rudd, supra note 22 at 39.
34 Ibid. at 46.
public expenditure in New Zealand as a percentage of GDP does not exceed the average for the G7 countries […] or for the smaller OECD countries. […] Moreover, New Zealand governments have not, from a comparative perspective, imposed onerous tax burdens on their citizens. […] The evidence, therefore, does not support Ruth Richardson’s contention that New Zealand governments ‘overspend’ and ‘overtax’, at least compared to other industrialized countries.”

### 2.2.1.1.3 Lack of an accountability mechanism

As discussed in Chapter 2 in relation to cases such as *Lawson v. Housing New Zealand*, the lack of free-standing ESCR in New Zealand law meant that there was no or only a very limited scope for challenging any of the reforms on a legal basis. Essentially, the only concrete way in which the Labour and National governments could be held accountable by those who disagreed with the reforms was through the ballot box. However, the 1980s and 1990s saw the failure of parliamentary democracy in New Zealand, as both parties repeatedly broke election promises.

Kelsey states that the 1984-1990 Labour government lied to its supporters. In her words:35

“[Labour] had promised to maintain social services, but it cut them. It had promised to retain state assets, but it sold them. It had promised full employment, but it produced record unemployment. It had promised constitutional government and the rule of law, but it circumvented, overrode and treated with contempt the democratic processes of representation, participation and accountability.”

In relation to the National Government that took over from Labour, Boston and Dalziel state:36

“Having won the 1990 election with an unprecedented majority, by late September 1991 public support for the [National] Government (as measured by national opinion polls) had shrunk to just over 20 per cent-lower in fact than that enjoyed by the fourth Labour Government in the months leading up to the 1990 election. The reasons for this rapid collapse in National’s support are readily apparent. They include the party’s failure to keep its election promises (especially with respect to superannuation, health care, and tertiary education), its failure to signal its radical policy agenda prior to the election, the lack of public consultation on the nature of changes to be introduced, serious doubts about the merits of many of the planned changes, and the incompetence demonstrated in the handling of crucial issues such as superannuation and health care.”

The breaking of election promises by both Labour and National and the severe consequences of the reforms for significant sectors of the population led to “deep-seated scepticism about electoral politics and

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36 Boston and Dalziel, *supra* note 27 at x-xi.
parliamentary democracy”.37 In 1993, following a national referendum, the electoral system was changed from First Past the Post [FPP] to a mixed member proportional system [MMP]. One of the principal reasons for this change was to reduce the likelihood of one of the two major parties being able to govern alone. In other words, its purpose was to place a restraint on state power, which many considered had been abused by Labour and National.

2.2.1.1.4 Short-term pain for long term gain?

Although one prominent proponent of the reforms stated in 2005 that “those who argued for the reforms have been proved right and their critics have been proved wrong”,38 it is far from clear that the reforms produced their promised benefits. For example, Kelsey states that “between 1985 and 1992 total growth across OECD countries averaged 20 percent; New Zealand’s economy shrank by 1 percent over the same period.”39 In a 2006 comparison between the economic performance of Australia and New Zealand since 1984, Hazledine and Quiggin find that:40

“[F]rom quite similar starting points the two countries pursued liberal reform programs that differed sharply [...]. Australia followed a more cautious, piecemeal, consensus-based approach, whereas New Zealand, in contrast, adopted a radical, rapid, ‘purist’ platform. The NZ reform package was generally seen by contemporary commentators as representing a ‘textbook’ model for best practice reform. However, Australia since 1984 has performed much better than New Zealand, whose per capita GDP growth indeed ranked at or near the bottom of the OECD.”

2.2.1.2 What role could ESCR have played?

As the summary set out above demonstrates, from 1984 through until the late 1990s successive New Zealand governments implemented a series of retrogressive measures with little or no mandate and apparently in some cases on the basis of scant evidence or analysis. These measures substantially affected the extent to which many people enjoyed ESCR in New Zealand, caused significant misery, and could have constituted violations of ESCR. At the same time, there appears to have been very little awareness amongst the population that they had such rights (albeit only recognised by the New Zealand government in the international sphere), and the domestic courts did not have an express or direct jurisdiction to inquire into whether government policy or legislation conflicted with ESCR.

37 Kelsey, supra note 4 at 297.
38 Roger Kerr (the Executive Director of the New Zealand Business Roundtable), “No Time to Stop and Smell the Roses” New Zealand Herald (15 March 2005), online: New Zealand Herald <http://www.nzherald.co.nz>, cited in Hazledine and Quiggin, supra note 6 at 150.
39 Kelsey, supra note 4 at 9.
40 Hazledine and Quiggin, supra note 6 at 145. Of course, the global economy over some of this period was volatile, particularly following the 1987 stock market crash. However, given that all OECD countries were subject to this volatility, it does not explain New Zealand’s poor performance relative to other OECD members.
According to the *White Paper*, the purpose of the Bill of Rights it proposed would be to guarantee CPR, act as a source of inspiration, restrain the abuse of power by the state, ensure that individuals who suffered violations of their rights would receive remedies, and to “provide a set of minimum standards to which public decision making must conform.” It would also educate New Zealanders about their rights. As the *White Paper* forcefully argued:

“[The Bill of Rights] will be an important means of educating people about the significance of their fundamental rights and freedoms in New Zealand society. Citizens will have a readily accessible set of principles by which to measure the performance of the Government and to exert an influence on policy-making. An awareness of basic human rights and fundamental freedoms amongst citizens and a desire to uphold them is as powerful a weapon as any against any Government which seeks to infringe them. In this way too, the Bill of Rights will be a powerful influence on the Government, its officials and agencies.”

All of these reasons for providing CPR with a special status in the *NZBORA* applied with equal force to ESCR (and continue to apply today). However, the decision not to include ESCR in the *NZBORA* meant that the Act was precluded from carrying out any of the tasks or objectives listed above in relation to ESCR. As a result, ESCR were left exposed.

Recognition of ESCR in the *NZBORA* could have had a number of important effects in relation to the reforms which occurred after its enactment in 1990. Government would have been required to take ESCR into account in making policy and law, and affected individuals or representative organisations would have been able to invoke a more meaningful judicial review of government policy that affected ESCR. This could have slowed the pace of the reforms, tempered their severity by contributing to a more cautious approach from the outset, encouraged more robust and evidence-based policy, and led to the identification of conduct that was inconsistent with ESCR (thereby protecting and upholding those rights). Alternatively, judicial review could have resulted in a finding that measures which now appear, perhaps with the benefit of hindsight and on the basis of incomplete information, highly problematic with respect to ESCR were not in fact ESCR inconsistent.

It seems indisputable that justiciable ESCR could have provided an important and democratic check on the state’s power, particularly given the context of democratic failure in which the reforms occurred.

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41 *White Paper, supra* note 1 at 5.
43 Had justiciable ESCR had such an effect, it could well have been significant. According to Hazledine and Quiggin (*supra* note 6 at 152), “[…] Australia’s superior performance supports the view that the speed with which the New Zealand reforms were implemented contributed to poor observed outcomes. Excessive speed was problematic in itself, since it increased adjustment costs, and was frequently associated with poor implementation and a preference for dogmatism over practicality.”
44 In this regard, see also Part III of Chapter 6.
Further, if New Zealand’s “radical, rapid and purist” reforms were responsible for the country’s poor economic performance relative to other OECD countries, as Hazledine and Quiggin argue, the constitutionalisation of ESCR could also have been beneficial from a purely economic perspective.

The inclusion of ESCR in the NZBORA would not have prevented the National government (or any subsequent government) from implementing the reforms it deemed necessary. However, to the extent that such reforms were inconsistent with ESCR and were not prescribed by law, a court could have found them to be impermissible. It would then have been up to the government to modify its policies so as to make them ESCR consistent, or to decide to override ESCR by enacting expressly inconsistent legislation (as the NZBORA permits). At each stage, however, the government would have had to consider directly the implications of any particular policy or law for the fundamental interests that ESCR represent, and the population would have had a set of internationally and domestically validated human rights standards against which to evaluate the government’s actions.

2.2.1.3 Is the change to MMP enough?

As stated above, in 1993 New Zealand’s electoral system changed to MMP (with the first MMP election being held in 1996). Since that time, while Labour and National continue to dominate New Zealand politics, neither has been able to govern alone. Instead, both have been forced to form coalitions with other parties.

However, while MMP has made government power more diffuse, and accordingly ESCR may be somewhat more secure under MMP than they were under FPP, such protection is indirect at best. Further, as the White Paper argued in making the case for a New Zealand Bill of Rights:45

“The power of Government […] is enormous. In some cases it can be compared with the power, claimed as well as actual, of the Stuart Kings before the revolution of the seventeenth century. The basic difference between then and now is of course the electorate. But the electorate’s role cannot, in the usual case, be focused on a precise issue. A general election is a blunt instrument. It cannot give judgment on particular issues. […] Political processes of a less formal kind are also a central part of our system and can be more focused, but they can ride roughshod over minority interests […]. And both sets of processes—the formal election and the less formal political activity—are of no, or of only, limited value to the individual whose rights are being threatened or infringed by those great powers [of the State].”

MMP may also not survive as New Zealand’s electoral system. In 2011, a referendum will be held in conjunction with the general election to determine whether New Zealanders wish to retain MMP or

45 Ibid. at 27, para. 4.7.
change to another voting system. If a majority votes for change in 2011, a binding referendum will be held on the issue at the time of the 2014 general election.\textsuperscript{46}

2.2.1.4 Summary

There is clearly a need for additional protection for ESCR. Contrary to the advice that the New Zealand government has given to the CESCR, the common law and existing legislation do not sufficiently secure these rights.\textsuperscript{47} While politicians should be primarily responsible for social and economic policy, the experiences of the 1980s and 1990s demonstrate that there is a role for the judiciary. What appear to be \textit{prima facie} violations of ESCR have occurred in New Zealand, and New Zealanders should have been and should now be able to test these apparent violations in court, as Brazilians, South Africans and Finns may do. There are also strong reasons for thinking that a role for the courts in relation to ESCR could contribute to better policy. If CPR are not to be left to politics (or to trust), neither should ESCR.\textsuperscript{48}

2.3 The reasons given for not including ESCR in the NZBORA

In Chapter 2, I set out the reasons that were given in the \textit{White Paper} for not including ESCR in the \textit{NZBORA} in 1990. I also summarised a number of the additional arguments that the chief protagonist of the \textit{NZBORA}, Sir Geoffrey, made against ESCR following the \textit{NZBORA}’s enactment. I now reconsider those reasons and arguments, and explain why they do not justify the ongoing exclusion of ESCR from New Zealand’s Bill of Rights.

2.3.1 Policy, not right?

Contrary to the argument in the \textit{White Paper}, the inclusion of ESCR in the \textit{NZBORA} would not have involved the imposition or the freezing into place of a “temporarily popular view of policy.” Far from being passing considerations, the majority of the ESCR recognised the \textit{ICESCR} are what many New Zealanders would consider as their birthright and as part of the country’s heritage.

For example, the guarantee of access to decent health care and education regardless of one’s ability to pay can be seen as a fundamental commitment in New Zealand. The same applies to adequate social security for those who cannot work (for reasons such as illness, disability, old age, or unemployment), and to access to employment for those who can work. At a more general level, one of the themes running through all ESCR is equality, and this is a core New Zealand value. The \textit{White Paper} itself referred to

\textsuperscript{46} Online: Elections New Zealand <http://www.elections.org.nz>.
\textsuperscript{47} See Part IV of Chapter 2.
\textsuperscript{48} As set out in Part I of Chapter 2, Sir Geoffrey considered that the issues the South African Constitutional Court dealt with in \textit{TAC} and \textit{Grootboom} (e.g. the rights to health and adequate housing) would be “best left to politics” in New Zealand.
“the strong and long-standing emphasis on equality in New Zealand social and political thinking” and described it as a “central and paramount value [which] can be traced far back in our modern history and indeed can be discerned in the Treaty of Waitangi itself.”

49 These commitments can be seen as constitutive, in that they form part of New Zealand’s basic values. As such, they merit a place in New Zealand’s constitutional law.

Further, the ICESCR does not dictate the way in which States parties should realise or protect ESCR, and it is possible to recognise such rights in domestic law while affording the government a margin of discretion similar to that which the Covenant allows States parties. In other words, ESCR do not require government to adopt and maintain one set of policies indefinitely (indeed, such a course of action would be likely to frustrate ESCR realisation rather than promote it).

It is also important to recall that the argument made in the White Paper against ESCR was in the context of a proposal to entrench the NZBORA as supreme law. It has even less force in the context of the NZBORA as enacted, which does not override inconsistent legislation and can be amended by simple majority.

2.3.2 Positive/negative distinction and judicial capacity

As discussed in detail in Chapter 6, the argument that ESCR are positive rights and therefore should be treated differently to CPR is based on an erroneous understanding of both sets of rights. Similarly, the argument that New Zealand judges do not have the capacity to adjudicate on ESCR is weak. First, as noted in Chapter 2, they already do adjudicate on aspects of these rights. Second, while ESCR inclusion would require judges to develop greater knowledge about ESCR, this task would clearly not be beyond them. Judges are often required to deal with new areas of law; indeed, the NZBORA was novel when it was first enacted. Third, as also discussed in Chapter 6, if a wider range of expertise were thought

49 White Paper, supra note 1 at 85, para. 10.75. See also CESCR, General Comment 20, 42nd Sess., E/C.12/GC/20 (2009) at 3, which states: “The principles of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the ‘equal and inalienable rights of all’ and the Covenant expressly recognizes the rights of ‘everyone’ to the various Covenant rights such as, inter alia, the right to work, just and favourable conditions of work, trade union freedoms, social security, an adequate standard of living, health and education and participation in cultural life.”

50 I have borrowed the idea of a “constitutive commitment” from Cass R. Sunstein, The Second Bill of Rights (New York: Basic Books, 2004). Sunstein uses this concept at 62 to describe rights which are not expressly set out in the Constitution of the United States (17 September 1787) [“United States Constitution”), but nonetheless “have a special place in the sense that they are widely accepted and cannot be eliminated without a fundamental change in social understanding.” These rights may be considered as “constitutive commitments” because they “help create, or constitute, a society’s basic values”, are “expected to have a degree of stability over time”, and “[a] violation of them would amount to a kind of breach- a violation of a trust.”

51 See Part II of Chapter 1.

52 See the more detailed discussion of this issue in Part II of Chapter 6.
desirable for ESCR cases, the presiding court could be comprised of not only judges but also lay people with relevant expertise.\(^53\) As in any case, experts could also be called in to assist.

The *White Paper* stated that, in enforcing the supreme law Bill it proposed, the courts “would be exercising, in part in an enhanced way, their historic constitutional role of protecting the individual, especially the weak, the disadvantaged, the member of an unpopular minority, against the State.”\(^54\) The role of the courts under the *NZBORA* is less than what it would have been under a supreme law Bill, but it still conforms with this characterisation, and indeed this role may be seen as one of the courts’ core functions. If New Zealand courts were given jurisdiction over enforceable ESCR, this core function would be extended but not substantially modified.

It was also argued in the *White Paper* that, under a Bill of Rights, “[t]he courts will have a role. It will be a crucial one but it will not be an exclusive one. The Bill of Rights should be thought of as providing a floor. The life of the state can and should rise far above it.”\(^55\) There is no reason why ESCR and the role of the courts in relation to these rights could not have been or could not now be conceptualised in the same way.

Of course, it is likely that if ESCR were recognised as free-standing rights in New Zealand, the involvement of the courts in issues formerly designated as wholly political could increase. However, for the reasons set out above, a greater role for the courts in relation to the protection of ESCR is desirable in New Zealand. As in South Africa, Brazil and Finland, expanding the jurisdiction of the courts in this respect would be appropriate recognition that, like CPR, ESCR are not just political issues but are also human rights issues.

### 2.3.3 ESCR: unmanageable, unenforceable or incapable of judicial resolution?

The Brazilian, South African and Finnish cases discussed in Chapters 3, 4 and 5 demonstrate that ESCR do not make a Bill of Rights or a constitution unmanageable. The courts of all of these states have been able to enforce constitutionally protected ESCR. It is also arguable that the inclusion of ESCR has increased the legitimacy and relevance of these countries’ constitutions.

While allegations of ESCR breach have given rise to complex issues, this has not always been the case. The resolution of some of the ESCR litigation that has occurred in South Africa, Brazil and Finland has appeared quite straightforward. Also, as in any field of the law, some cases are more complicated than


\(^{54}\) *White Paper*, *supra* 1 note at 22, para. 3.10.

\(^{55}\) *White Paper*, *supra* note 1 at 26, para. 4.5.
others and some judgments may be more open to critique than others (although such categorisations will often depend upon the viewpoint of the person making them). However, there is nothing in the Brazilian, South African or Finnish experiences with ESCR to suggest that the judiciary has been incapable of adjudicating on these rights (or that the Constitutional Law Committee [CLC] in Finland has been unable to carry out its functions in relation to them). If such incapacity had been perceived, constitutional amendments would have no doubt been made to rectify the problem.  

Indeed, far from leading to disaster, the judiciary’s jurisdiction over these rights in Brazil, South Africa and Finland has provided an important check on the powers of the legislature and executive (as does the CLC’s jurisdiction in Finland), and a critical source of protection for people who have not otherwise been well served by democratic processes.

Of course, much of the information set out in this thesis was not available when the White Paper was drafted and the NZBORA enacted. At those times, the constitutions of South Africa and Finland discussed in this thesis were not in force, and the Brazilian Constitution was only enacted in 1988. In addition, in 1990 the majority of the CESCR’s General Comments had not been issued. Viewed in that context, the decision to exclude ESCR from the NZBORA could seem unsurprising.

However, it is noteworthy that while the White Paper drew on the experiences of the United States, the United Kingdom, and Canada, there does not seem to have been any attempt made in its drafting to consider the way in which ESCR had been functioning as constitutional rights (or constitutional obligations imposed upon the state) in jurisdictions such as Italy, Portugal, Spain and the Netherlands.

The Italian Constitution entered into force in 1948, and refers to ESCR including the rights to work, health, education, fair wages, and social security. The Portuguese Constitution, in force from 1976, includes a Part on “Economic, Social and Cultural Rights and Duties”. This Part encompasses rights such

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56 Of course, at least in the Brazilian context such amendment would be more complicated or in some cases impossible given that Brazil’s social rights are largely entrenched within the Constitution’s untouchable stone clauses. However, none of the literature by Brazilian scholars that I reviewed suggested that the constitutionalisation of social rights in Brazil has turned out to be unworkable.

57 That noted, as stated in Part VI of Chapter 4, the Constitution Act of Finland 1919 (17 July 1919) (one of the four sources of Finland’s constitutional law prior to the enactment of its current constitution) did guarantee a right to work, a right to education, and the right to the necessary facilities to enable the speaking of Finnish and Swedish.

58 Art. 4 of the Costituzione della Repubblica Italiana (1 January 1948) [“Constitution of Italy”].

59 Ibid., art. 32.

60 Ibid., art. 34.

61 Ibid., art. 36.

62 Ibid., art. 38.
as a right to work, a right to social security, a right to health, a right to adequate housing, and a right to education.

The Spanish Constitution came into force in 1978, and includes rights such as the right to education and to work. It also includes provisions on the family, children, worker protection, social security, health, housing, sports, leisure, and culture and science as “Guiding Principles of Social and Economic Policy.” The constitution of the Netherlands dates from 1983, and its chapter on fundamental rights includes provisions relating to the right to work, social security, health and housing, and education.

An analysis of these countries’ constitutions and constitutional law would have shown that constitutional guarantees relating to ESCR were not uncommon even in 1985, and had not resulted in constitutional crises. It may also have provided evidence that the recognition of ESCR as fundamental guarantees could be beneficial, that the courts could enforce such rights, and that there was a place for ESCR in the NZBORA. However, no such analysis was undertaken.

2.3.4 Generating unrealistic expectations?

Sir Geoffrey considered that “to state as fundamental rights matters which it was not within the power of government to deliver would cause expectations to rise, only to be dashed.” While such an argument may carry some weight in countries such as Brazil, even then it could only provide justification for

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63 Art. 58 of the Constituição da República Portuguesa (25 April 1976) [“Constitution of Portugal”].
64 Ibid., art. 63.
65 Ibid., art. 64.
66 Ibid., art. 65.
67 Ibid., arts. 73-77.
68 Art. 27 of the Constitución de España (29 December 1978) [“Constitution of Spain”].
69 Ibid., art. 35.
70 Ibid., Chapter 3 of Part I.
71 Art. 19 of the Constitution of the Netherlands (17 February 1983) [“Constitution of the Netherlands”].
72 Ibid., art. 20.
73 Ibid., art. 22.
74 Ibid., art. 23.
75 It appears that while a variety of the ESCR included in the constitutions of the Netherlands, Spain, Italy and Portugal are justiciable, some may not be: e.g. Spain’s “Guiding Principles of Social and Economic Policy”. It is not possible to draw any definitive conclusions one way or the other simply on the basis of the constitutional text. However, the judgment of the Constitutional Court of Portugal referred to in Part II of Chapter 3 of this thesis does show that the right to social security in the Constitution of Portugal is justiciable. This would suggest that the other ESCR in Portugal’s Constitution are also justiciable.
76 See also in this regard Philip Alston, “U.S Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for An Entirely New Strategy” (1990) 84 Am. J. Int’l L. 365 at 379, who writing in 1990 stated: “Dutch courts have applied the provisions of the Covenants in domestic cases; the Dutch, Greek, Portuguese, Spanish, Swedish and Swiss Constitutions all explicitly recognize at least some economic and social rights; and the Scandinavians have consistently accorded prominence to those rights in the context of their domestic political agendas.” See further notes 80, 95 and 96 below regarding ESCR in United States constitutional law and elsewhere.
making some ESCR subject to progressive realisation. In New Zealand, as in Finland, the state should be in the position to guarantee most - if not all of these rights. If it is not, then this would only add strength to the argument that the legal status of such rights should be enhanced (once again, perhaps by enacting them as free-standing rights subject to progressive realisation) so that government is required to prioritise their realisation over less fundamental interests.

2.4 The New Zealand government’s current position on ESCR

Article 2(1) of the ICESCR obliges States parties to realise ESCR progressively “by all appropriate means, including particularly the adoption of legislative measures.” While this does not create an absolute obligation to enact free-standing ESCR in domestic law, it is more plausible to conclude that such a step would advance the realisation and protection of these rights rather than that it would harm them. That being the case, any decision to deny ESCR such a status should be based on compelling reasons.

The New Zealand government, however, has offered only very limited justification for its position that greater legislative recognition of ESCR, such as incorporation into the NZBORA, would be inappropriate or not conducive to such realisation. Moreover, the reasons that it has advanced do not stand scrutiny.78

The brief review of the drastic reforms of the 1980s and 1990s set out above and the analysis of cases such as Lawson v. Housing New Zealand79 demonstrate that the New Zealand government’s assertion that ESCR are already adequately protected is incorrect. Further, the government’s position that ESCR are not easily translatable into justiciable rights ignores the existence of such rights at a constitutional level in countries such as Finland, South Africa and Brazil.80

In many respects, the government appears to be doing little more than reiterating the position it took in the early 1990s in the first report it submitted under the Covenant, seemingly without taking into account the considerable developments in the understanding of ESCR which have occurred since that time. The government’s position is also incoherent. The absence of the majority of ESCR from the NZBORA

78 See Part IV of Chapter 2 for a fuller summary of these reasons.
79 See Part III of Chapter 2.
80 New Zealand’s position may in fact be considerably out of step with the majority of the world. As previously cited in Chapter 1, in The Endurance of National Constitutions (New York: Cambridge University Press, 2009), Zachary Elkins, Tom Ginsburg, and James Melton state at 28: “As is well-known, the menu of ‘required’ rights has expanded dramatically since the days when the negative rights enshrined by the U.S founders seemed complete. Second and third generation rights, the positive rights, are now included in international covenants as well as most national constitutions.” [emphasis added]. Their conclusion in this regard is based on a database which records a “large set of characteristics of each and every constitution written since 1789.” (see 9). However, as also previously noted, the authors do not indicate whether such rights are justiciable in the national constitutions to which they refer.
directly contradicts the government’s advice to the CESCR that the indivisibility of human rights is a principle of paramount importance in New Zealand.  

2.4.1 Beyond minimum international standards

Further, although the ICESCR does not impose an unequivocal obligation on New Zealand to recognise ESCR as human rights in its domestic law, this does not mean that such recognition should not occur. New Zealand’s decision-making about fundamental human rights should not be guided only by minimum international standards. Instead, it should also be informed by an objective appraisal of how those fundamental interests are best advanced and protected in the New Zealand context and given New Zealand’s capabilities.

This type of objective appraisal in Brazil, South Africa and Finland led to the conclusion that ESCR should have a constitutional status in each of those states. Of course, not all of the reasoning that informed the decision-making in these states with respect to ESCR is applicable to New Zealand. For example, it is unlikely that the enactment of free-standing ESCR in New Zealand would be intended or expected to have the transformative effect hoped for in South Africa and Brazil. However, the understanding of each country that ESCR and CPR both represent fundamental interests and values, and that these interests and values are of equal importance for the creation and maintenance of a society consistent with human dignity, is plainly relevant to and applicable in New Zealand. The conclusion that inexorably flows from such an understanding, which is that ESCR and CPR should both be included in any Bill of Rights and should share an equal legal status unless there are compelling reasons to the contrary, is also irresistible in New Zealand’s context.

New Zealand would do well to follow the approach that Finland employed in its fundamental rights reform. As discussed in Chapter 4, the objects of this reform were to update Finland’s constitutional law so that it would not be out of step with developments in international law, to strengthen the status of international human rights treaties in Finnish domestic law, and to enact a wider range of ESCR while at the same time ensuring that those rights were formulated in such a way that they could be fulfilled by the Finnish state. This approach is practical and principled. It also led to the enactment of broader constitutional protections for ESCR notwithstanding the serious recession affecting Finland at the time the reform occurred. There is no reason why New Zealand could not undertake a similar review.

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81 See Part IV of Chapter 2.
82 See Part VI of Chapter 4.
2.5 The origins of the ICESCR and Roosevelt’s Second Bill of Rights

Among the scarce references to the ICESCR in the White Paper, there is the following:

“The proposed Bill draws as well on the wider experience and conscience of the international community—a conscience reawakened and developed by the horrific denials of human rights 40 to 50 years ago and later put into binding international legal form—especially in the International Covenants on Human Rights. New Zealand continues to play a significant part in that international endeavour and in 1978 ratified the International Covenants.”

As this passage correctly recognises, the ICESCR and the ICCPR are in part products of the Second World War and the international community’s efforts to prevent a repetition of the events that caused that war, and the gross human rights violations that occurred in the lead up to the war and during it. The White Paper could also have referred to the Universal Declaration of Human Rights (UDHR), which preceded both of the Covenants and heavily influenced the content of each.

Importantly, it appears that the UDHR itself was significantly influenced by the ideas set out in a State of the Union speech that Franklin D. Roosevelt, then the President of the United States, gave in 1944. I summarise Roosevelt’s speech in some detail below, as I consider that in it Roosevelt articulates the central considerations that should inform New Zealand’s decision-making on ESCR, both in general and in relation to the legal status of ESCR in particular.

In his speech, Roosevelt stated that the United States was determined that in the peace to come, “the tragic errors of ostrich isolationism” and “the excesses of the wild twenties when this Nation went for a

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83 There are three references in total. See White Paper, supra note 1 at 21, para. 3.4 (quoted in the main text above); at 83, para. 10.66 (a reference to the fact that article 8 of the ICESCR, regarding trade union rights, is closely related to article 22 of the ICCPR, concerning freedom of association); and at 112, para. 10.179, stating that while the rights in the ICESCR “were undoubtedly important, and indeed New Zealand has pledged itself internationally to respect them” by ratifying the Covenant, such rights were not capable of being enforced by the courts.

84 Ibid. at 21, para. 3.4.


86 For a full copy of Roosevelt’s speech, see online: Franklin D. Roosevelt Presidential Library and Museum <http://www.fdrlibrary.marist.edu>. See also Sunstein, supra note 50 at 100. Sunstein states that “the Universal Declaration was produced under the leadership of Eleanor Roosevelt, who was directly influenced by the American experience in the Great Depression and the New Deal. Her husband’s four freedoms speech and his proposal for the second Bill played a crucial role in determining the contents of the Universal Declaration.” Roosevelt gave the Four Freedoms speech in 1941, in which he looked forward to a world founded on the freedom of expression, freedom of religion, freedom from want, and freedom from fear.
joy ride on a roller coaster which ended in a tragic crash [the Great Depression]”87 would not be repeated, ensuring that a new disaster would not follow on the heels of the war. For all nations, “the one supreme objective for the future” was “security”, defined to include physical, economic, social and moral security.

Roosevelt argued that it was in the best interests of all “the freedom-loving” nations of the world to join together in a “just and durable peace.” On the one hand, this would require “unquestioned military control” over nations that threaten peace. On the other, “an equally basic essential to peace is a decent standard of living for all individual men and women and children in all Nations. Freedom from fear is eternally linked with freedom from want.”

As well as stressing that the nations of the world depended upon one another for their security, Roosevelt argued that the war had taught United States citizens “how interdependent upon each other are all groups and sections of the population of America.” Towards the end of his speech, he referred to a duty “to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishment of an American standard of living higher than ever before known.”

According to Roosevelt, the United States had risen to a position of strength under the protection of the rights of life and liberty. However, those political rights were inadequate “to assure us equality in the pursuit of happiness.” It was self-evident that “true individual freedom cannot exist without economic security and independence”, “necessitous men are not free men” and that “people who are hungry and out of a job are the stuff of which dictatorships are made”. Accordingly, “a second Bill of Rights” was necessary, under which “a new basis of security and prosperity can be established for all regardless of station, race, or creed.” Roosevelt listed the following rights as being “among those” which would properly come within the Bill:

- “The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;
- The right to earn enough to provide adequate food and clothing and recreation;
- The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;
- The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

87 See Sunstein, supra note 50 at 10-11. It was in response to the Great Depression that the Roosevelt administration implemented the New Deal (a series of social and economic programmes aimed at overcoming the massive unemployment and serious poverty that the Depression caused).
• The right of every family to a decent home;

• The right to adequate medical care and the opportunity to achieve and enjoy good health;

• The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

• The right to a good education.”

Roosevelt affirmed that “all of these rights spell security”, and that following the war, “we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.”

He asked the United States Congress “to explore the means for implementing this economic bill of rights- for it is definitely the responsibility of the Congress so to do. Many of these problems are already before committees of the Congress in the form of proposed legislation.”

2.5.1 The relevance of Roosevelt’s speech to New Zealand’s decision-making on ESCR

In his speech, President Roosevelt identifies a group of social and economic rights as one half of a national and worldwide project based on achieving and maintaining the security that was seriously undermined or breached in the Great Depression and the Second World War. Roosevelt defines security broadly and in a positive rather than merely repressive sense, and clearly expresses the reasons why human rights and rights-holders are interdependent. People depend upon one another not only within each individual nation-state but increasingly worldwide. True security requires recognition of the collective and shared interests of each individual and each nation-state.

All of these principles and objectives were recognised in the UDHR and both Covenants. There are express references in the preamble of each to freedom from fear and want, and almost all of the rights in the Second Bill were later recognised in the UDHR and the ICESCR.

88 It may also be relevant to note that according to Sunstein (supra note 50 at 137 and 193), Roosevelt was hostile to Marxist doctrine and believed strongly in capitalist institutions. The President invoked the freedom from want “not in spite of his commitment to individualism but because of it.”

89 For a discussion of the preambles to the ICCPR and the ICESCR see Part I of Chapter 1. The preamble to the UDHR states, amongst other matters: “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, […]

The linkages that Roosevelt makes emphasise the fundamental importance of both ESCR and CPR. Both are necessary for the maintenance of a peace worth having, both at home and abroad. Both promote the maximisation of freedom. This being the case, both sets of rights should receive equal priority. Amongst other measures, the legal status of each set of rights should reflect their common purpose and their equal need for protection and realisation. These are the fundamental principles which should guide New Zealand in deciding what steps it needs to take in relation to ESCR.

As it stands, however, the NZBORA only recognises and promotes one half of the equation: the ICCPR and CPR. This makes it deficient as a human rights instrument and means that it is incapable of advancing the fuller vision of the UDHR and the Covenants in New Zealand. There is no need for the NZBORA to be so limited, particularly because New Zealand is in a position to guarantee most if not all ESCR in full (unlike many of the other State parties to the Covenant).

Further, the absence of the majority of ESCR from the NZBORA also limits New Zealand’s ability to promote abroad what the White Paper described as the “international endeavour” that the Covenants represent. As Finland recognises, its credibility on the international stage as an advocate for all human rights is enhanced by the wide range of rights it guarantees nationally, both in its Constitution and in practice. New Zealand is not in the same position, and will not be until the legal status of ESCR in New Zealand changes.

2.5.2 Economic and social rights in the United States Constitution?

Roosevelt, who died in 1945 soon after beginning his fourth term in office in November 1944, did not attempt to achieve a formal amendment to the United States Constitution to incorporate the second Bill of Rights. According to Sunstein, the reason for this was “that Roosevelt believed [formal] constitutional change was difficult, that courts could not be trusted, and that a change in the text of the founding document was far less important than political will-less important, that is, than an affirmation by the public of its deepest commitments.” Of course, it is impossible to say what might have occurred if

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom, […]"

See Part VII of Chapter 4.

Sunstein, supra note 50 at 137. Note that Sunstein’s own position is that the Second Bill should count among the United States’ “constitutive commitments” (see supra note 49), but that the Constitution should not be amended to include it. This is because Sunstein considers that it would be difficult for the United States’ courts to enforce the Second Bill’s rights in the context of the United States’ supreme law Constitution. However, Sunstein also states at 175 to 176 that “[o]ther nations, writing constitutions from scratch or without our distinctive traditions, would do well to take either the ‘directive principles’ approach followed by India or the intriguing alternative followed by South Africa […].” At 229, Sunstein further stated that “the South African experience shows that some of the strongest objections to constitutionalizing the second bill [such as the enforceability of ESCR and judicial capacity
Roosevelt had lived, or what decisions could have been made in relation to the rights set out in the second Bill of Rights if the Roosevelt administration had not been operating in a supreme law context.

Sunstein also argues, however, that even though the text of the Constitution was never formally amended to incorporate any aspects of the second Bill, in the late 1960s the Supreme Court of the United States was developing interpretations of the Constitution that could have effected, at least in part, such an amendment. Sunstein contends that in a series of judgments the Court found that the Constitution protected aspects of the second Bill, and that these judgments demonstrate the Court was “moving toward ruling that the Constitution requires government to provide a decent minimum for all.”

The reason that such a ruling was never ultimately made, and the favourable jurisprudence towards social and economic rights largely came to an end, was the election of the Republican candidate Nixon to the presidency in 1968. Between 1969 and 1972, President Nixon appointed four judges to the bench of the Supreme Court. These new judges “produced a stunning series of decisions, issued in amazingly rapid succession, which limited the reach of the decisions just described and eventually made it clear that for the most part, social and economic rights have no constitutional status.”

Sunstein’s view is that had the Democratic candidate, Hubert Humphrey, won, “he would in all likelihood have appointed judges who understood the Constitution to protect social and economic rights”; and “aspects of the second bill would have [by now] been a solid part of the constitutional landscape.”

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and legitimacy in ESCR adjudication] are misconceived. If the courts are asked to protect the rights that Roosevelt identified, they have sensible ways to do so.”

92 Ibid. at 153. Sunstein states that “[i]n a number of decisions, the Court held that the government must allow poor people to protect their interests, and that the government must provide them resources in order to enable them to do so.” These decisions are summarised at 156-162. See also 107-108, where Sunstein writes: “In a key decision, sometimes called the Finnegan’s Wake of constitutional law, the Court invalidated California’s effort to impose a six-month residency requirement on people seeking welfare payments. Building on the Court’s decisions, prominent academic commentators insisted that the Court should find a constitutional right to minimum welfare guarantees. In the late 1960s, it would not have been foolish to predict that the Court would eventually do just that.”

93 Ibid. at 163.

94 Ibid. at 153. See also 108, where Sunstein states: “The irony is that with a relatively small shift in the presidential vote, the American Constitution might well have been understood to create a wide range of social and economic rights.”

95 Ibid. at 169. Sunstein insists “[t]here can be no serious doubt that appointees by Hubert Humphrey would have seen things very differently [than the judges appointed by President Nixon].” He also notes at 171 that even now, “bits and pieces of the second bill are now part of the Constitution”, and that “there may be a [constitutional] right to some minimal level of education.” See also Herman Schwartz, “Do Economic and Social Rights Belong in a Constitution?” (1995) 10 Am. U. J. Int’l L. & Pol’y 1233 at 1240, who states that “[p]ositive rights are not unknown to American constitutional law. Almost all state constitutions provide for a right to an education, and some states recognize constitutional rights to welfare, housing, health, and abortions”; and at 1241 that “the United States Constitution implies some positive obligations.”
Accordingly, while as Schwartz writes, “[t]oday, no serious person would suggest establishing economic and social rights as a matter of American constitutional law”, 96 clearly this was not always the case. 97

What this brief history highlights is that ESCR have no inherent defect which means that they cannot be recognised as justiciable rights. The determining factor in any case is political will. Where the dominant political groups favour the recognition of ESCR as constitutional and justiciable rights, as occurred in Brazil, South Africa and Finland, the arguments against ESCR are either not accepted or solutions are found to deal with issues which are considered valid. Where this is not the case (as in New Zealand in the 1980s and 1990s), the opposite occurs. ESCR are presented as fundamentally flawed, at least from a legal perspective.

At one level, recognising this could suggest that ESCR should simply be left to politics. If a democratically elected government wishes to respect ESCR, it may. If it does not and that is a concern to the electorate, the electorate will vote it out. Arguably, it is undemocratic to favour certain values such as those which ESCR represent by incorporating them in a Bill of Rights or other constitutional document. Doing so restricts the ability of any subsequent government, which may have a different political view of the importance, universal applicability, or usefulness of such rights, from amending them or acting contrary to them. In other words, the constitutionalisation of ESCR means prioritising a certain set of political values.

The fundamental difficulty with this argument is that in all democracies it is generally perceived to be unacceptable when it comes to CPR. Because CPR represent fundamental values, they must be protected against the will of the majority, which may not always respect those values or may violate them. As ESCR also represent fundamental values, the same logic must apply to them. ESCR should also be granted a heightened level of protection and, absent convincing reasons, an equal status with CPR.

96 Schwartz, supra note 95 at 1235. Schwartz further notes at 1242 that “[i]n the United States, we have long accepted the fundamental nature of the basic civil and political rights, and that is certainly true in most western societies. But-and this may come as a surprise to most Americans-almost all societies save our own also recognize the prime importance of economic and social rights. Far from such rights being newly sprung from the paternalistic soil of Communism, these rights go back at least to Franklin D. Roosevelt’s Four Freedoms, and appear in constitutions as conservative as the French Gaullist constitution of 1958, which explicitly incorporated the Preamble to the 1946 constitution with its economic and social guarantees, as well as in Italy, Spain, Japan and virtually everywhere else.”

97 Indeed, as Alston writes (supra note 76 at 384): “There is, in fact, ample evidence to support the argument that the rejection of economic, social and cultural rights in the context of U.S foreign policy [since 1981, when President Reagan took office] was largely motivated by the desire to ensure consistency with a comparable domestic policy agenda that has been pursued with vigor and considerable success throughout the 1980s.”
3 PART II: THE OPTIONS FOR A GREATER LEGAL STATUS FOR ESCR

3.1 The available options

There are essentially three options for granting ESCR an enhanced legal status in New Zealand. The first is to follow an approach similar to India and Ireland by granting ESCR a constitutional status, but only as directive, non-justiciable principles. The second is to provide state institutions, such as the Human Rights Commission or the Ombudsmen, with a greater statutory role in relation to ESCR. The third is to grant ESCR a justiciable status.

As signalled earlier in this thesis, the Indian and Irish approach is inconsistent with the indivisibility and interdependence of human rights. It provides only weak guarantees for ESCR and has the effect of identifying them as inferior rights to CPR. Therefore, it should not be followed in New Zealand. Instead, both options two and three should be pursued.

The first step would be to recognise ESCR as justiciable rights in a manner consistent with the nature of ESCR and their current levels of realisation in New Zealand (and I propose below how this could be done). One of the direct effects of such recognition would be that policy-makers would have to acquire a wider understanding of ESCR and factor these rights into their work.

Following the enactment of free-standing ESCR, the Human Rights Commission could be empowered to take on more specific duties in relation to them (similar to, for example, the ESCR monitoring role that the South African Human Rights Commission has). While the advocacy, educational, advisory and broad investigative functions and powers that the Commission already has under the Human Rights Act 1993 [HRA] theoretically encompass the promotion and protection of ESCR (given their international status as human rights), domestic recognition of these rights would provide a more definitive framework as well as a clearer orientation and mandate for the Commission’s ESCR work.

Consideration could also be given to appointing an Ombudsman under the Ombudsmen Act 1975 to receive and investigate complaints that state agencies have breached ESCR (and CPR), and to make

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98 For a brief review of the ESCR in the Irish and Indian Constitutions, see n. 185 in Chapter 2 of this thesis, under heading 7 (“The Purpose of the Comparative Analysis in Chapters 3, 4 and 5”).
99 As discussed in Part I of Chapter 5, s. 184(3) of the Constitution of South Africa obliges the South African Human Rights Commission to require that state organs inform it on an annual basis about the measures they have taken to progressively realise the constitutional rights to housing, health care, food, water, social security, education and the environment.
100 The functions and powers of the Human Rights Commission are set out in s. 5 of the HRA.
101 Ombudsmen Act 1975 (N.Z.), 1975/9 [“Ombudsmen Act”].
recommendations to those agencies regarding how any breach may be remedied. Further research into the work of the Finnish Parliamentary Ombudsman and Chancellor of Justice in relation to the human rights guaranteed under the Finnish Constitution could inform decision-making in this regard.\(^{102}\)

### 3.2 Incorporating ESCR into the NZBORA

The most logical way to enact justiciable ESCR in New Zealand would be to incorporate them in the *NZBORA*. This would provide them with the same status as CPR; that is, free-standing rights which influence statutory interpretation and law and policy-making, override inconsistent subordinate legislation and inconsistent policy, but must give way to ordinary inconsistent legislation (and acts carried out or policy made pursuant to such legislation).

Such an approach has its weaknesses. Principal amongst these is that ESCR would not be as strong in the formal legal sense as, for example, some of the ESCR in the Finnish Constitution. However, there was considerable opposition amongst members of the New Zealand public to the proposal that CPR be entrenched in the *NZBORA*,\(^{103}\) and there is no indication that sentiments have now changed or would be any different in relation to ESCR. Also, as discussed in Chapter 6, there would be advantages in only providing ESCR with the status that CPR currently have in the *NZBORA*. This approach would mitigate counter-majoritarian concerns, including those relating to the legitimacy of the courts adjudicating on ESCR. If at some later stage there were a renewed interest in a supreme law Bill of Rights in New Zealand, the issues that arise in relation to entrenched ESCR could be considered together with those relating to entrenched CPR.

#### 3.2.1 Proposed amendments to the NZBORA

I set out below a modified version of the *NZBORA* which I have amended to include a range of ESCR (the italicised text indicates the changes I have made). The drafting I suggest is not intended to be anything more than preliminary. The ESCR I propose are based principally on provisions of the *ICESCR* and of the Brazilian, South African, and Finnish Constitutions, but are also influenced in part by the constitutions of the Netherlands, Spain, Italy, and Portugal.

\(^{102}\) One of the clear advantages of an investigation by an Ombudsman is its informal nature and the fact that it is at no cost to the complainant. However, s. 13(7) of the *Ombudsmen Act* currently provides that an Ombudsman may not investigate a complaint if the complainant has a right of appeal or objection or a right to apply for a review to a court or tribunal on the merits of his or her complaint, unless there are special circumstances that make it unreasonable for the complainant to exercise those rights. Accordingly, if ESCR became justiciable rights in New Zealand but the *Ombudsmen Act* remained unmodified, the jurisdiction of any Ombudsman in relation to ESCR could be considerably limited. The Finnish model may provide a useful example of how the jurisdiction of Ombudsmen could be expanded in relation to human rights without compromising the role of the courts and other tribunals, or the need for finality in litigation.

\(^{103}\) See Part I of Chapter 2.
Before setting out my proposed amendments, I outline the thinking behind them.

3.2.1.1 Express reference to the ICESCR

In the title to the NZBORA, I propose the affirmation of New Zealand’s commitment not only to the ICCPR but also the ICESCR. As well as raising the profile of the ICESCR in New Zealand, this would emphasise the relevance of the Covenant and the CESCR’s General Comments to the interpretation of the ESCR that I suggest be included in the Act.

This affirmation would not result, however, in the direct incorporation of the ICESCR into New Zealand law. Accordingly, there would be no risk of New Zealand courts having to resolve any conflict that could arise between the ICESCR and the rights in the NZBORA. In the event of any such inconsistency, the domestic rights would prevail.

3.2.1.2 Minimum standards

The majority of the ESCR I propose are not subject to progressive realisation or resource constraints. Rather, my intention is that these rights should set minimum standards which are immediately applicable in full (similar to the ESCR in the constitutions of Brazil and Finland and the CPR affirmed in the NZBORA). As discussed in Chapter 1, the reason for the use of progressive realisation in the ICESCR was that it was considered that many states did not have the resources to ensure full and immediate realisation of the rights the Covenant recognises. Because New Zealand is generally not so constrained, there does not appear to be any reason why minimum standards relating to most ESCR could not be guaranteed immediately and into the future.

It may be, however, that New Zealand is not presently able to guarantee in full the right to adequate housing or the right to equal access to tertiary education on the basis of capacity. If this is the case, then there would be a compelling reason for differentiating these rights from the rest of the rights in the NZBORA. However, the answer would not be to leave these rights out. Instead, both could be subject to progressive realisation, and I have proposed clauses to this effect (see the italicised and underlined provisions in sections 30(3) and 34).

In these clauses, I have used the term “all appropriate steps” (essentially the term used in the ICESCR) to define the nature of the New Zealand government’s obligation, as opposed to, for example, “reasonable steps” (essentially the term used in the South African Constitution). The term “reasonable steps” could be

104 See Part II of Chapter 1.
105 On the other hand, if these rights could be immediately guaranteed then there would be no reason not to do so. In this scenario, the italicised and underlined provisions in ss. 30(3) and 34 could be omitted.
interpreted as allowing the government a greater margin of discretion than the formulation I have adopted. If granting such a wider margin were thought preferable, “reasonable steps” could be substituted for “all appropriate steps”.

In relation to the rights to primary and secondary education and to health care services, I propose that each right be guaranteed to a level that is “adequate” (meaning “satisfactory or acceptable in quality or quantity”),106 and “suitable” (in the sense of being “right or appropriate for a particular person, purpose or situation”).107 The use of the adjective “adequate” is intended to provide a general quality standard, while “suitable” is intended to ensure that, to the greatest extent possible, substantive rather than merely formal equality is achieved in everyone’s enjoyment of the guaranteed minimum standards (in the sense that Baragwanath J envisaged in Attorney-General v. Daniels, the New Zealand case regarding special education discussed in Chapter 2). Both standards are intended to be dynamic, so that their meaning may be modified over time to keep pace with societal changes.

Further, by restricting what could be a general “right to health” to a right to health care services, I intend to make it clear that the government is not legally obliged to ensure that everyone is healthy. Instead, the right I propose would require government to guarantee everyone the right to the same minimum standard of health care.

I do not include a requirement of suitability in the right to tertiary education, given that such education is both advanced and not compulsory. However, it may be that this requirement should also apply to tertiary education. For obvious reasons, the standards in relation to the rights to food and water are “adequate and sufficient” as opposed to adequate and suitable.

It could be argued that the standard in relation to health and education should be one of excellence rather than adequacy, and that the formulation of the rights in the terms set out above suggests that mediocrity in education and health care is acceptable. However, such an argument misunderstands the difference between setting excellence as a standard to be achieved, and guaranteeing minimum and justiciable human rights standards. Health and educational institutions should aim for excellence, but they should not be subject to a legally enforceable obligation to achieve excellence at all times.

Finally, the minimum standard that I have specified for the right to social security is the level required to ensure “a standard of living consistent with human dignity.” This differs from, for example, the Finnish Constitution, which refers to indispensable and basic subsistence. I have borrowed this terminology from

107 Ibid.
the 1972 report of the Royal Commission on Social Security, which considered that this was the standard the New Zealand community was required to guarantee dependent people.\textsuperscript{108}

On the one hand, the use of this term aims not to discourage personal initiative or undermine the incentives for employment and saving. The standard of living to be preserved is not high. On the other hand, however, it is intended to set the minimum level of social security beyond that of indispensable or basic subsistence. This is on the understanding that the latter terminology could be interpreted in a way that results in a level of provision insufficient to allow the right-holder to care for him or herself and any family adequately, and to participate in his or her community at a minimum level. A decent community ensures that those who require social security can do both. Further, maintenance of each is likely, amongst other benefits, to improve the outcomes for children, assist unemployed persons to retain or re-establish an understanding of their community and its expectations sufficient to allow them to reintegrate into the workforce, and to preserve a dignified life for those who can no longer work, such as the elderly.

3.2.1.3 Justified limitations

The ESCR I have proposed would, like the CPR currently in the \textit{NZBORA}, be subject to the justified limitations set out in section 5. Therefore, for example, the government could limit the right to strike of persons who work in essential services to a greater degree than the right of persons who do not work in such services (as it does now) without contravening that right. However, in order to provide an extra level of protection for both ESCR and CPR, I propose that an additional condition be added to section 5: namely, that any limitation not be incompatible with the nature of the right in question.

As set out above, resource constraints would not generally justify a failure to meet the minimum standards imposed by the ESCR provisions (although in relation to some rights, such as the right to health care services for example, resource constraints would play a role in defining what those minimum standards were). While in exceptional cases, such as financial crises, resource-related limitations could perhaps be relied upon to excuse such a failing, these cases would have to be truly exceptional and the requirements of section 5 would still have to be met.

If some ESCR were ultimately enacted as subject to progressive realisation, any retrogressive measure would be unjustifiable unless it met the section 5 conditions. Conversely, as discussed in Chapters 1 and 5, any government decision not to realise such rights further for a temporary period would not be considered as a limitation subject to the section 5 standards (although such a decision could still be judicially reviewed for consistency with the government’s obligation to take all appropriate steps to

\textsuperscript{108} Royal Commission on Social Security (1972) at 65, cited in Stephens, \textit{supra} note 19 at 101.
realise the right in question). Finally, section 4 of the \textit{NZBORA} would also permit Parliament to override any right, whether subject to progressive realisation or not.

\subsection*{3.2.1.4 Human Rights Select Committee}

As the \textit{NZBORA} currently stands, the Attorney-General is required to report to Parliament any bill which appears to be inconsistent with the \textit{NZBORA}. I propose that this function be transferred to a Parliamentary select committee. This could be established as a new, specialist committee, which I have referred to as the Human Rights Committee. Alternatively, the jurisdiction of the Justice and Electoral Committee or the Regulations Review Committee could be extended to encompass this function.\footnote{As noted in Part I of Chapter 2, this was one of the recommendations that the Justice and Law Reform Select Committee made in its report on the bill that led to the \textit{NZBORA} (N.Z., “Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand” 1988 (Bill Dillon, Chair) at 11 (“\textit{Final Report}”)). It also considered that such a committee could be given jurisdiction not only to review bills for human rights consistency, but also enactments. This function seems ultimately to have been granted to the Human Rights Commission (see s. 5(2)(k) of the \textit{HRA}), but to extent to which the Commission carries it out is unclear.}

The purpose of this change would be to promote a wider involvement in and understanding of human rights issues by members of Parliament across the political spectrum, and a corresponding reduction in what may be seen as a government monopoly on decision-making regarding whether a bill is \textit{NZBORA} inconsistent.\footnote{I do not overlook that in exercising the s. 7 function the Attorney-General acts independently from government. However, the Attorney-General is still appointed from within government, and is advised by the government’s primary legal adviser, the Crown Law Office, or by the Ministry of Justice.} It could also promote additional scrutiny of and publicity about bills which appear to contravene either CPR or ESCR, and in that way assist in preventing the enactment of \textit{NZBORA} inconsistent legislation.\footnote{Such additional scrutiny and the potentially greater level of protection it may provide would seem desirable. In “The Comparative Irrelevance of the \textit{NZBORA} to Legislative Practice” (2009) 23 N.Z.U.L. Rev. 465 at 475 and 477, Andrew Geddis records that since 1990 up to the publication of his article, the Attorney-General had issued 48 section 7 reports, twenty-two of which related to government bills, and twenty-six to members or local bills. Of the government bills, 19 became law without any modifications being made as a result of the Attorney-General’s report. 21 of the 26 members or local bills were defeated in the House or were passed only following amendment to rectify the apparent \textit{NZBORA} inconsistency. At n. 58, Geddis contrasts these statistics with those of Canada (where he states that no government bill has been introduced to the House following an adverse report from the Canadian Attorney-General), and the United Kingdom (where only one such incident has occurred). The select committee I propose would not necessarily improve the record in relation to government bills which are apparently inconsistent with the \textit{NZBORA}. However, it could have such an effect, particularly if it increased MPs’ knowledge of human rights and led to the generation of greater publicity about such bills.} Finally, even if such legislation were enacted, the involvement of MPs outside of government in reviewing that legislation against \textit{NZBORA} standards could increase the likelihood of it being revisited following a change of government.

It could, however, be too onerous for such a committee to consider all bills. If that were the case, the committee could be established along similar lines to the Finnish Constitutional Law Committee. The responsibility for reviewing all bills could remain with the Attorney-General, with the committee being
required to report to Parliament on any bill the Attorney-General identified as potentially inconsistent with the NZBORA. The committee could also have jurisdiction to review any other bill on its own initiative or on referral from any other member of Parliament.

3.2.1.5 Application to legal persons

Currently, the NZBORA only applies to acts done by state institutions or by persons exercising public powers, although legal persons may claim the benefit of its provisions. I propose, along the lines of the South African Constitution, that its applicability be extended in a limited way to private actors, both in relation to ESCR and CPR.

Private entities have a significant role in the delivery of many goods and services in New Zealand which are relevant to ESCR, such as electricity, food, and water. Accordingly, the actions or omissions of these actors may affect ESCR or result in the violation of these rights.112 In addition, if plans for the partial privatisation of prisons are implemented, private entities may begin delivering correctional services, and this may have implications for CPR.113 There would also seem to be no reason why private companies should be entitled to the benefit of the NZBORA without carrying some of the burden.

Under my amendment, the primary source of human rights duties for private entities would be any specific and applicable legislation which imposed binding obligations on them in relation to such matters (such as, for example, the HRA or the Health and Safety in Employment Act 1992); and ensured that an individual whose human rights had been violated by a private actor could claim a remedy against it or against the New Zealand government. If such legislation were applicable to a case before the courts, the courts would apply that legislation to the case rather than applying the NZBORA. However, if legislation of this nature were not in place, the intention of my provision would be to ensure that a person who had suffered a rights-violation could still bring a claim under the NZBORA for an appropriate remedy. This would provide an incentive for government to enact appropriate legislation while at the same time protecting against any omission to do so or any attempt by the government to contract out of its human rights obligations.

Clearly, this is a complex issue, and I have not undertaken research into how the limited horizontal application of the South African Constitution has functioned in practice. However, it is an issue that

112 The negative impact that private individuals and organisations may have on human rights has already been recognised by legislation such as the HRA, which makes certain types of discrimination unlawful in not only the public sector but also the private (such as, for example, in partnerships, associations and trade unions, and the provision of goods and services).

113 See, for example, Amnesty International “Privatisation of prisons a blow to New Zealand’s commitment to human rights” (15 April 2010), online: Amnesty International Aotearoa New Zealand <http://www.amnesty.org.nz>.
would need to be dealt with if ESCR were included in the NZBORA (and may still be an issue that needs attention even if the NZBORA remains almost exclusively concerned with CPR). My clause provides a starting point for thinking about how this could be done.

3.2.1.6 Cultural rights and the rights of minorities

In section 38(1), I propose a general right to participate in New Zealand’s cultural life. This right is in fairly much the same terms as article 15(1)(a) of the ICESCR, and belongs to all persons. However, because all the rights in the NZBORA should set minimum and enforceable standards, it would be desirable to define the scope of this right further by listing the minimum rights that it encompasses. While the CESCR’s detailed General Comment on article 15(1)(a) would assist in carrying out this task,114 input from experts and the public generally would be vital in determining the minimum standards that should be imposed in New Zealand (as indeed is the case in relation to all the ESCR I suggest be included in the NZBORA).

This general right would not affect Māori rights under the Treaty of Waitangi, under legislation which creates rights or obligations based on the Treaty, or as derived from the common law. It is difficult to see how such a right could be inconsistent with any such Māori right, and in any case the legislative or common law rights that Māori already have would continue to be preserved by section 4 of the NZBORA and its savings provision, set out below as section 39. The Treaty itself could not of course be modified by the NZBORA. However, if the NZBORA were amended to include ESCR, additional consideration may need to be given to whether the rights of Māori should receive specific recognition in it.115

Section 38(2) affirms the minority rights currently set out in section 20 of the NZBORA. Section 38(2) can be defined as affirming a right to culture, in that it protects the right of minorities to be free from state interference in the enjoyment of their culture, including their religion and language. Therefore, I have grouped it together with the general right set out in section 38(1).

3.2.1.7 Remedies

The NZBORA does not have an express remedies provision. However, as noted in Chapter 2, the New Zealand courts have held that they have an implicit jurisdiction to grant “appropriate and effective

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115 The White Paper, supra note 1 at 74-75, paras. 10.36-10.47, proposed that the Treaty of Waitangi be recognised and affirmed “as part of the supreme law of New Zealand”. This would have meant that the Treaty would have been superior to ordinary legislation. However, the reference to the Treaty in the White Paper’s Bill of Rights was removed before the NZBORA was enacted. The Justice and Law Reform Committee recommended this amendment in its Final Report, supra note 109 at 4, reasoning that because the NZBORA would not be supreme law, referring to the Treaty in it could suggest that the Treaty had no greater status than that of an ordinary statute.
remedies” following a finding that any of the rights affirmed in the NZBORA have been violated. Because of section 4 of the NZBORA, however, even where a court finds that ordinary legislation is inconsistent with the rights in the NZBORA, it has no jurisdiction to strike down that legislation or to rewrite it.

There would seem to be little reason to modify this jurisdiction if ESCR were included in the NZBORA. Accordingly, I have not suggested an express remedies provision or any changes to the current remedial jurisdiction of the courts under the NZBORA.

3.2.1.8 Additional rights and provisions

There are a number of rights that do not feature in my modified version of the NZBORA but which arguably should be affirmed by it. Principal among these are a right to the environment (not expressly recognised in the ICESCR but included in the constitutions of South Africa, Brazil and Finland), and a right to property (also not in the ICESCR, but guaranteed in differing ways in the South African and Finnish constitutions). A freedom from private or public monopolies, as set out in Roosevelt’s second Bill of Rights, could also be considered. The relatively limited reference in my amended NZBORA to trade union rights could be expanded, perhaps along the lines of South Africa’s Constitution (which refers not only to trade union rights but also the rights of employers and employers’ associations, and the rights of each to engage in collective bargaining).

In addition, perhaps there should be greater recognition given to New Zealand’s obligation under the ICESCR to protect and assist the family, or express provisions inserted regarding the rights of everyone

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116 See Taunoa and Ors v. Attorney-General and Anor [2007] NZSC 70 at para. 106. This is essentially the jurisdiction that the White Paper envisaged that the courts would have. Art. 25 of the draft Bill of Rights set out in the White Paper provided: “Anyone whose rights or freedoms as guaranteed by this Bill of Rights have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”

117 I note that the recognition of justiciable ESCR could give rise to cases in which the appropriate remedy is a suspended or delayed declaration of invalidity. As far as I am aware, this is not a remedy that the New Zealand courts have granted before, at least under the NZBORA. However, if such a case were to arise, no doubt the court would find that it had jurisdiction to grant such a declaration pursuant to its power to grant an effective and appropriate remedy.

118 S. 23 of the Constitution of South Africa.

119 Art. 10(1) of the ICESCR refers to the recognition of States parties that: “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.” Arts. 10(2) and (3) refer to protection for mothers before and after childbirth, and protection for children and young persons. I have attempted to reflect most of these obligations in my proposed sections on social security (s. 34) and the rights of children, young persons and their parents or guardians (s. 36). However, if greater recognition in the NZBORA of the Covenant’s art. 10(1) obligation were thought desirable, the Finnish Constitution could perhaps be used as a model. Its s. 19(3) (one of the provisions on social security) provides: “[…] the public authorities shall support families and others responsible for
under the Covenant to “enjoy the benefits of scientific progress and its applications” and “to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

On the other hand, however, it may be that given the focus in the NZBORA on setting out enforceable, minimum rights, at least the first two matters (the family and the enjoyment of technological advances) are better dealt with in separate, specific legislation. Further thought may also be required on whether the NZBORA should contain a reference to duties as well as rights.

The desirability of including express provisions relating to standing (i.e. the right to bring proceedings alleging that an affirmed right has or may be infringed) in the NZBORA should be investigated. The broad provisions regarding standing in the South African and Brazilian constitutions could provide useful points of reference in this regard.

Finally, consideration should be given to whether a preamble should be added to the NZBORA or the title to the Act expanded to incorporate matters other than the affirmation of New Zealand’s commitment to the ICESCR and the ICCPR. As well as providing further interpretive guidance to the courts, a preamble could add to the moral and political force of the NZBORA.

The draft Bill of Rights set out in the White Paper had such a preamble, which stated amongst other matters: “New Zealand is a democratic society based on the rule of law and on principles of freedom, equality and the dignity and worth of the human person.” These references to equality and dignity would have particular resonance in a NZBORA which included ESCR. The new section 8 I suggest, which affirms the equal right of women and men to enjoy the rights in the NZBORA, aims to guarantee equal enjoyment of all of the rights up to the minimum guaranteed standards; and the new section 34 on the right to social security places considerable reliance on the concept of human dignity. However, a preamble which also referred to these values would both reinforce these new sections and emphasise the centrality and relevance of equality and dignity to all human rights.

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120 See arts. 15(1)(b) and (c) of the ICESCR. The right to “the freedom indispensable for scientific research and creative activity”, recognised in art. 15(3) of the Covenant, is reflected in part in my proposed s. 30(4) (which states “No person shall be denied the right to academic freedom”).

121 See, for example, art. 29(1) of the UDHR which provides: “Everyone has duties to the community in which alone the free and full development of his personality is possible.” See also similar references in the preambles to the ICCPR and the ICESCR, which state: “Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant, […]”. However, because it seems likely that such references could only be hortatory rather than justiciable, I have omitted them from my proposed NZBORA.

122 See s. 38 of the South African Constitution.

123 See arts. 5(LXX), 5(LXXIII) and 129 of the Brazilian Constitution.

124 White Paper, supra note 1 at 10.
I set out my amended version of the *NZBORA* below.
NEW ZEALAND BILL OF RIGHTS ACT 1990

An Act—

(a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

(b) To affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Short title and commencement

[...]

PART 1-General Provisions

2 Rights affirmed

The rights and freedoms contained in this Bill of Rights are affirmed.

3 Application

This Bill of Rights applies only to acts done—

a) By the legislative, executive, or judicial branches of the government of New Zealand; or

b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law; or

(c) By any other person, to the extent that any right in this Bill of Rights is applicable to that person’s acts, taking into account the nature of the right, any duty imposed by it and any other relevant legal duty.

4 Other enactments not affected

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
b) Decline to apply any provision of the enactment—
   by reason only that the provision is inconsistent with any provision of this Bill of Rights.

5 Justified limitations

Subject to section 4 and the other express limitations 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 are not
incompatible with the nature of these rights and freedoms and can otherwise be demonstrably justified in
a free and democratic society.

6 Interpretation consistent with Bill of Rights to be preferred

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

7 Select Committee to report to Parliament where Bill appears to be inconsistent with Bill of Rights

Where any Bill is introduced into the House of Representatives, the Human Rights Committee shall,—
a) In the case of a Government Bill, on the introduction of that Bill; or
b) In any other case, as soon as practicable after the introduction of the Bill,—
   bring to the attention of the House of Representatives any provision in the Bill that appears to be
   inconsistent with any of the rights and freedoms contained in this Bill of Rights.

PART 2 - Equality and Non-Discrimination Rights

8 Equal rights of men and women

Every woman and man has the equal right to enjoy the rights affirmed in this Bill of Rights.

9 Freedom from discrimination

1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human
2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons
   disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act
   1993 do not constitute discrimination.
PART 3 - Civil and Political Rights

[These are set out in sections 8-27 of the current NZBORA. They include the non-discrimination rights now set out in section 9 above, the right to freedom from association, now modified and set out in section 19 below, and the rights of minorities, now set out in section 38 below. Other than these rights, the civil and political rights and freedoms the NZBORA affirms are the right not to be deprived of life; the right not to be subjected to torture or cruel treatment; the right not to be subjected to medical or scientific experimentation; the right to refuse to undergo medical treatment; electoral rights; the freedom of thought, conscience and religion; the freedom of expression; the right to manifest one’s religion or belief; the freedom of peaceful assembly; the freedom of movement; the right to be secure against unreasonable search and seizure; the right not to be arbitrarily arrested or detained; certain rights of persons arrested, detained or charged; minimum standards of criminal procedure; the freedom from retroactive penalties and double jeopardy; and the right to justice (the right to natural justice or due process, the right to bring judicial review, and the right to bring civil proceedings against the Crown and defend civil proceedings brought by the Crown)].

19 Freedom of association

1) Everyone has the right to freedom of association.
2) This right includes the right of every person to form and join trade unions for the promotion and protection of his or her interests.

PART 4 - Economic, Social and Cultural Rights

30 Right to education

1) Everyone has the right to compulsory primary and secondary education that is:
   a) free; and
   b) adequate; and
   c) suitable.
2) Every person who has not received or completed his or her primary or secondary education has the right to an equivalent education.
3) Every person has the right to equal access to adequate tertiary education on the basis of his or her capacity. The government of New Zealand shall take all appropriate steps to the maximum of its available resources, including the progressive introduction of free tertiary education, to achieve progressively the full realisation of this right.
4) No person shall be denied the right to academic freedom.
5) Every person has the right, at his or her own expense, to establish and maintain independent educational institutions.
6) Subject to any requirements which independent educational institutions may impose, every person has the right to choose such institutions for the education of their son or daughter.
7) Independent educational institutions must, at a minimum:
   a) not impose requirements or engage in practices which are inconsistent with any of the rights or freedoms in this Bill of Rights;
   b) be registered with the government of New Zealand;
   c) maintain standards not inferior to standards at comparable public educational institutions.

31 Right to work
1) Everyone has the right to work.
2) This right includes the following minimum rights:
   a) The right of every person to the opportunity to gain his or her living by work which he or she freely chooses or accepts. The government of New Zealand shall take all appropriate steps to safeguard and realise this right, but is not obliged to provide employment:
   b) The right not to be unlawfully dismissed from or unlawfully disadvantaged in employment:
   c) The right to equal remuneration for work of equal value:
   d) The right to safe and healthy working conditions:
   e) In the case of employees, the right to reasonable limitation of working hours, periodic holidays with pay, and remunerated public holidays:
   f) The right to strike.

32 Right to health care services

Everyone has the right to adequate and suitable health care services.

33 Right to food and water

Everyone has the right to adequate and sufficient food and water.

34 Right to social security
1) Everyone has the right to social security.
2) This right includes the following minimum rights:
   a) The right of every person to a standard of living consistent with human dignity, where he or she is unable to achieve that standard independently by reason of unemployment, age, illness, disability, accident, loss of a provider, or for any other justifiable reason:
   b) The right of every person in employment to remunerated parental leave without prejudice to his or her employment.
35 Right to housing

Everyone has the right to adequate housing. The government of New Zealand shall take all appropriate steps, to the maximum of its available resources, to achieve progressively the full realisation of this right.

36 The rights of children, young persons and their parents or guardians

1) Every child and young person has the right to special measures of protection and assistance where such measures are necessary for his or her well-being.

2) Subject to subsection 1 of this section, every parent or legal guardian has the right to care for his or her son or daughter until they reach adulthood.

37 Rights relating to New Zealand’s official languages

1) The official languages of New Zealand are English, Te Reo Māori and New Zealand Sign Language.

2) Everyone has the right to use any of these languages before the New Zealand courts or in other legal proceedings, in Parliament, and before authorities of the government of New Zealand.

3) Everyone has the right to receive documents of the government of New Zealand in English or Te Reo Māori.

4) Nothing in this section limits the right affirmed in section 24(g) of this Bill of Rights.125

38 Cultural rights and the rights of minorities

1) Every person has the right to participate in the cultural life of New Zealand.

2) A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

PART 5- Miscellaneous provisions

39 Other rights and freedoms not affected

An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part.

125 The right in s. 24(g) of the NZBORA is the right of a person charged with an offence to “the free assistance of an interpreter if the person cannot understand or speak the language used in court.”
40 Application to legal persons

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

ESCR are inadequately recognised in New Zealand’s legal system, and as a result they are exposed. The decision to elevate CPR to a special status in the NZBORA, while simultaneously denying this status to ESCR at a time when the latter were at significantly greater risk, now appears unjustifiable.

The inclusion of ESCR in the NZBORA would be entirely consistent with New Zealand’s obligation to progressively realise ESCR by all appropriate means. Of course, providing these rights with enhanced legal protection is only one of the measures that need to be taken to ensure their realisation. However, it is a very important measure. Recognising ESCR in the NZBORA would guarantee these rights to the same extent as CPR and would result in a considerably increased focus on them. It would also encourage more principled and accountable government.

Affirming ESCR in the NZBORA would not amount to putting a straitjacket on government or requiring it to provide everything needed to fulfil the rights. Instead, it would constitute a limited but necessary restraint on the powers of the state. Government would still retain a significant margin of discretion with regard to its policies, as well as the power to override ESCR.

The Brazilian, South African and Finnish approaches to ESCR reflect the social, economic, and legal contexts and cultures of each of those countries, and are logical and principled. New Zealand cannot claim the same in regard to its approach. Unlike these countries, New Zealand has yet to take advantage of ESCR’s potential to protect fundamental interests and promote democratic governance. There is no good reason to wait any longer.
BOOKS

ANC Constitutional Committee, *A Bill of Rights for a New South Africa* (Belville: Centre for Development Studies, 1990)


ARTICLES OR PRESENTATIONS

Albie Sachs, “Towards a Bill of Rights in a Democratic South Africa” (1990) 6 S.A.J.H.R. 1


Lon L. Fuller, “The Forms and Limits of Adjudication” (1978) 92 Harv. L. Rev. 353


Maria Green, “What We Talk about When We Talk about Indicators: Current Approaches to Human Rights Measurement” (2001) 23 Human Rights Quarterly 1062


Miia Halme, “From the Periphery to the Centre: Emergence of the Human Rights Phenomenon in Finland” (2007) 18 Finnish Yearbook of International Law 257


Paul Hunt, “Using rights as a shield” 6 HRLP 111
Paul Hunt, “The UN and economic, social, and cultural rights: some recent developments: The globalisation of accountability” (1999) 5 HRLP 82
Sir Geoffrey Palmer, President of the New Zealand Law Commission “The Bill of Rights Fifteen Years On” (Keynote Speech for the Ministry of Justice Symposium on the New Zealand Bill of Rights Act 1990, 10 February 2006)


PUBLICATIONS OR RESOLUTIONS BY STATES OR INTERNATIONAL BODIES


*Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, OHCHR, HRI/MC/2008/3


**PARLIAMENT, GOVERNMENT OR CROWN ENTITY PUBLICATIONS**

(Finland), “Government Report to Parliament on the Human Rights Policy of Finland”, 2004


*New Zealand Parliamentary Debates*, New Zealand Bill of Rights Bill 10 October 1989

N.Z., Cabinet Office, *Cabinet Manual 2008* (Wellington, Department of the Prime Minister and Cabinet, 2008)


N.Z., “Inquiry to review New Zealand’s existing constitutional arrangements: Report of the Constitutional Arrangements Committee” 2005 (Hon. Peter Dunne, Chair)


**ELECTRONIC RESOURCES**

*ACT ESCR project: Protecting Economic, Social and Cultural Rights in the Act*, online: Australian National University <http://acthra.anu.edu.au>
Amnesty International “Privatisation of prisons a blow to New Zealand’s commitment to human rights” (15 April 2010), online: Amnesty International Aotearoa New Zealand <http://www.amnesty.org.nz>

Online: Constitutional Court of South Africa <http://www.constitutionalcourt.org.za>
Online: Department of Justice and Constitutional Development <http://www.justice.gov.za>
Online: Elections New Zealand <http://www.elections.org.nz>
Online: Franklin D. Roosevelt Presidential Library and Museum <http://www.fdrlibrary.marist.edu>
Online: Oxford Dictionaries <http://www.oxforddictionaries.com>

NEWSPAPER AND MAGAZINE ARTICLES

Derek Cheng, “Corrections to become monster department” New Zealand Herald (2 July 2010), online: New Zealand Herald <http://www.nzherald.co.nz>
Bonny Schoonakker, “Treated with Contempt” Sunday Times (21 March 2004)
Pearlie Joubert, “Grootboom dies homeless and penniless” Mail & Guardian Online (8 August 2008), online: Mail & Guardian Online <http://www.mg.co.za>
“A special report on business and finance in Brazil: The self-harming state” The Economist (12 November 2009), online: The Economist <http://www.economist.com>

STATUTES, CONSTITUTIONS AND TREATIES

Act on the High Court of Impeachment (Finland) (25 November 1922)
Act on the Right of Parliament to Inspect the Lawfulness of the Official Acts of the Members of the Council of State, the Chancellor of Justice and the Parliamentary Ombudsman, (Finland) (25 November 1922)
Commerce Act 1986 (N.Z.), 1986/5
Constitución de España (29 December 1978)
Constituição da República Federativa do Brasil de 1988 (5 October 1988)
Constituição da República Portuguesa (25 April 1976)
Constitution Act of Finland 1919 (Finland) (17 July 1919)
Constitution of Finland (Finland) (11 June 1999)
Constitution of India (India) (26 January 1950)
Constitution of Ireland (Ireland) (29 December 1937)
Constitution of the Netherlands (17 February 1983)
Constitution of the United States (17 September 1787)
Costituzione della Repubblica Italiana (1 January 1948)
Crown Entities Act 2004 (N.Z), 2004/115
Education Act 1964 (N.Z), 1964/135
Education Act 1989 (N.Z), 1989/80
Employment Relations Act 2000 (N.Z), 2000/24
European Social Charter (revised), 03 May 1996, Eur. T.S. 163
Holidays Act 2003 (N.Z), 2003/129
Housing Restructuring Act 1992 (N.Z), 1992/76
Housing Restructuring and Tenancy Matters Act 1992 (N.Z.), 1992/76
Human Rights Act 1993 (N.Z.), 1993/82
Injury Prevention, Rehabilitation, and Compensation Act 2001 (N.Z), 2001/49
Magistrates’ Courts Act 1944 (S.A), No. 32 of 1944
New Zealand Bill of Rights Act 1990 (N.Z), 1990/109
New Zealand Public Health and Disability Act 2000 (N.Z), 2000/91
Ombudsmen Act 1975 (N.Z.), 1975/9
Parliament Act (Finland) (13 January 1928)
Privacy Act 1993 (N.Z.), 1993/28
Social Security Act (N.Z), 1964/36


Water Services Act 1997 (S.A), No. 108 of 1997

CASES

Brazil

Associação Nacional dos Membros do Ministério Público v. Congresso Nacional (26 September 2007) ADI 3.04 (DF) (FSC)
Banco Itaú v. Armindo Luiz Segabinazzi (3 December 2008) RE 349.703-1 (RS) (FSC)
Companhia Paulista de Plásticos v. Congresso Nacional (29 August 2001) MI 542-7 (SP) (FSC)
Estado do Rio Grande do Sul v. Luiz Marcelo Dias e outro (12 December 2006) RE 393.175-AgR (RS) (FSC)
Estado do Rio Grande do Sul v. Rodrigo Skrsypcsak (22 February 2000) RE 195.192-3 (RS) (FSC)
Município de Santo André v. Ministério Público do Estado de São Paulo (22 November 2005) RE 410.715-AgR (SP) (FSC)
Município de Santo André v. Ministério Público do Estado de São Paulo (26 April 2007) RE 384.201-4 (SP) (FSC)
Partido Socialista Brasileiro v. Mesa da Câmara dos Deputados e outros (3 April 2003) ADI 1.946 (DF) (FSC)

Finland

KKO 1997:141 (Yearbook of the Supreme Court 1997 No. 141) (S.C.)
KKO 2001:93 (Yearbook of the Supreme Court 2001 No 93) (S.C.)
(27 November 2000) No. 3118 (S.A.C.)
(1 June 1999) No. 368/3 (Administrative Court of Hame)
(23 November 1998) No. 512/2 (Administrative Court of Turku and Pori)
(28 February 2000) No. 394 (S.A.C.)
New Zealand

Aorangi School Board of Trustees v. Minister of Education (21 December 2009) CIV-2009-409-002812, H.C.
LSA Daniels & Ors v. Attorney-General (3 April 2002) M 1615-SW99 (H.C.)
Rahman v. Minister of Immigration (26 September 2000) AP 56/99; CP 49/99, H.C.
Taunoa and Ors v. Attorney-General and Anor [2007] NZSC 70
Willowford Family Trust & Ors v. Christchurch City Council (29 July 2005) CIV-2004-409-2299, H.C.
New Zealand Bus Limited and Ors. v. Commerce Commission [2007] NZCA 502

Portugal

Acórdão 509/02 (19 December 2002) 768/02 (Tribunal Constitucional de Portugal)

South Africa


