RECLAIMING ECONOMIC, SOCIAL AND CULTURAL RIGHTS

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I. INTRODUCTION

Most bills of rights focus on civil and political rights, such as the prohibition against torture and freedom of expression. They rarely include economic, social and cultural rights, like the rights to education and health services. Of course, the line between these two categories - sometimes called first-generation and second-generation rights - is blurred. For example, provisions for the protection of minorities do not fall neatly into either category. Nonetheless, an examination of national bills of rights shows that first-generation rights are commonly included and second-generation rights are not. The New Zealand Bill of Rights Act 1990, with its emphasis on civil and political rights, conforms to this global practice.

In the 1980's, when the bill of rights proposal was debated in New Zealand, support for the inclusion of economic, social and cultural rights was not widespread. The White Paper, *A Bill of Rights for New Zealand*, argued for the exclusion of second-generation rights.[1] The interim report of the Select Committee charged with examining the White Paper adopted the same position.[2] Moreover, it rejected a compromise proposal, modelled on the Indian constitution, that economic, social and cultural rights should be included as directives to government rather than judicially enforceable provisions.[3]

The Committee's final report took a different view. Its main recommendation was for the introduction of a statute that was neither supreme law nor entrenched and it appended an "outline" draft bill with the traditional focus on civil and political rights.[4] But the report also noted New Zealand's international obligations and suggested that a bill of rights should include key economic, social and cultural rights, such as education, housing and medical care.[5] The government did not take this advice and thus the bill subsequently debated in Parliament excluded second-generation rights. This

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1 *A Bill of Rights for New Zealand, A White Paper* (1985) A 6.

2 *Interim Report of the Justice and Law Reform Select Committee, Inquiry into the White Paper - A Bill of Rights for New Zealand* (1987) 1.8A, 79.

3 Idem.

4 *Final Report of the Justice and Law Reform Committee on a White Paper on a Bill of Rights for New Zealand* (1988) 1.8C, 3.

5 Ibid, 10.

is not surprising since Geoffrey Palmer, the main architect of the legislation, was firmly against their inclusion.[6]

In some respects, New Zealand's bill of rights debate was similar to the discussions of the 1950's and 1960's within the United Nations about the international Bill of Rights.[7] Although both generations of rights form part of the international Bill, they are treated differently. For example, the international machinery relating to civil and political rights is more sophisticated than the equivalent arrangements concerning second-generation rights. The reasons for this different treatment were essentially the same as those used to exclude economic, social and cultural rights from the New Zealand Bill of Rights Act.

In the last few years, however, attitudes within the United Nations have changed. Today, there is increasing recognition that the two generations of rights are "parts of a single whole."[8] Also, the United Nations and some regional human rights bodies are trying to devise ways to implement second-generation rights. They appear to be endeavouring to reclaim economic, social and cultural rights from the margins of international human rights' protection.

Thus, although the implementation of second-generation rights is not today a significant issue for New Zealand's major political parties, it is climbing up the agenda of the international human rights community. For the time being the issue may have disappeared from Wellington, but New Zealand's United Nations representatives will be confronted with it in Geneva and New York. Accordingly, it is of contemporary relevance to examine the way in which second-generation rights have been dealt with at the international level, and to explore the different treatment afforded to first-generation and second-generation rights.

II. THE DEVELOPMENT OF THE INTERNATIONAL BILL OF RIGHTS

In April 1945, the founding conference of the United Nations opened in San Francisco. New Zealand's delegation to the conference, led by Peter Fraser, played an active part in the proceedings.[9] In June, the United Nations

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6 Infra note 84 and accompanying text.

7 The UN debate was complicated by the Cold War. More recently the issue has been complicated by the North-South divide.

8 Infra note 32 and accompanying text.

9 For Fraser's official report see *UN Conference on International Organisation, Report on the Conference held at San Francisco 25 April - 26 June 1945* AJHR (1945) A 2.

Charter was open for signature and it entered into force before the end of the year.[10]

The purposes of the United Nations are set out in the first four paragraphs of the Charter, one of which states:

> To achieve international co-operation in solving international problems of an economic, social, cultural and humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion;[11]

There are several other references to human rights in the Charter.[12] Some delegates at San Francisco argued that the Charter's human rights provisions should be stronger. One suggestion was for the incorporation of an international bill of rights. The conference closed, however, with the understanding that a separate bill of rights would be drafted as soon as possible.[13]

The Charter places primary responsibility for human rights with the Economic and Social Council (ECOSOC).[14] In 1946, ECOSOC established a Commission on Human Rights and its first task was to prepare an international bill of rights. With Eleanor Roosevelt in the chair, the Commission agreed a draft Declaration which was adopted by the General Assembly in 1948.[15]

The Universal Declaration on Human Rights does what the Charter omitted to do: it sets out in some detail the meaning of the Charter's phrase "human rights and fundamental freedoms". Significantly, the Declaration includes the classic civil and political rights and also economic, social and cultural rights, including the rights to an adequate standard of living and just working conditions.[16] The Declaration treats both generations of rights equally; there is no sign that one has priority over the other.

When the Declaration was being drafted, Eleanor Roosevelt said it "is not, and does not purport to be a statement of law or of legal obligation".[17] According to its Preamble, the Declaration is "a common standard of

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10 Bailey, S *The United Nations: A Short Political Guide* (2nd ed 1989) 13.

11 Article 1(3).

12 Articles 13, 55, 62, 68, 76 and in the Preamble.

13 Robertson, A H and Merrills, J G *Human Rights in the World* (3rd ed 1989) 24.

14 UN Charter, chapter 10.

15 UN Centre for Human Rights, *Human Rights: A Compilation of International Instruments* (1988) 1.

16 Respectively, articles 25 and 23.

17 Harris, D J *Cases and Materials on International Law* (4th ed 1991) 610.

achievement for all peoples and all nations", rather than an instrument imposing legally binding obligations. In the last fifty years, however, the Declaration has grown in stature to the extent that some commentators now argue it forms part of customary international law.[18] For present purposes it is not necessary to debate the status of the Declaration; suffice it to say that it is a uniquely authoritative human rights instrument which gives equal weight to civil, political, economic, social and cultural rights.

The General Assembly resolution which approved the Declaration also decided work should proceed on other parts of the international Bill of Rights.[19] As one commentator explained: "There then began a period of discussion, drafting and negotiation which lasted for eighteen years."[20]

Briefly, the Commission on Human Rights produced a text devoted exclusively to civil and political rights. In 1950, the Assembly decided that economic, social and cultural rights should be included, but two years later it changed its mind. As Henkin put it: "Western states fought for, and obtained, a division into two covenants".[21] In accordance with the Assembly's instructions, the Commission submitted drafts of two Covenants in 1954, each devoted to one generation of rights.

Twelve years later, three instruments emerged from the negotiating process and were unanimously approved by the General Assembly. In addition to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Assembly approved a First Optional Protocol to ICCPR which established an individual complaints procedure in relation to states ratifying both ICCPR and the Protocol.[22] No equivalent complaints procedure was set up in relation to economic, social and cultural rights; in other respects, too, the implementation provisions of ICESCR are weaker than those in ICCPR.

In 1976, after acquiring thirty-five ratifications, the three instruments entered into force. New Zealand ratified ICCPR and ICESCR in 1978 and acceded to the Optional Protocol in 1989. For those states ratifying or acceding to them, the three treaties impose legally binding obligations. Together with the Universal Declaration on Human Rights, they constitute the international Bill of Rights.

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18 See eg Robertson, supra note 13, at 27.
19 Idem.
20 Ibid, 28.
21 Henkin, L *The International Bill of Rights* (1981) 10.
22 UN Centre for Human Rights, supra note 15, at 7, 18 and 38.

Thus, although the Declaration did not distinguish between civil and political, and economic, social and cultural rights, a dichotomy between these two categories of rights soon emerged in the United Nations. Moreover, this division has had a profound influence on the development of international human rights protection.

III. ATTITUDE CHANGE WITHIN THE UNITED NATIONS

In his recent report to a leading United Nations human rights body, the Sub-Commission on Prevention of Discrimination and the Protection of Minorities, Danilo Turk briefly surveyed the shifting United Nations debate about the two categories of rights.[23] Like so much else in the United Nations, the debate was a victim of the Cold War.

He referred to the traditional Western doctrine that appears to give primacy to civil and political rights.[24] By contrast, "up until the mid-1980s, the preference of socialist States and of most developing States was clearly for economic, social and cultural rights."[25] Turk suggested that from the late 1960's to the mid-1980's, the majority of United Nations members gave priority, at least at the rhetorical level, to economic, social and cultural rights.[26] In this period, however, remarkably little practical progress was made to develop the international protection of social rights.[27]

In the 1980's, a significant change of attitude began to occur. Turk argued that some of the states which had hitherto been active supporters of social rights, began to recognise that neither set of rights should have priority over the other.[28] For example, the Declaration on the Right to Development, adopted by the General Assembly in 1986, states:

> All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, socal and cultural rights.[29]

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23 Turk, D *The Realization of Economic, Social and Cultural Rights*, E/CN 4/Sub.2/1992/16; in particular, see Part I.

24 Ibid, para 15. Not all commentators agree with all of Turk's analysis. In 1990, for example, Alston wrote that the debate "is between the United States on the one hand, and most of the rest of the world on the other. It is not principally between East and West" (Alston, "US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy" (1990) 84 AJIL 365, 376).

25 Turk, supra note 23, at para 15.

26 Ibid, para 16.

27 For convenience, sometimes social rights will be used as an alternative to the phrases economic, social and cultural rights and second-generation rights.

28 Turk, supra note 23, at paras 19-22.

29 Article 6(2).

This Declaration is one of the major human rights initiatives of developing states, yet it unequivocally rejects the view that one category of rights has preference over another. Turk saw this as evidence of an important shift of attitude within the UN.[30] This change in perspective was further reinforced by the disintegration of the socialist bloc towards the end of the decade.

As Turk put it:

> the political and ideological considerations which influenced much of the earlier reasoning on the primacy of economic, social and cultural rights have become obsolete.[31]

He argued that "(t)he realization of civil and political rights and the realization of economic, social and cultural rights are, in fact, parts of a single whole."[32] In his opinion:

> this is precisely the time when a unified and balanced approach should be sought in the interpretation of the relationship between the two major sets of human rights.[33]

A new approach would be especially timely today as new economic policies throughout the world expose vulnerable communities and individuals to increasing hardship and exploitation. Although the norms, procedures and institutions relating to civil and political rights remain incomplete and flawed, they are more fully developed than those involving economic, social and cultural rights. One component of "a unified approach" should be to redress this juridical imbalance between the two categories of rights.

IV. DIFFERENCES BETWEEN THE TWO COVENANTS

Apart from an identical provision concerning the right to self-determination, the substantive rights enshrined in the ICCPR and ICESCR Covenants are not the same.[34] In addition, there are other significant differences between the two international treaties.

First, the nature of the states parties' general obligation is different.[35] Under article 2(1) of ICCPR:

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30 Turk, supra note 23, at para 22.

31 Ibid, para 26.

32 Ibid, para 19.

33 Ibid, para 26.

34 The common article on self-determination is article 1 in both Covenants. The substantive non-discrimination provisions of both Covenants begin differently but in effect are the same. See article 2(2) ICESCR and article 2(1) ICCPR.

35 States parties are states which have agreed to be legally bound by a treaty.

> Each State Party to the present Covenant *undertakes to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.[36]

This provision is not free from ambiguity: does it impose an "immediate obligation or only an obligation to do something in the future?"[37] The general view is that it imposes an immediate obligation.[38] This immediate obligation, however, is qualified by article 2(2):

> *Where not already provided for by existing legislative or other measures*, each State Party to the present Covenant *undertakes to take the necessary steps*, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.[39]

Thus, if the substantive rights are not already provided for in national law, a state party undertakes to take the necessary steps to realise them. In effect, the immediate obligation (article 2(1)) is subject to the possibility of progressive application (article 2(2)).[40]

The approach of ICESCR, on the other hand, is significantly different:

> Each State Party to the present Covenant *undertakes to take steps ... 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.[41]

Thus, states parties' general obligation under ICESCR is not immediate, but explicitly progressive. It is also subject to the availability of resources.

A second difference between the two Covenants can be seen in the way that some of their substantive rights are formulated. ICCPR tends to use the classic formulations "Every one has the right to"[42] or "No one shall be subjected to".[43] ICESCR's formulation, however, is often less emphatic, such as, "The States Parties to the present Covenant recognize the right".[44] This wording tends to reinforce the Covenants' different approaches to states parties' general obligations, as already discussed.

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36 Emphasis added.
37 Robertson, supra note 13, at 33.
38 Idem.
39 Emphasis added.
40 Robertson, supra note 13, at 34.
41 Article 2(1) (emphasis added).
42 Eg article 9.
43 Eg article 7.
44 Eg article 11.

A further difference concerns the two Covenants' implementation provisions. Briefly, ICCPR establishes the Human Rights Committee, an independent body of human rights experts. The committee publicly examines periodic reports submitted by states parties; it also considers "communications" submitted under the First Optional Protocol by individuals complaining that their civil and political rights have been infringed.

ICESCR, on the other hand, does not establish an independent body of experts to supervise implementation of the Covenant's provisions. Instead, responsibility for implementation is placed with ECOSOC, which is composed of governmental representatives. In 1976, ECOSOC set up a Sessional Working Group (consisting of governmental delegates) to help discharge its responsibilities under the Covenant. The Working Group was not a success and in 1987 ECOSOC replaced it with a committee of human rights experts acting in their personal capacity. This new committee, which in some ways is akin to the Human Rights Committee, has made good progress in recent years.

Another significant difference between the two Covenants in relation to implementation, concerns the First Optional Protocol. The complaints procedure established by the Protocol only extends to the rights enshrined in ICCPR. There is no equivalent complaints procedure for rights guaranteed by ICESCR.

V. THE REASONS FOR THE DIFFERENT TREATMENT OF THE TWO CATEGORIES OF RIGHTS

The traditional view is that the different treatment reflects the different character of the rights involved.[45] Another argument is that it is not the character of the rights which is inherently different, but the nature of their implementation measures.[46] As Turk intimates, a third view is that the dichotomy between the Covenants has more to do with ideological differences between the proponents of the two categories of rights rather than conceptual or theoretical differences between the rights themselves.[47]

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45 See eg Henkin, supra note 21; Robertson, supra note 13, at 230; and Bossuyt, "International Human Rights Systems: Strengths and Weaknesses" in Mahoney K and Mahoney P (eds), *Human Rights in the Twenty-first Century* (1993) 47.

46 Kartashkin, "Economic, Social and Cultural Rights" in Vasak K and Alston P (eds), *The International Dimensions of Human Rights* (1982) 112 (Vol.1).

47 Turk, supra note 23, at para 26.

Several commentators have examined the arguments for and against the distinction drawn between the two categories of rights.[48] Here, I will introduce and comment upon some of the reasons commonly given for distinguishing the two sets of rights.

1. State Abstention versus State Intervention

Some commentators argue that civil and political rights are negative and social rights are positive;[49] or that civil and political rights require non-interference by the state, in contrast to social rights which need state intervention; or that civil and political rights are largely cost-free while the realisation of social rights needs substantial expenditure.

It seems to me that these are not really different arguments but different ways of making essentially the same point: if a right needs substantial expenditure it almost certainly requires state intervention of one sort or another - in other words it is a positive right. Thus, I will not differentiate between these three points, but treat them together.

Bossuyt has argued that civil and political rights impose on the state a number of prohibitions:

> the prohibition against torture and slavery, the prohibition against depriving someone arbitrarily of his/her life or liberty, the prohibition against interfering in someone's privacy or in his or her freedom of opinion, expression, association, assembly and circulation.[50]

Thus, to respect such rights a state must not practise torture, disappearances, arbitrary detention, religious persecution, censorship of the press, or race discrimination. The argument continues that this self-restraint by the state is

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48 See eg Vierdag, "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights" in *Netherlands Yearbook of International Law* (1978) 69; Bossuyt, supra note 45; Sampford C J G and Galligan D J (eds), *Law, Rights and the Welfare State* (1986); van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views" in Alston P and Tomasevski K (eds), *The Right to Food* (1984) 97; and Alston, "No Right to Complain about being Poor: The Need for an Optional Protocol to the Economic Rights Covenant" in Eide A and Helgesen J (eds), *The Future of Human Rights Protection in a Changing World* (1991) 79. Sometimes the discussion concerns the differences between the rights as they are enshrined in the two Covenants; this aspect of the debate will not be considered any further here as it is accepted that, as drafted, the Covenants treat the rights differently (see the preceding section).

49 Positive in the sense that action is required if they are to be realised.

50 Bossuyt, supra note 45, at 53.

cost-free or at any rate "does not go beyond the minimum required to ensure the very existence of the State".[51]

Vierdag considered Bossuyt's "penetrating analysis of the differences between these two types of rights" and noted that "according to a general consensus" social rights "require state-action for their realisation" while civil and political rights "traditionally directed against wrongs committed by the state - require state-abstention".[52]

Social rights are distinguished from civil and political rights on the ground that social rights demand positive state action accompanied by very considerable expenditure. The rights to education and health services require costly literacy and primary health care programmes, as well as schools, colleges, clinics and hospitals. Second-generation rights are not really rights at all, it is said, but programmatic aspirations.[53]

This alleged difference between the two categories of rights is used to support the contention that civil and political rights - but not social rights - are enforceable in the courts.

It is misleading to suggest that civil and political rights require only non-interference by the state. The prohibition against torture, inhuman and degrading treatment, for example, obliges the state to provide places of detention which conform to international standards and to establish training programmes for prison and police officers. As the work of the United Nations Committee against Torture shows, a state does not discharge its international responsibilities simply by passing a national law banning the practice of torture.[54] Yet the construction of humane places of detention and the creation of training programmes for state officials are costly exercises.

Courts in the United States are confronted with these and related issues by the Eighth Amendment to the Constitution which prohibits "cruel and

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51 van Hoof, supra note 48, at 103.

52 Vierdag, supra note 48, at 80-1. Vierdag and Bossuyt are often regarded as representatives of the school of thought which differentiates between the legal nature of the two categories of rights (see van Hoof, supra note 48). But there are significant differences in their analyses. Vierdag, for example, remarked that some of Bossuyt's observations "are based entirely on the sharp distinction between state financial intervention and abstention" but submitted "that this criterion for differentiation is not a quite adequate one" (Vierdag, supra note 48, at 82).

53 See eg Bossuyt, supra note 45, at 52; and Vierdag, supra note 48, at 103.

54 For a summary and critique of the work of the committee see Byrnes, "The Committee against Torture" in Alston P (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992) 509.

unusual punishments".[55] Although the precise meaning of the phrase is unclear, according to Chief Justice Warren:

> the basic concept underlying the eighth amendment is nothing less than the dignity of man ... (I)t must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[56]

Thus, from time to time the amendment is used to challenge deplorable conditions of detention, such as overcrowding and inadequate sanitation. In response, penal administrators have "repeatedly sought to explain poor conditions as the result of insufficient funds".[57] The courts, however, have consistently declined to accept this argument:

> Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons.[58]

As it was put in another case "(h)umane considerations and constitutional requirements are not ... to be ... limited by dollar considerations".[59] Thus, the United States courts recognise that civil and political rights are not cost-free, and they state that the prohibition against inhuman treatment is not to be violated for fiscal reasons.

Obviously, if individuals are to enjoy the right to a fair trial, states have to build courts and pay the salaries of judges, prosecutors, administrators and interpreters; in some circumstances, they are obliged to provide individuals with free legal assistance.[60] The promotion and protection of other civil and political rights, such as the right to free and fair elections, also require considerable state expenditure.

The following table provides the annual expenditure of the New Zealand Government for some civil and political rights. The list is not exhaustive, for example, it does not make allowance for any component of the Ministry

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55 According to the Eighth Amendment of the US Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". All state constitutions in the United States except Connecticut, Illinois and Vermont contain similar provisions. The wording derives from the English Bill of Rights 1688. See Wood, "Recent Applications of the Ban on Cruel and Unusual Punishments: Judicially Enforced Reform of Nonfederal Penal Institutions" (1972) 23 Hastings LJ 1111, 1113.

56 *Trop v Dulles* 356 US 86, 100 (1958).

57 Wood, supra note 55, at 1132.

58 *Hamilton v Love*, 328 F Supp 1182, 1194 (ED Ark 1971).

59 *Jackson v Bishop* 404 F 2d 571, 580 (8th Cir 1968).

60 Generally, see article 14 ICCPR; in relation to legal assistance, see article 14(3)d.

of Maori Development's budget. Also, some of the amounts are approximate, such as those depending upon a percentage of Department of Justice figures.[61] Nonetheless, the table tends to show that the realisation of civil and political rights is neither a cost-free exercise nor one requiring only modest state expenditure.

The New Zealand Government's Expenditure on the Domestic Realisation of Civil and Political Rights

	$NZ, millions
Human Rights Commission[62]	2.24
Race Relations Conciliator[63]	1.27
Ombuds[64]	2.78
Commissioner for Children[65]	.54
Wanganui Computer Centre Privacy Commissioner[66]	.37
Privacy Commissioner[67]	.34
Legal Aid[68]	56.60
Department of Justice: Policy Advice, including advice on claims by Maori arising under the Treaty of Waitangi[69]	1.62
Department of Justice: Administrative Services to Courts and Tribunals[70]	59.51
Department of Justice: Information Services to Courts and Tribunals[71]	9.34
Department of Justice: Services to Parties Appearing before Courts and Tribunals, including the provision of duty solicitors[72]	15.18

61 One can debate what is an appropriate percentage of Department of Justice figures to treat as a contribution to the realisation of civil and political rights. I do not insist that the percentages identified in the text are the most appropriate ones. The exercise is intended to convey simply that the implementation of civil and political rights is a costly business. I am not suggesting that New Zealand's expenditure in relation to civil and political rights is adequate. Plainly, it is not.

62 *Report of the Human Rights Commission, for the year ended 30 June 1991* (GP E 6) 35.

63 *Report of the Office of the Race Relations Conciliator, for the year ended 30 June 1991* (GP E 6) 72.

64 *Report of The Ombudsmen, for the year ended 30 June 1992* (GP A 3), 52.

65 *Report of the Office of the Commissioner for Children, for the year ended 30 June 1992*, 14.

66 *Report of the Wanganui Computer Centre Privacy Commissioner, for the year ended 30 June 1992* (GP A 4) 12.

67 Projected costs for 1992-3. Information provided by the Office of the Privacy Commissioner.

68 Projected costs for 1992-3. Letter dated 5 February 1993 from Secretary of the Legal Services Board to the author. The government has allocated the Board $53 million for the 1992-3 financial year. In addition, the Board receives funding from the NZ Law Society Special Fund; in January 1993, the Board received over $300,000 from this source.

69 20% of the entire figure for this "output". See *Report of the Department of Justice, for the year ended 30 June 1992* (GP E 5) 50.

70 50% of the entire figure for this "output" (idem).

71 Idem.

72 Idem.

Department of Justice: Custodial Remand Services to Courts[73]	5.64
Department of Justice: Administration of Court Sentences of Imprisonment[74]	49.11
Department of Justice: Management of the Electoral System[75]	4.19
Ministry of Women's Affairs: Policy Advice, including advice on legislation and other policy proposals of significance for women's social, economic or political equality[76]	2.26
Ministry of Women's Affairs: Information Services, including the organisation of seminars on women's issues[77]	.71
Ministry of Women's Affairs: Ministerial Services, including services to the Minister to enable her to meet her obligations to Parliament[78]	.61
Maori Language Commission, the aim of which is to promote and maintain the Maori language as a living language[79]	1.01
TOTAL	213.32

Thus, the New Zealand government's annual expenditure on the domestic realisation of civil and political human rights is more than NZ$ 210 million. A similar exercise undertaken in relation to the cost of civil and political rights in Canada comes to over Canadian $1.76 billion, roughly NZ$ 615 million.[80]

In summary, both first-generation and second-generation rights require state intervention and the expenditure of substantial sums of money.

2. The Policy Objection

Another argument closely related to the preceding one is that there are more policy choices associated with the realisation of social rights than civil and political rights. Judges, it is said, may properly adjudicate on cases involving first-generation rights, but social rights involve policy choices better left to legislators, ministers, civil servants and their experts.

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73 20% of the entire figure for this "output" (idem).

74 Idem.

75 100% of the entire figure for this "output". Note the year in question, 1991-2, was not an election year (idem).

76 100% of the entire figure for this "output" (*Report of the Ministry of Women's Affairs, for the year ended 30 June 1992* (GP G39) 14).

77 Idem.

78 Idem.

79 *Report of the Maori Language Commission, for the year ended 30 June 1991* (GP E 34) 24.

80 Unpublished paper presented by Paul LaRose-Edwards, Director, Human Rights Unit, Commonwealth Secretariat, to the NGO Conference on Empowering People, held in Arusha, Tanzania, August 1991.

Vierdag has argued that "the implementation of (social rights) is a political matter, not a matter of law, and hence not a matter of rights".[81] According to Mureinik:

> The most effective realization of (social) rights depends upon ... policy choices and it is precisely choices of this kind for which the judges lack two essential qualifications: expertise and political accountability.[82]

Davis agreed that disputes about social rights "are no more than decisions about policy".[83] According to Palmer, it was impossible to include social rights in New Zealand's Bill of Rights because "such broad policy questions would have made it unmanageable".[84]

In common law jurisdictions the judiciary has always been - and remains - constantly involved in the formulation of law and policy. As Lord Reid said:

> There was a time when it was thought almost indecent to suggest that Judges make law - they only declare it. Those with a taste for fairy tales deem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. ... But we do not believe in fairy tales anymore.[85]

More recently, Sir Robin Cooke argued that:

> the great majority of New Zealand Judges, perhaps all, now openly recognise (albeit no doubt to varying degrees) that the inevitable duty of the Courts is to make law and that this is what all of us do every day. Doubtless some make more than others, but it could not seriously be contended that Judges at any level are merely applying black-and-white rules.[86]

Wade put it more pithily: "judges are up to their necks in policy, as they have been all through history".[87]

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81 Vierdag, supra note 48, at 103.

82 Mureinik, "Beyond a Charter of Luxuries: Economic Rights in the Constitution" (1992) 8 SAJHR 464, 467.

83 Davis, "The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles" (1992) 8 SAJHR 475, 484.

84 Palmer, G *New Zealand's Constitution in Crisis* (1992) 57.

85 Reid, "The Judge as Lawmaker" (1972) 12 J.SPTL 22.

86 Cooke, R "Dynamics of the Common Law" in IXth Commonwealth Law Conference, *Conference Papers* (1990) 1.

87 Wade, H W R *Constitutional Fundamentals* (rev ed 1989) 78. Lord Denning MR said: "In the end, it will be found to be a question of policy, which we, as judges, have to decide" (*Dutton v Bognor Regis UDC* [1972] 1 QB 373, 391).

Moreover, judicial law-making is not incidental or peripheral to policy matters. On the contrary, it has shaped concepts and principles with crucial policy content, such as the law of negligence and rules of natural justice.[88] Whatever one's view of the case, the Court of Appeal's decision in *New Zealand Maori Council v Attorney-General*, concerning the State-Owned Enterprises Act 1986 and the Treaty of Waitangi, dealt with weighty policy issues of constitutional importance.[89]

More specifically, when tribunals adjudicate upon civil and political rights, they become involved in policy issues. The landmark United States decision of *Brown v Board of Education*, concerning the civil right of non-discrimination, had major policy implications.[90] When the European Commission on Human Rights held that the absence of statutory controls over the British security services amounted to a violation of the right to privacy guaranteed under the European Convention on Human Rights, its decision impinged on policy issues of national importance.[91] The United Nations Human Rights Committee's decision in *Lovelace v Canada* that the Indian Act violated minority rights also raised significant policy questions.[92] International and regional human rights case reports, as well as national law reports, are replete with examples of the courts deciding civil and political rights cases which involve "broad policy questions". If policy content is not an obstacle in these instances, why should it be a problem in relation to social rights?

In this context, it is worth emphasising the negative nature of most judicial review proceedings. These days, the courts continually scrutinise the exercise of state power and decide whether or not it conforms to statute and the common law. This is what judicial review and the doctrine of *ultra vires* is all about. A purported exercise of a statutory power may be quashed if it does not conform to the express provisions of the relevant Act of Parliament. Also, a power must be exercised in conformity with limitations implied into the statute by the common law, such as the rules of natural justice and *Wednesbury* unreasonableness, otherwise the courts may set it

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88 *Donoghue v Stephenson* [1932] AC 562 and *Ridge v Baldwin* [1964] AC 40.

89 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

90 *Brown v Board of Education* 347 US 483 (1954).

91 *Hewitt and Harman v UK* (1989) 14 EHRR 657. As a result of these proceedings, the government introduced legislation which gave MI5 a statutory framework and established a Security Service Tribunal and Commissioner. Note the case's fiscal, as well as policy, implications.

92 Communication No 24/1977. Canada amended the offending legislation and so 24,000 individuals regained their Indian status. See Newman, F and Weissbrodt D *International Human Rights* (1990) 82.

aside.[93] In an application for judicial review, the role of the court is to consider the facts and the law and decide the lawfulness or otherwise of the decision under review. The court's function is not to quash an unlawful decision and substitute its own.[94] In this sense, the judiciary only has the power of negative review.

There is no reason why the courts could not play the same role in relation to social rights. A ministerial decision could be measured by the court against social rights enshrined in statute. If the court found the decision to be inconsistent with a statutory social right, it might quash the decision - but not substitute its own view by telling the minister what to do. Thus, it "would be reviewing policy choices, not making them".[95] This negative review mirrors the judicial function associated with civil and political rights and may mitigate the concerns of those who fear that statutory social rights give too much scope for judicial policy-making.

It may be useful to give two examples of this approach in the context of social rights.

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.[96] 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?[97] No doubt, among the evidence before the court would be the Treasury's "income adequacy" figures. The 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.[98] Such a function is not conceptually different from a court

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93 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

94 Exceptionally, a court hearing an application for judicial review not only quashes an unlawful decision but also substitutes its own. In New Zealand, a clear example of this is *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544.

95 Mureinik, supra note 82, at 472. An unavoidable policy element would remain as the court decided whether or not to quash the ministerial decision. That element also exists, of course, when courts adjudicate upon civil and political rights.

96 Finance Bill Submission to Social Services Select Committee, Human Rights Commission, no date.

97 According to article 11(1) of ICESCR: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living".

98 In this instance, the reduced rates were passed by Parliament. Thus, a court could not find the rates were unlawful unless the right to an adequate standard of living was constitutionalised as a form of superior law. The point of mentioning this example here, however, is to show that there is no conceptual, theoretical or juridical reason

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.

Secondly, imagine a poor rural community dependent on the cultivation of black beans.[99] The government introduces a scheme of financial incentives whereby landowners are induced to stop growing beans and instead produce flowers for export. The scheme causes malnutrition among sections of the local community. If the state in question recognises the right to food, there is no juridical reason why the courts could not declare the scheme unlawful because it infringed individuals' right to food. The government may have the policy goal of increasing the nation's export earnings. The function of the court would not be to identify lawful ways by which the government could attain this legitimate goal. Instead, its task would be to ensure that the government initiative did not infringe the basic social rights of individuals.

In summary, there appears to be no conceptual or juridical reason why social rights, like civil and political rights, cannot be adjudicated upon by a tribunal in the manner described. That is not to say that the problems associated with implementing the two categories of rights are identical. But it is suggested that the juridical difficulties traditionally associated with the implementation of social rights have been overstated.

VI. RENEWED ATTENTION TO SOCIAL RIGHTS FROM INTERNATIONAL HUMAN RIGHTS BODIES

Within the last few years, the international human rights community has shown a renewed interest in the implementation of second-generation rights. New mechanisms have been agreed and important studies commissioned. Although these developments are not dramatic, they appear to represent an emerging and significant trend. I shall briefly outline some of the social rights' mechanisms and studies recently introduced by the United Nations and regional human rights bodies.[100]

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why this particular social right - the right to an adequate standard of living - may not be adjudicated upon by a tribunal in the manner described.

99 This example is based upon Henry Shue's illustration in Sadurski, "Economic Rights and Basic Needs" in Sampford C J G and Galligan D J (eds) *Law, Rights and the Welfare State* (1986) 57.

100 There is a close relationship between the realisation of social rights and the right to development. Thus it is interesting to note that in 1993 the UN Commission on Human Rights established for the first time a thematic procedure on the right to development. Hitherto the focus of the Commission's thematic procedures has been classic civil and political rights: see eg the Special Rapporteur on Torture and the Working Group on Disappearances. Therefore the creation of a fifteen-person Working Group on the Right to Development is a significant departure. Moreover, given the close relationship between the right to development and social rights, the

1. The Committee on Economic, Social and Cultural Rights[101]

Considering that the Committee was only established in the late 1980's, it has made significant progress. Its public scrutiny of states parties' periodic reports submitted under ICESCR is more rigorous than the practice adopted by its predecessor. It has introduced into its sessions general discussion days on selected rights, including the rights to food and housing. These discussions may lead to the Committee subsequently formulating General Comments, such as the one on the right to housing, which are designed to provide "jurisprudential insights" into the provisions of the Covenant.[102] The Committee has actively sought the participation of United Nations specialised agencies, such as the International Labour Office, as well as non-governmental organisations.

In 1992, the Committee took what Turk described as "critical and path-breaking steps" in the protection of social rights.[103] It declared that a presidential decree of the Dominican Republic, which purported to evict - if necessary by force - 70,000 residents, was a violation of the Republic's obligations under the Covenant's right to housing provision. According to housing rights campaigners in the Republic, without the Committee's action the families would have been evicted. As one commentator observed, the Committee issued what "amounted to an injunction".[104]

Another initiative which could have a dramatic impact is the Committee's proposal for an optional protocol which would permit it to hear complaints alleging that states parties have violated the Covenant's provisions. In broad terms, the proposal parallels the First Optional Protocol to ICCPR which enables the Human Rights Committee to hear complaints from individuals who allege that a state party has violated ICCPR. More than anything else, the adjudication of complaints develops jurisprudence, in particular the normative content of the provisions in question.

There appears to be growing support for the Committee's proposal. For example, according to Turk:

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establishment of the Working Group would appear to be part of the emerging trend outlined in this section of the article.

101 Supra: "Differences Between the Two Covenants".

102 Alston, "The Committee on Economic, Social and Cultural Rights" in Alston P (ed), *The United Nations and Human Rights: A Critical Appraisal* (1992) 473, 494.

103 Turk, supra note 23, at para 184.

104 Leckie, "From Infancy to Adulthood - UN Committee on Economic, Social and Cultural Rights - and the Right to Adequate Housing" [1992] 3 Human Rights Tribune 10.

> Work on the Optional Protocol should be continued as a matter of priority, with a view to giving the rights in (ICESCR) practical meaning for the hundreds of millions of citizens who have yet to benefit from the norms of the Covenant.[105]

The proposal was included in the Final Outcome of the World Conference on Human Rights, held in Vienna during June, 1993:

> The World Conference encourages the Commission on Human Rights, in cooperation with the Committee on Economic, Social and Cultural Rights, to continue the examination of optional protocols to (ICESCR).[106]

The International Commission of Jurists, an influential international human rights non-governmental organisation, has also publicly supported the initiative.[107]

2. Danilo Turk's study[108]

Between 1989-92, Turk produced four annual reports focusing on second-generation rights and issues like the role of social and economic indicators, the indivisibility and interdependence of rights and the role of the International Monetary Fund.[109] The reports include numerous recommendations, some of which have already been implemented.[110] Probably, the study is the most comprehensive and authoritative undertaken to date by the United Nations on the realisation of economic, social and cultural rights.[111] It seems likely to influence debate throughout the 1990's.

3. Report on the Right to Adequate Housing

In 1992, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed its independent expert from India, Rajindar Sachar, as Special Rapporteur on the right to adequate housing.[112] The right to housing is a classic social right and forms

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105 Turk, supra note 23, at para 186.

106 A/CONF157/DC/1/Add.1, at Part III, III (Cooperation, Development and Strengthening of Human Rights), 1993, para 10.

107 It did so at the UN Commission on Human Rights, 1993.

108 Turk, supra note 23.

109 E/CN.4/Sub.2/1989/19; E/CN4/Sub.2/1990/19; E/CN4/Sub.2/1991/17; E/CN4/Sub 2/1992/16.

110 Turk, supra note 23, at para 202.

111 Other United Nations studies on the general issue include E/CN4/988 (1969) and Ganji, M *The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress*, UN Sales no E75.XIV.2 (1975).

112 In accordance with one of Turk's recommendations.

part of the international Bill of Rights.[113] The precise meaning of the right, however, is not clear. This difficulty is not confined to social rights. The content of some civil and political rights - such as the prohibition against degrading treatment - is not at all certain.

Obviously, if human rights are to be implemented, their normative content has to be clarified. There are different ways of doing this and the Sachar report exemplifies one of them. Among other issues, the two-year report will explore the content of the right to housing, developing the work begun by the Committee on Economic, Social and Cultural Rights.[114]

4. Protocol of San Salvador

In addition to the international human rights standards and procedures associated with the United Nations, there are regional arrangements such as the American Convention on Human Rights which is an instrument of the Organisation of American States. The American Convention, which entered into force in 1978, guarantees a range of civil and political rights. Its enforcement is entrusted to the Inter-American Commission and Court of Human Rights, which may receive complaints about alleged violations of the Convention.[115]

In 1988, the states parties to the American Convention approved an Additional Protocol, know as the Protocol of San Salvador, which guarantees many economic, social and cultural rights.[116] Broadly, the Protocol and ICECSR guarantee similar substantive rights and provide comparable reporting procedures for states parties.[117] For our purposes, however, there is one noteworthy difference between the two treaties. While ICESCR establishes no complaints procedure, the Protocol creates a petition system for individuals in relation to the right to education and trade union rights.[118] The complaints may be heard by the Inter-American Commission and Court of Human Rights.

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113 See article 11(1) ICESCR.

114 Alston, supra note 103 and accompanying text.

115 For a brief introduction to the Convention see Harris, supra note 17, at 714-6.

116 (1989) 28 ILM 156.

117 But there are some significant differences between the substantive rights guaranteed by the two instruments, for example, the right to a healthy environment (see article 12(2)b ICESCR and article 11 San Salvador Protocol).

118 See article 19.

The Protocol has not yet entered into force and so it is impossible to say how effective it will be.[119] Its complaints procedure, however, certainly represents a new dèparture for the international protection of social rights in the Americas.

5. European Social Charter

As the European Convention on Human Rights is the regional counterpart of ICCPR, so the European Social Charter is the regional equivalent of ICESCR.[120] The Charter, which entered into force in 1965, has always lived in the shadow of the Convention.[121]

According to Harris, a member of the supervisory Committee of Independent Experts established under the Charter, the treaty has not realised "its full potential".[122] The reasons for this are beyond the scope of this article. What is important for our purposes is that in the last two or three years the Charter has gained "a fresh impetus".[123] In 1990, the Council of Europe established an *ad hoc* committee to make "proposals for improving the effectiveness of the European Social Charter".[124] The Committee drafted an Amending Protocol which was adopted and opened for signature the following year.

For the most part, the Protocol's reforms are modest. In some cases, they merely introduce commonplace features of United Nations human rights mechanisms.[125] Nonetheless, as Harris says: "Upon entry into force, the Protocol will considerably improve the effectiveness of the Charter".[126]

The Amending Protocol may not be the only change to emerge from the reform process. The Council of Europe meeting which approved the Protocol also resolved that at the earliest opportunity there should be an

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119 The Protocol will enter into force when eleven parties have agreed to comply with its provisions.

120 The Convention and Charter are instruments of the Council of Europe, which is quite different from the European Community. The controversial Maastricht Treaty, which has important social rights provisions associated with it, is an instrument of the European Community.

121 The Convention establishes the European Commission and Court of Human Rights which sit in Strasbourg, France. Each year these bodies hear many civil and political rights cases; they are developing a considerable jurisprudence.

122 Harris, "A Fresh Impetus for the European Social Charter" (1992) 41 ICLQ 659.

123 Idem.

124 Ibid, 660.

125 For instance, the Protocol enables the Committee of Independent Experts, which considers the periodic reports of states parties, to meet with representatives of the reporting states.

126 Harris, supra note 123, at 660.

examination of "a draft protocol providing for a system of collective complaints, with a view to its adoption and opening for signature".[127]

According to Harris:

> ... the future of the European Social Charter as an international treaty-based instrument for the protection of economic and social rights in Europe is brighter than could possibly have been foreseen just a year or two ago.[128]

VII. CONCLUSION

In 1992, 1.5 billion individuals were deprived of primary health care and a safe water supply, 2 billion lacked safe sanitation, over 1 billion adults could not read or write and 180 million children suffered from serious malnutrition.[129] Moreover, the numbers are escalating, not decreasing.[130] As the Committee on Economic, Social and Cultural Rights recently observed, the international community tolerates breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, "would provoke expressions of horror and outrage".[131]

In addition, breaches of second-generation rights have obvious implications for the enjoyment of first-generation rights:

> Can an illiterate, hungry person participate in the political process let alone social life? Does a marginalised, rural woman ... have anything remotely akin to civic equality to her urban, middle-class male compatriot?[132]

This is not to argue that social rights should have priority over civil and political rights, but to agree with Turk that human rights require a holistic approach. Social rights challenge discriminatory patterns of domination and subordination which survive the formal enjoyment of civil and political rights. Hence Wright's suggestion that "the category of rights which might be of greatest applicability to women are economic, social and cultural rights".[133] The same can be said about other marginalised groups which is probably why there is such a lively debate about the constitutionalisation of social rights in contemporary South Africa.

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127 Ibid, 674.

128 Ibid, 676.

129 Turk, supra note 23, at para 38.

130 Idem.

131 Quoted in *Human Rights Monitor* (1993) Vol 19, 12.

132 Haysom, "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" (1992) 8 SAJHR 451, 460.

133 Wright, "Human Rights and Women's Rights" in Mahoney K and Mahoney P (eds), *Human Rights in the Twenty-first Century* (1993) 87.

Finally, neither first-generation nor second-generation rights can be implemented exclusively by judicial processes. In New Zealand and elsewhere, numerous institutions modelled on the Swedish Ombudsman, for example, promote and protect civil and political rights. Equally, the implementation of social rights needs non-judicial investigatory devices, in addition to complaint-based procedures. One suggestion is for national Social Rights Commissions "to monitor, report on, do research on, receive complaints on and generally supervise the implementation of social rights programmes".[134] Sachs suggested:

> An adverse report by the Social Rights Commission might not be as powerful in a technical legal sense as an adverse judgment by a court of law, but it could have great significance with public opinion, and end up being enforced in practice through consequent legislative or executive action.[135]

There is no doubt that more work needs to be done on the formulation of judicial and non-judicial mechanisms, at the international and national levels, for the implementation of second-generation rights, so that they may become part of mainstream human rights promotion and protection.

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134 Sachs, A *Affirmative Action and Good Government - A Fresh Look at Constitutional Mechanisms for Redistribution in South Africa* (unpublished paper, 1992). It is interesting to note parallels between the Waitangi Tribunal and the proposed Social Rights Commission.

135 Idem. Sachs adds ruefully: "if the law were as inventive in relation to securing the rights of the poor as it is in respect of the rights of the rich, there would be no difficulty in finding appropriate ways and means to enforce basic social rights" (idem).

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