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DOMESTIC VIOLENCE: JUST A MATTER FOR THE POLITICIANS?

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Contents

Abstract

Domestic violence is New Zealand's most significant human rights failing according to the 2014 Universal Periodic Review on Human Rights. Yet, there is no indication in legislation or policy that domestic violence is considered a human rights issue in New Zealand. The Domestic Violence Act 1995 is merely ordinary law. In this paper I consider whether a human rights approach to domestic violence would provide greater redress for vulnerable women and children in New Zealand. Ultimately it is argued that domestic violence should be framed as a human rights approach. This could be by recognising a right to be free from domestic violence within the New Zealand Bill of Rights Act 1990 or by inserting a rights framework provision into the Domestic Violence Act. However, this is no simple solution to domestic violence. This is because it seems that human rights are considered mere political claims in New Zealand and because there is a clear reluctance to require the state to take positive action to prevent human rights abuses. Such culture may undermine the effectiveness of a recognised right to be free from domestic violence. However, I conclude by arguing that such problems do not outweigh the benefits of a human rights approach but merely require careful and sensitive enforcement of the right to be free from domestic violence.

Key Words

Human rights, domestic violence, positive obligations, human rights culture

I Introduction

> "We are looking to empower women. We have the audacity to think that we might be able to use the state to help do it." – Catherine MacKinnon[1]

This statement by MacKinnon sets the scene for this paper. I explore New Zealand's human rights obligations in regards to protecting and preventing women from domestic violence. This is because domestic violence is New Zealand's most significant human rights failing and recognised as such by the international community in the 2014 Universal Periodic Review on Human Rights (UPR). Yet, it seems that New Zealand fails to recognise domestic violence as a human rights issue, as a matter of law. The Domestic Violence Act 1995, our primary mechanism for addressing domestic violence, is mere ordinary law. The pertinent question for this paper is whether framing domestic violence as a legal human rights issue and therefore recognising a right to be free from domestic violence would provide effective and appropriate redress for those most vulnerable.

Ultimately it is argued that New Zealand should recognise a right to be free from domestic violence. This could be done by introducing a right to be free from domestic violence into the Bill of Rights Act 1990 or the Human Rights Act 1993 or by inserting a provision within the Domestic Violence Act. Recognising a right to be free from domestic violence will highlight the seriousness of this social problem and emphasise the importance in allocating state resources to address it. However, I identify two problems with recognising a right to be free from domestic violence.

First, it is suggested that human rights lack power in New Zealand because it seems that New Zealand's human rights culture tends to view human rights as political rights rather than legal rights. I attempt to gain some indication of New Zealand's rights culture by considering evidence of culture from recent cases, statements by Parliament and the Executive and academic discourse. It is suggested that such evidence indicates a political rights culture. Such dichotomy, whether rights are legal or political, comes from Professor Griffith's theory that human rights are mere political claims by individuals or groups and are not legal causes of action.

Secondly, recognising a human right to be free from domestic violence within legislation would impose positive obligations on the state to enforce such right. This may not be appropriate as

[1] As cited in Leigh Goodmark *A Troubled Marriage: Domestic Violence and the Legal System* (New York University Press, New York, 2012) at 11.

there is a clear reluctance to recognise positive obligations to prevent economic, social and cultural rights abuses in New Zealand, and, positive state action may not be the most appropriate or effective means to address domestic violence.

Nonetheless, I conclude by arguing that such problems with a human rights approach to domestic violence do not outweigh the importance of recognising a right to be free from such violence. Although a human rights approach to domestic violence is no simple solution and will require careful and sensitive application New Zealand has no excuse for refusing to recognise and publically label domestic violence as what it is, our most significant human rights abuse.

Finally a note on scope; I am concerned with domestic violence towards women. Although there are certainly cases of domestic violence directed towards men, women make up the majority of domestic violence victims. In 2015, 89 percent of applicants for protection orders were women and 88 percent of respondents named in protection order applications were male.[2] New Zealand Family Violence Clearinghouse stated that the most critical factor for determining whether or not someone would use violence or be a victim of violence was gender.[3] Statistics such as these are consistent with feminist thinking that "subjugation to men defines what it is to be a woman."[4] Such thinking will be expanded on later in regards to the value of a human rights approach to domestic violence. The power of a human rights approach in reinforcing respect for gender equality is why this paper is confined to domestic violence against women.

II New Zealand's Most Significant Human Rights Failing

In this part I outline in brief the issue of domestic violence in New Zealand, the current legislative framework addressing domestic violence and whether or not such framework establishes domestic violence as a human rights issue. I argue that according to the current framework domestic violence is not as a matter of law a human rights issue in New Zealand.

[2] New Zealand Family Violence Clearing House "Violence Against Women" (2015) < nzfvc.org.nz>. Also see Ministry of Justice "The nature and dynamics of family violence across population groups" <www.justice.govt.nz>.
[3] New Zealand Family Violence Clearing House "Respect position statement: gender and domestic violence" < nzfvc.org.nz>. Also see Ministry of Justice "The nature and dynamics of family violence across population groups" <www.justice.govt.nz>.
[4] Goodmark, above n 1, at 10.

New Zealand has one of the highest rates of domestic violence of the developed world.[5] Over half of all reported crime in New Zealand is domestic violence related with police responding to over 95 000 domestic violence related incidents each year.[6] This is 200 domestic violence call outs each day or one domestic violence call out every five to seven minutes.[7] In 2012 and 2013 Women's Refuge, New Zealand's primary family violence response agency, provided 76,000 safe beds for women and children who felt unsafe in their own homes.[8] On average, this was 209 persons each day that sought safety through Women's Refuge.[9] It is important to note that Women's refuge only has capacity for the most serious cases of abuse. Most often this is where children are at risk of violence. Such statistics are shocking yet they account for only 18 percent of all domestic violence incidents, a fraction of all domestic violence that occurs in New Zealand. [10]

The Domestic Violence Act is New Zealand's primary mechanism for addressing domestic violence. It was enacted in response to increased public outcry regarding domestic violence. Accordingly, the Domestic Violence Act is premised on the belief that domestic violence in all forms is unacceptable behaviour therefore domestic violence is defined broadly.[11] It includes physical, sexual and psychological abuse.[12] This incorporates a wide range of behaviour which reflects the wide range of domestic violence apparent in New Zealand society. For example, Women's Refuge found that 64 percent of clients reported psychological abuse, 49 percent reported physical abuse, 23 percent reported financial abuse, 21 percent reported harassment and stalking, 12 percent reported spiritual abuse, 12 percent reported sexual abuse and 11 percent report that weapons were used.[13] In many cases more than one type of abuse was reported.[14]

At the centre of the Domestic Violence Act is the protection order. Such remedy is hoped to prevent future violence. To obtain a protection order an applicant must satisfy three elements.

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[5] NZPA "NZ worst for domestic violence-UN report" *Stuff National* (New Zealand, 24 July 2011).
[6] Denise Wilson and Melinda Webber *The People's Blueprint* (The Glenn Inquiry, November 2014) at 16.
[7] National Collective of Independent Women's Refuges "New Zealand Domestic Violence Statistics" <womensrefuge.org.nz>.
[8] Ibid.
[9] Ibid.
[10] Wilson and Webber, *The People's Blueprint*, at 5, and National Collective of Independent Women's Refuges "New Zealand Domestic Violence Statistics" <womensrefuge.org.nz>.
[11] Section 5 Domestic Violence Act 1995.
[12] Section 3.
[13] National Collective of Independent Women's Refuges "New Zealand Domestic Violence Statistics" <womensrefuge.org.nz>.
[14] Ibid.

First, she must be in a domestic relationship with the perpetrator of the violence, again this is defined broadly and is satisfied by any close personal relationship, for example, flat mates.[15] Secondly, there must be domestic violence and thirdly, a protection order must be necessary.[16] To determine whether or not a protection order is necessary the court takes into account all relevant factors including the subjective fears of the victim.[17] The protection order is a civil order within the jurisdiction of the Family Court and contravention of or failure to comply with protection order conditions is a criminal offence within the jurisdiction of the District Court.[18] In 2014, 3124 protection orders were granted to victims of domestic violence.[19] This was 61 percent of all protection orders applied for.[20] Additionally, 3149 persons were convicted and sentenced for breach of a protection order.[21]

A No Right to be Free from Domestic Violence in New Zealand Law

The framework established by the Domestic Violence Act is mere ordinary law. The Domestic Violence Act does not establish domestic violence as a human rights abuse and neither the Act nor leading domestic violence cases utilise human rights rhetoric. For example, the Domestic Violence Act does not incorporate a provision affirming that freedom from domestic violence is a recognised human right. This means that the Domestic Violence Act is equivalent in status to legislation such as the Crimes Act 1961. It is not equivalent to constitutional human rights statutes like the New Zealand Bill of Rights Act or the Human Rights Act. As well, neither the New Zealand Bill of Rights Act nor the Human Rights Act specifically encapsulate a right to be free from domestic violence.

Further, the Domestic Violence Act does not affirm New Zealand's commitment to freedom from domestic violence under The Convention on the Elimination of Discrimination against Women (CEDAW). CEDAW is the primary international treaty governing violence against women and encapsulates related human rights. CEDAW does not address domestic violence explicitly however the CEDAW committee in General Resolution 19 identified gender-based violence as a form of discrimination in serious opposition to a women's human rights.[22] New

[15] Section 4 Domestic Violence Act.
[16] Section 14.
[17] *Surrey v Surrey* [2008] NZCA 565 2 NZLR 581 at [96]-[104].
[18] Section 49 Domestic Violence Act.
[19] New Zealand Family Violence Clearing House "Violence Against Women" (2015) < nzfvc.org.nz>.
[20] Ibid.
[21] Ibid.
[22] J Fenrich and J Contesse "It's Not Ok: New Zealand's Efforts to Eliminate Violence Against Women" (2008) 1(1) Crowley Mission Reports 4 at 8.

Zealand has signed and ratified CEDAW however has failed to incorporate it directly into domestic legislation. Regardless, it is generally accepted that New Zealand's domestic violence policy meets CEDAW obligations.[23] The Optional Protocol to CEDAW enables rights violations to be taken before the CEDAW committee. Again, New Zealand has ratified this provision but failed to utilise it as a protection.[24] CEDAW's status means that the right to be free from domestic violence per CEDAW is not translated directly into New Zealand law. This is because New Zealand has a dual legal system.[25] Traditionally, international obligations have been unenforceable in New Zealand unless incorporated into domestic legislation.[26]

Absence of a rights approach to domestic violence within the legislative framework reflects the historical attitude that domestic violence is a private affair between husband and wife and should not be dealt with by the state. According to Goodmark domestic violence was deemed "an extension of the husband's right to control the behaviour of his wife, to be handled within the confines of the home"[27] Enacting domestic violence legislation (in New Zealand, the Domestic Protection Act 1982 and then the Domestic Violence Act 1995) and recognising that "public systems and institutions have a responsibility to address abuse was a radical development of the law as state intervention runs counter to the attitude that domestic violence is a private matter."[28] Understanding this underlying attitude, an attitude that is arguably still prevalent among families in New Zealand today, helps one to understand why the New Zealand state may be reluctant to frame domestic violence as a human right within either the Domestic Violence Act or constitutional human rights statutes. Recognising a right to be free from domestic violence within the New Zealand Bill of Rights Act, for example, would be a further encroach into the privacy of families as it would mandate state responsibility and intervention in domestic violence situations. This will be discussed later in regards to positive obligations.

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[23] Fenrich and Contesse, above n 22, t 8.
[24] United Nations Women "Text of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women" <www.un.org/womenwatch/>. Also see Susan Deller Ross *Women's Human Rights: The International and Comparative Law Casebook* (University of Pennsylvania Press, Philadelphia, 2008) at ch 369.
[25] Sir Kenneth Keith "The Application of International Human Rights Law in New Zealand" (1997) 32 (3) Texas International Law Journal 401 at 406.
[26] At 406. Also see *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA) per Cooke J at 224. However, note that the dualist approach to international law is no longer definitive. Courts are arguably becoming more willing to interpret legislation consistently with international obligations despite non-incorporation, this may be through application of the presumption of consistency. For example, see *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA). There may be greater scope nowadays for CEDAW to have direct influence in domestic violence cases. However, I have not yet come across a domestic violence case that directly discusses an approach consistent with the requirements in CEDAW.
[27] Goodmark, above n 1, at 1.
[28] At 1.

Nevertheless, perhaps the right to be free from domestic violence underlies the current legislative framework. Geiringer and Palmer argue that human rights are protected in "manifold ways throughout the breadth of statute and common law." For example, Geiringer and Palmer draw attention to the criminalisation of murder under ss 167-168 of the Crimes Act 1961 and suggest that despite being an ordinary criminal provision these sections are one of the ways in which the state recognises and protects the right to life.[29]

If this line of reasoning is followed, it could be argued that prohibiting violence towards women in the Domestic Violence Act 1995 is sufficient to recognise a right to be free from domestic violence. This argument is flawed. "Not all wrongs constitute violations of rights."[30] There must be a distinction between ordinary legal (criminal) wrongs and breach of human rights.[31] Further, Geiringer and Palmer's example of murder relates to an already existing right. The law against murder enforces the right to life per s 8 of the New Zealand Bill of Rights Act. There is no corresponding right to be free from domestic violence in the New Zealand Bill of Rights Act, therefore there is no existing rights foundation for the provisions in the Domestic Violence Act.

Accordingly, this shows that domestic violence is not, as a matter of law, considered a human rights issue in New Zealand. Despite this, the UPR recommendations are premised on domestic violence being considered a human rights issue. Of 155 recommendations more than 20 specifically related to domestic violence.[32] In particular, the UPR drew attention to New Zealand's lack of national strategy and policy to combat domestic violence, New Zealand's lack of monitoring and evaluation of domestic violence prevention programmes and agencies, the lack of empirical data around domestic violence, the lack of human rights training for actors involved in domestic violence work and the lack of adequate resources allocated to preventing domestic violence.[33]

In response to these concerns New Zealand made two comments. First, that New Zealand is committed to improving women's safety from violence and secondly that New Zealand's

[29] Claudia Geiringer and Matthew Palmer, "Human rights and social policy in New Zealand" (2007) 30 Social Policy Journal of New Zealand 12 at 14-15.
[30] Joseph Raz "Human Rights without Foundations" (2007) 14 University of Oxford Faculty of Law Legal Studies Research paper Series 1 at 13.
[31] At 13.
[32] Ministry of Justice "List of recommendations made during New Zealand's 2014 Universal Periodic Review" (2014) <www.justice.govt.nz>.
[33] Ibid.

legislative framework already provides comprehensive protection against discrimination.[34] It could be argued that such response indicates tacit acceptance that domestic violence is a human rights issue in New Zealand. Perhaps in the public arena state actors are willing to hint at domestic violence being considered a rights issue. In public newspaper articles and press releases concerning the UPR recommendations politicians have certainly utilised rights language and discussed domestic violence as if it is considered a human rights issue.[35] However, as identified, human rights rhetoric is not present in the current domestic violence legal framework. The political discourse does not translate into the legal framework. This may be because human rights are considered only political claims in New Zealand. This will be expounded later.

B An Implied Right to be Free from Domestic Violence

I argue that framing domestic violence as a rights issue would provide greater redress for women suffering from domestic violence in New Zealand. The following section addresses whether despite absence of explicit language recognising a right to be free from domestic violence such right could be read into the current legal framework per ss 8 and 9 of the New Zealand Bill of Rights Act.

It could be argued that the right to be free from violence could be read into the right to life per s 8 of the New Zealand Bill of Rights Act. In *Lawson v Housing New Zealand* the plaintiff attempted to argue that the right to life encompassed things "necessary to support and ensure a person's existence such as adequate and affordable housing."[36] The same argument could be made in regards to domestic violence. That is, that the right to life extends to a safe and non-violent state of being. Such approach would be consistent with CEDAW obligations. General Resolution 19, noted above, specifically declares that gender-based violence contravenes the right to life in CEDAW.[37] However, Butler and Butler argue against an extension of s 8 in this manner.[38] They argue that the s 8 right to life in New Zealand Bill of Rights Act is limited to life or death situations.[39] Section 8 does not speak to quality of life issues, of which domestic

[34] Ministry of Justice "List of recommendations made during New Zealand's 2014 Universal Periodic Review" (2014) <www.justice.govt.nz>.
[35] See, NZPA "NZ worst for domestic violence-UN report" *Stuff National* (New Zealand, 24 July 2011), Stacey Kirk "UN concern over violence in NZ" *Stuff National* (New Zealand, 28 January 2014), Green Party "UN-NZ failing on domestic violence and protecting children" (press release, 1 February 2014).
[36] *Lawson v New Zealand Housing* [1997] 2 NZLR 474 (HC).Also see Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A commentary* (Lexis Nexis, Wellington, 2005) at [9.4.1-9.4.2].
[37] Fenrich and Contesse, above n 22, at 8.
[38] Butler and Butler, *The New Zealand Bill of Rights Act* above n 36, at [9.4].
[39] At [9.4].

violence would fall under.[40] Butler and Butler state that "inferior housing, poor quality health systems, poor criminal law enforcement that leads to vicious but non-fatal attacks, are not covered by s 8 of the New Zealand Bill of Rights Act."[41] They argue that s 8 sets a high threshold. In *Lawson* Williams J found that it is unlikely that s 8 can be extended to social and economic factors.[42] The plaintiff's right to life did not include the right to basic standard of living.[43]

William J's approach is consistent with the deliberate omission of economic, social and cultural rights from the New Zealand Bill of Rights Act.[44] The Act incorporates New Zealand's international obligations regarding civil and political rights but it does not incorporate the International Covenant on Economic, Social and Cultural Rights (the ICESCR).[45] The right to be free from violence arguably falls more naturally within the sphere of economic, social and cultural rights. Given the distinction between these categories of rights it would be somewhat awkward and contrary to parliamentary intent to attempt to interpret the right to life in a civil and political context to include the right to be free from domestic violence.

I am persuaded by this argument, recognising a right to be free from domestic violence within New Zealand's civil and political rights framework goes against parliamentary intent. However, such argument is perhaps not as unequivocal as the above section asserts. Tushnet argues that distinguishing civil and political rights from economic, social and cultural rights is ingrained in legal and political thinking.[46] Yet, he argues that the categorisation of rights in this way may stem from a decision about the priority of rights and the associated obligations rather than from the substance of rights.[47] For example, Opie argues that all rights require the state to take positive action, for example, the enactment of legislation, monitoring and enforcement, not just civil and political rights.[48] Positive obligations will be discussed in greater detail later. For now, it is sufficient to note that if Tushnet is correct in arguing that the distinction between civil and political rights and economic, social and cultural rights has "collapsed" then a narrow

[40] Butler and Butler, *The New Zealand Bill of Rights Act* above n 36, at [9.4].
[41] At [9.4.1-9.4.2].
[42] *Lawson v Housing New Zealand,* above n 36, at 494-495.
[43] At 494-495. Also see discussion in, Joss Opie, "A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990" (2012) 43 VUWLR 471 at 494-495.
[44] Opie, above n 43, at 494-495.
[45] At 494-495.
[46] Mark Tushnet, "Civil and Social Rights" (1991) 25 Loy. L. A. L. Rev. 1207 at 1213-1217.
[47] At 1213-1217.
[48] Opie, above n 43, at 505. Also see, Stephen Holmes and Cass R Sunstein *The Cost of Rights* (WW Norton & Company, New York, 1999) at 44.

interpretation of s 8 may be incorrect.[49] The example of domestic violence shows that the line between civil and political rights and economic, social and cultural rights can be blurred. The right to life is violated when a woman dies from domestic violence. Arguably it would be absurd to hold that the violence be sufficiently serious as to result in death before a human right would be considered breached as a matter of law in New Zealand. This argument conflicts with the approach to human rights in New Zealand and may indicate, as will be argued, that New Zealand should change its current approach to human rights to recognise that the right to be free from domestic violence is a valid and legally enforceable human right.

Regarding s 9 of the New Zealand Bill of Rights Act, it could be argued that the right to be free from domestic violence can be read into the right to be free from cruel or degrading treatment. In my view this is a more convincing argument than interpreting s 8 to include freedom from domestic violence. Certainly, this argument has been accepted in other jurisdictions. In *A v United Kingdom* the European Court of Human Rights held that physical chastisement of a child with a wooden cane was sufficiently serious to invoke s 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European equivalent to s 9 in the New Zealand Bill of Rights Act. [50] Perhaps it could be argued that similar reasoning should apply in New Zealand. Section 9 of the New Zealand Bill of Rights Act states that:

> **9. Right not to be subjected to torture or cruel treatment** – Everyone has the right not to be subjected to torture or to cruel, degrading or disproportionately severe treatment or punishment.

Domestic violence arguably falls within this provision. Domestic violence is treatment. Although there is not yet any case law on the precise meaning of "treatment" per s 9, Butler and Butler argue that treatment is a wide concept and prima facie means *any measure* applied to a particular person or persons.[51] Domestic violence is also likely cruel and degrading. It has been suggested that cruel means the "intentional imposition of severe suffering."[52] Degrading has not been considered by the New Zealand courts. However, in the United Kingdom it has been held that degrading suggests "an assault on the dignity and physical integrity of an individual which humiliates and debases."[53] The inquiry into whether conduct is cruel or degrading would likely be intensely factual and depend on all relevant factors. Such approach

[49] Tushnet, above n 46, at 1213-1217.
[50] *A v United Kingdom* (1998) 27 EHRR 611 (ECtHR).
[51] Butler and Butler, *The New Zealand Bill of Rights Act,* above n 35, at [10.9].
[52] *Taunoa v Attorney General* (2004) 7 HRNZ 379 (HC).
[53] Butler and Butler, *The New Zealand Bill of Rights Act,* above n 35, at [10.11].

would be consistent with the approach already taken in domestic violence cases in New Zealand.

I am unconvinced as to the strength of this argument. This is because of the clear refusal by the legislators to enact the New Zealand Bill of Rights Act in such a way as to impose positive obligations on the state.[54] As highlighted, domestic violence occurs between private individuals and was historically considered a private matter. Accepting that a right to be free from domestic violence could be read into the New Zealand Bill of Rights Act would require recognition of positive obligations on the state to intervene and protect one private individual from domestic violence by another private individual.[55] This approach would be contrary to Parliamentary intent. When the New Zealand Bill of Rights Act was drafted the introduction of positive obligations was particularly feared.[56] This is why economic, social and cultural rights were omitted from the Act.[57] Enforcement of economic, social and cultural obligations would require enacting the New Zealand Bill of Rights Act as supreme law that the courts could use to hold state actors to account and strike down inconsistent action.[58] The Justice and Law Reform Select Committee believed that this would allow too much power to unelected judges.[59] Economic, social and cultural rights are not "value free" and the ramifications of "freezing" such substantive rights into "special constitutional status" were also feared.[60] Again, this suggests that a right to be free from domestic violence cannot be read into the current New Zealand rights framework.

This part concludes therefore that there is no recognised right to be free from domestic violence in New Zealand. In my view this is unsatisfactory. New Zealand should recognise freedom from domestic violence as a human right. The following part explores this.

III New Zealand should Recognise a Right to be Free from Domestic Violence

New Zealand should recognise a right to be free from domestic violence. In this part I argue that a human rights approach to domestic violence will strengthen the object of the existing

[54] Opie, above n 43, at 476-477.
[55] Jan Stemplewitz "Horizontal rights and freedoms: an analysis of the role and effect of the New Zealand Bill of Rights Act 1990 in private litigation" (LLM Research Paper, Victoria University of Wellington, 2005) at 197-198.
[56] Opie, above n 43, at 476-477.
[57] At 476-477.
[58] At 476-477.
[59] At 476-477.
[60] At 476-477.

domestic violence framework and signify the weighting that should be given to domestic violence policy as well as working to further empower women. In particular, I argue that human rights recognise an inherent right that a person is entitled to merely by virtue of their status as a human being. I also, in brief, question the soundness of human rights more generally.

The underlying purpose of the Domestic Violence Act is to recognise that domestic violence in any form is unacceptable behaviour.[61] Recognising domestic violence as a human rights issue will strengthen this purpose because human rights language indicates that the interest in question is of fundamental importance and "demands recognition".[62] A human right and rights discourse "elevates" the interest in question "above the arena of state law and into the realm of universal right."[63] Therefore, breach of a human right is no ordinary wrong.[64] Geiringer and Palmer explain this by comparing rights with needs.[65] They argue that rights emphasis entitlement and the particular aspects of the interests and duties at play.[66] A right is a superior interest to a need. For example, Geiringer and Palmer provide the example: "John needs food" and argue the absence of rights language fails to indicate the moral or legal obligations of others in relation to John's need. The phrasing "John has a right to food", in contrast, connotes that someone else, for example the state, has a duty to ensure that John's right to food is upheld.[67]

Further, a human rights approach to domestic violence would ensure that the state prioritises domestic violence policy. "Rights" language indicates the importance and weighting that should be given to the interest.[68] Rights impose significant duties therefore the interest must be "sufficiently compelling to justify the imposition of such duty on others."[69] A right to food, to continue Geiringer and Palmer's example, means that the individual's interest in food is of greater priority than other interests held by members of the community.[70] John should therefore be allocated more resources than those in the community presenting ordinary needs.[71] Again, this is because a human right is a superior interest to an ordinary legal right.[72]

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[61] Section 5 Domestic Violence Act 1995.
[62] Martin Loughlin *The Idea of Public Law* (Oxford University Press, Oxford, 2003) at 126-127.
[63] At 128.
[64] At 126-127.
[65] Geiringer and Palmer, above n 29, at 14.
[66] At 14.
[67] At 14.
[68] At 14.
[69] At 14.
[70] At 14.
[71] At 14.
[72] Loughlin, *The Idea of Public Law,* above n 62 at 128-129.

A human rights approach to domestic violence would indicate that the state has recognised that domestic violence is an imperative social issue in need of immediate response as well as raising the priority status of domestic violence above other social concerns.[73] Within social policy there is always tension. State resources are finite and allocation of such resources must be a zero sum game. The state must consider which issues should be prioritized and in what order. Issues of higher priority are, as would be expected, granted more resources. Framing the right to be free from domestic violence as a human right would ensure that present and future governments allocate more resources to domestic violence policies than to social issues that do not attach the same human rights status. The UPR recommendations show that the international community expects such positive action from New Zealand. The UPR recommended that New Zealand put in place, strengthen and allocate more resources to existing measures to combat domestic violence.[74]

Human rights labelling is also important because it provides an educative function, that is, it will lead to greater community awareness about the right in question.[75] Again, this is because the human rights "label" indicates the significance of the interest in question. Greater awareness will be influential in changing culture and raising the profile of domestic violence.[76] In New Zealand awareness of domestic violence has improved considerably in recent years yet greater awareness is still needed.[77] Domestic violence is notably underreported, as stated almost 80 percent of all domestic violence incidents are not brought to the attention of the authorities.[78] As discussed, this is because domestic violence is still considered a private issue that should remain behind closed doors. I believe that to reduce rates of domestic violence the public must become more aware of the atrocity that domestic violence is. Community discourse and action has in the past been responsible for major social reform.[79] Shelton argues that human beings have an "innate desire to be protected from abuse" and the "ethical and moral dimension" of human rights law compels the use of human rights as a legal check on excessive

[73] Karen Morgaine "Domestic Violence and Human Rights: Local Challenges to a Universal Framework" (2006) 33 J Sociol Soc Welfare 109 at 113.
[74] Ministry of Justice "List of recommendations made during New Zealand's 2014 Universal Periodic Review" (2014) <www.justice.govt.nz>.
[75] Peter Bailey *Bringing Human Rights to Life* (The Federation Press, Sydney, 1993) at 253-254.
[76] Centre for Social Research and Evaluation *Campaign for Action on Family Violence* (Ministry of Social Development, March 2010).
[77] Ibid.
[78] Wilson and Webber, *The People's Blueprint*, at 5, and National Collective of Independent Women's Refuges "New Zealand Domestic Violence Statistics" <womensrefuge.org.nz>.
[79] Bailey, above n 75, at 250.

exercises of power.[80] Accordingly, this "moral dimension" has inspired formation of human rights communities, in particular, non-government organisations who have worked to raise awareness of rights issues, worked to further develop rights discourse and have acted as "watchdogs and whistle-blowers" regarding human rights violations.[81] A human rights label, or even discussion in the public arena regarding whether domestic violence should be a human rights issue, will bring domestic violence to the public's attention once again and encourage public debate and condemnation of the issue.[82]

Finally, framing domestic violence as a human rights issue will empower women. "The language of [human] rights is the language of empowerment."[83] This is because human rights labelling conceptualises the right bearer as self-sufficient, and independent, a holder of entitlements.[84] This is important because domestic violence by its nature is flagrantly opposed to a sense of empowerment. Domestic violence is degrading, demeaning and strips women of power. Victims of domestic violence would therefore no longer be seen as passive and in need of charity but rather as equal and autonomous rights holders.[85]

I would argue that, at present, ordinary legal remedies do little to give victims back such sense of power and dignity. Issues like domestic violence are often termed women's rights issues which, according to Bunch, allows the state to dismiss women's issues as less important than traditional human rights issues.[86] Further, recourse to the law is often a last resort for women in domestic violence situations.[87] One reason for this is that complainants of domestic violence often feel like they are disrupting normal; in some cultures and parts of society being powerless to men and a victim of domestic violence is inherent in being a women.[88] A human rights approach would begin to undermine this as it would recognise a woman standing up for a state

[80] Dinah Shelton, "An Introduction to the History of International Human Rights Law", (2007) 346 Legal Studies Research Paper 1 at 28.
[81] At 28.
[82] Such public debate was the catalyst for enacting the Domestic Violence Act in 1995.
[83] Geiringer and Palmer, above n 29, at 14.
[84] At 14.
[85] Yakin Ertürk "The Due Diligence Standard: What Does It Entail for Women's Rights? In Carin Benninger-Budel (ed) *Due Diligence and its Application to Protect Women From Violence* (Martinus Nijhoff Publishers, Boston, 2008) at 28.
[86] Charlotte Bunch "Women's Rights as Human Rights: Towards a Re-Vision of Human Rights" (1990) 12 Human Rights Quarterly 486 at 496-498.
[87] Goodmark, above n 1 at 4.
[88] At 10-11. Also see Lisa Gormley "Violence against Women by Non-State Actors, a Responsibility for the State under Human Rights Law: Amnesty International's Work on Domestic Violence" in Carin Benninger-Budel (ed) *Due Diligence and its Application to Protect Women From Violence* (Martinus Nijhoff Publishers, Boston, 2008) at 181.

of being that is rightfully and validly due to her.[89] Ertürk argues that "applying a human rights perspective to violence has created a momentum for breaking the silence around violence and for connecting the diverse struggles across the globe."[90] This is because, as Loughlin writes, reliance on human rights is "essentially an appeal to some fundamental set of rights that inhere in the individual and demand recognition" whether or not the state or the public accept such recognition.[91]

The arguments that have been advanced in this part are premised on a natural law justification for human rights. In brief, that human rights are legal entitlements that every human being without discrimination is entitled to merely because they are human. It is important to note that the way human rights are defined and the reason for defining the right in such a manner will determine how it is applied and how fundamental it is considered.

It is near impossible to think and argue about human rights without being influenced by one's personal worldview. I am influenced by an orthodox definition of human rights and this motivates my argument that domestic violence should be framed as a human rights issue in New Zealand. In my view, human rights validate the inherent worth and dignity of a person. Therefore, what better tool to utilise when attempting to remedy a social issue so clearly opposed to a woman's dignity and worth?

Natural law theory mandates that certain rights exist by dint of some "higher law" superior to positive or man-made law.[92] Such higher law establishes universal and timeless rights that all human beings are entitled to and may make recourse to.[93] John Locke's famous enunciation that all free men have inalienable rights to life, liberty and property is evidence of early natural rights thinking.[94] All human beings are equal and all deserve to be treated with dignity.[95] "Human dignity constitutes the intellectual centre of the entire culture of human rights."[96] Human rights are the most important rights that a person may enjoy and should be given effect as such.[97]

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[89] Ertürk, above n 85, at 28.
[90] At 28.
[91] Loughlin, *The Idea of Public Law,* above n 62, at126.
[92] Malcom N Shaw *International Law* (7th ed, Cambridge University Press, Cambridge, 2014) at 195.
[93] At 195.
[94] At 195.
[95] Christian Tomuschat *Human Rights: Between Idealism and Realism* (2nd ed. Oxford University Press, New York, 2008) at 2-3.
[96] At 2-3.
[97] At 2-3.

There are problems with natural law justifications for human rights and history has shown natural law jurisprudence to come and go from accepted legal thinking.[98] At present, two primary criticisms of natural rights are the fact that natural law rationales are often based on Judaeo-Christian thinking which is increasingly unpopular in a modern secular age and that the universality of human rights undermines cultural relativism and state sovereignty.[99] These criticisms have led to rights discourse being positivized.[100] In particular, the term "natural right" and the appeal to a higher power for justification have been rejected and replaced with "human right" and there has been a movement towards deriving justification for such rights from the mere fact that one is human.[101] Raz explains this:[102]

> Human rights' [are] those important rights which are grounded in our humanity. The underlying thought is that the arguments which establish that a putative right-holder has a human right rely on no contingent fact except law of nature, the nature of humanity and that the right holder is a human being.

Again, such justification poses problems. Raz argues that scholars advancing a modern natural law justification rely on the concept of personhood or humanism.[103] Yet, to achieve full personhood human rights must already exist.[104] Such logic is flawed. It would suggest that those stripped of human rights, those enslaved or those who knowingly consent to their human rights being limited, for example, cannot obtain full status as a person. Raz argues;[105]

> The life of people so controlled or dominated may be better or worse as a result, but are those people really persons only to a lesser degree? I find it difficult to avoid the suspicion that [Griffin] is smuggling a particular ideal of a good life into his notion of being a person to the fullest degree.

These criticisms are certainly valid arguments and may work to undermine the legitimacy of human rights as constraints on public power. As such, those who reject a natural law justification of human rights may balance the competing arguments for and against recognising

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[98] Shaw, above n 92, at 195.
[99] Tomuschat, above n 95, at 2-3 and Jessica Whyte "Human Rights: confronting governments? Michel Foucault and the right to intervene" in Matthew Stone (ed) *New Critical Legal Thinking: Law and the Political* (Routledge, New York, 2012) at 14-18.
[100] Loughlin, *The Idea of Public Law,* above n 62, at 126.
[101] At 126.
[102] Raz, above n 30, at 2-3.
[103] At 6. Also see A Gerwith *Human Rights* (University of Chicago Press, Chicago, 1982) at 46 and Whyte, above n 84, at 14-18.
[104] Raz, above n 30, at 5-6.
[105] At 6.

domestic violence as a human rights issue with different weight than suggested in this paper. For example, those who conceive of rights as rights deriving from God or the nature of humanity may give more weight to the enforcement of the right than those who conceive rights in a strictly positive sense.[106] Likewise, whether human rights are conceived as a political or legal phenomena will affect the application of the right in a particular situation. This will be discussed in the following part.

IV Problems with Recognising a Right to be Free from Domestic Violence

Recognising a right to be free from violence is however no simple solution. The following part considers two problems that framing domestic violence as a human rights issue in New Zealand may pose. First, it is argued that a human rights approach is inappropriate because it seems that rights only have political value in New Zealand rather than value as legal causes of action. Secondly, it is argued that application of human rights to domestic violence would require positive action by the state and that such further state action may be inappropriate in the context of domestic violence.

A A Political Approach to Rights in New Zealand

Until this point the term "human right" has been used somewhat blindly without much explanation as to the legal status of the term. This section emphasises the contentious status of human rights. On one hand, human rights may be considered valid legal causes of action. Other laws and actions by legal persons are subject to compliance with human rights and legal forums are authorised to enforce such compliance. On the other hand, human rights may be merely political in nature. Compliance with human rights is a matter best determined within a political forum. This political-legal dichotomy comes originally from Professor Griffith's work.[107]

In brief, Griffith claimed that there is no such thing as *legal* rights. Rights are merely political claims framed as legal rights by individuals and groups. For example:[108]

> In this political, social sense there are no over-riding human rights. No right to freedom, to trial before conviction, to representation before taxation. No right not

[106] Loughlin, *The Idea of Public Law,* above n 62, at 126-128.
[107] See Grahame Gee and Grégoire CN Webber, "What Is a Political Constitution?" (2010) 30 OJLS, Adam Tomkins "The Role of the Courts in the Political Constitution" (2010) 60 UTLJ 1 and Martin Loughlin *Sword and Scales: An Examination of the Relationship between Law and Politics"* (Hart Publishing, Oxford, England 2000 for a comprehensive discussion of Griffith's argument and noted critiques.
[108] JAG Griffith "The Political Constitution" (1979) 42(1) MLR 1 at 17.

> to be tortured, not to be summarily executed. Instead these are political claims by individuals and by groups.

Griffith had two main reasons for this argument. First, Griffith believed at a philosophical level that there is a continuous struggle between the rulers and the ruled about the size and shape of rights, interests and duties.[109] This affects the way that law and politics develop.[110] Constitutions should reflect such tension between law and politics, yet recognise rights issues are "political throughout."[111] Constitutions should create political institutions in which individuals and governments can discuss these varying political claims.[112] Secondly, Griffith believed that law was merely a form of politics.[113] Law is not separate or superior to politics rather it is one way in which disputes can be discussed and resolved.[114]

I would argue that Griffith's claim is certainly relevant in society today, despite its age. Perhaps it is even more applicable than when Griffith first propounded his thesis given the modern rejection of a natural law justification of rights. In an increasingly secular society a political approach to rights is both pragmatic and reflective of reality.[115] If human rights lack common religious or moral justification they are rendered without foundation.[116] Lack of foundation undermines the legal value of the rights so proponents are compelled to justify rights on the basis of common politics.[117] For example, Griffith's view of human rights is consistent with the increasing number of rights claimed to be fundamental rights. Raz is particularly dubious of the legal nature of rights in a constitution where one can effectively claim "a right against poverty and a right to be loved," a right "not to be exposed to excessively and unnecessarily heavily, degrading, dirty and boring work, " a right to "globalisation" or a right to "sexual pleasure and comprehensive sexual education."[118] The constant evolution and creation of rights reflects the shifting of political values and resource allocation. Arguably, if rights were so fundamental and inherent then the substantive content of such rights would be finite and few.[119]

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[109] Gee and Webber, above n 92, at 277.
[110] At 278.
[111] At 278.
[112] At 277.
[113] At 277.
[114] At 277.
[115] Loughlin, *The Idea of Public Law,* above n 62, at 127.
[116] Raz, above n 29, at 18-20.
[117] At 18-20.
[118] Griffith, "The Political Constitution", above n 108, at 2.
[119] Loughlin *Sword and Scales: An Examination of the Relationship between Law and Politics,* above n 96, at 203.

In relation to domestic violence in New Zealand, there is significant contention within New Zealand's rights culture as to whether rights should be considered legal or political. I argue that New Zealand human rights culture aligns more closely with a political conception of human rights. However, it is important to note that ascertaining human rights culture or attempting to ascertain culture is an abstruse task. How does one measure and encapsulate something like culture which by its nature is vague and unscientific? Therefore, this section merely attempts to identify an indication of attitudes towards human rights. To do this several recent cases, state decisions and opinions of academics are considered.

I The Judiciary

There is some evidence of judges in New Zealand taking active steps to protect citizen rights. The longstanding purpose of judges is to protect the citizen by promoting and upholding individual rights.[120] This was true before the introduction of formal legislation protecting human rights.[121] Judges have a dual duty.[122] On one hand they are required to interpret and enforce law of a sovereign parliament and on the other hand they are equally required to discharge their obligation to the citizen by ensuring that "the working of legislation is sensible, just and practical."[123] This traditional purpose would be consistent with upholding legal human rights.

Judicial and extra-judicial writings of New Zealand's Lord Cooke are consistent with the principle that judges are the bulwark against excessive state power.[124] In *Taylor v New Zealand Poultry Board* Cooke J, as he was then, stated that some rights lie so deep that even a sovereign Parliament could not override them.[125] This shows that at least one judge values an activist and legal approach to the protection of human rights. Lord Cooke indicates that the correct response to human rights breaches would be redress through the courts.[126] A victim of rights abuse would be entitled to have his or her case heard before the court and the court would be mandated to stand between Parliament and the citizen and declare that such oppressive action by the state was contrary to fundamental tenets of law, in other words, human rights.[127] However, Lord

[120] Loughlin, *The Idea of Public Law,* above n 62, at 81.
[121] JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, Lexis Nexis, Wellington, 2009) at 320.
[122] At 320.
[123] Burrows and Carter, above n 110, at 320.
[124] Claudia Geiringer "The Principle of Legality and the Bill of Rights Act" A Critical Examination of *R v Hansen"* in (Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 69 at 81.
[125] *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (CA) at 398.
[126] Sir Robin Cooke "Fundamentals" (1988) NZLJ 158 at 164.
[127] At 164.

Cooke was referring to extremely serious human rights abuses, such as an attempt by the state to strip Jewish citizens of their citizenship.[128] A situation of this gravity has never arisen in New Zealand and one can only speculate on how far the Judiciary would go in encroaching on parliamentary sovereignty if such a case were ever to arise. Further, the seemingly activist approach in favour of legal human rights advanced by Lord Cooke may not be indicative of judicial culture as a whole. Lord Cooke was writing at a time where there was significant concern about the absence checks on state power, in particular the absence of a Bill of Rights Act.[129]

Regardless, there are cases that suggest some modern judges also take an active approach to validating the existence of legal human rights. In *Ministry of Transport v Noort,* for example, the Court of Appeal endorsed a generous interpretation to human rights issues, adopting Lord Wilberforce's statement in *Minister of Home Affairs v Fisher* that human rights require:[130]

> A generous interpretation avoiding what has been called the 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.

R v Poumako also validated the existence of legal human rights.[131] The defendant's right to a minimum standard of criminal procedure enshrined in s 25 of the New Zealand Bill of Rights Act was purportedly breached by the enactment of retrospective legislation. In order to protect such a fundamental human right the court read s 80(2A), the retrospective provision, as to only apply retrospectively to the date on which the amendments commenced.[132] This interpretation was in patent opposition to parliamentary intent. The amendments introducing retrospective penalties were intended specifically as a response to Mr Poumako's offending.[133] The Court's interpretation was rights friendly. Although the interpretation of s 80(2A) was significantly strained and contrary to the principle of parliamentary sovereignty the Court considered human rights more important. This suggests that human rights are valid legal safeguards against oppressive state power and can be effectively relied on by individuals in court.

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[128] Cooke, above n 126, at 164.
[129] The Hon Justice MD Kirby "The Struggle for Simplicty: Lord Cooke and Fundamental Rights" (1998) 24 Commonwealth Law Bulletin 496 at 500.
[130] *Ministry of Transport v Noort* [1992] 3 NZLR 439 (CA) at 440 and *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328.
[131] *R v Poumako* [2000] 2 NZLR 695.
[132] At 702-703.
[133] At [8].

The recent case *Taylor v Attorney General* also shows judicial willingness to recognise and protect legal human rights.[134] This case concerned an amendment to the Electoral Act 1993 in 2010 which prohibited all prisoners incarcerated after 16 December 2010 from voting in a General Election. Such amendment is contrary to fundamental electoral rights enshrined in s 12 of the New Zealand Bill of Rights Act.[135] Taylor sought a declaration of inconsistency. Such remedy had never been granted by New Zealand Courts. However, Heath J asserted that the courts have a legal responsibility to "fashion public law remedies to respond to the wrong inherent in any breach of a fundamental right."[136] Such responsibility was not precluded from extending to wrongs committed by the Legislature.[137] In fact, Heath J stated that the courts function "*is* to determine whether legislation is in breach of fundamental rights."[138] This statement again suggests that the judiciary is the appropriate legal protector of rights. Rights issues are not to be determined in the political arena. Victims of rights breaches are entitled to legal redress despite such redress appearing contrary to political sovereignty.

These cases could be argued to be examples of the Judiciary actively protecting human rights as a matter of law. However, in my opinion it cannot be argued convincingly that these cases represent the culture of the judiciary as a whole. One or two judicial cases, albeit decisions considered emblematic human rights cases, may not accurately shed light on the attitude of the entire judiciary. I would argue that presenting these cases in support of clear legal protection of rights by the judiciary is too simplistic.

First, the liberal and "rights friendly" approach of Heath J in *Taylor v Attorney General* may not be reflective of judicial attitudes across New Zealand. Only several years prior to *Taylor,* the Court of Appeal, in *Boscawen v Attorney General* seemed to take a political approach to human rights. The Court found that they could not make a declaration of inconsistency in the abstract although the door was tentatively left open for such a declaration in cases where there was a dispute.[139] This led commentators to believe that it would be highly unlikely that New Zealand courts would ever make a declaration of inconsistency.[140] Further, the Court stated that the appropriate forum for discussion of human rights implications was Parliament, in

[134] *Taylor v Attorney General* [2015] NZHC 1706.
[135] See excerpts from the Attorney General's s 7 report cited in *Taylor v Attorney General* above n 92, at [29].
[136] At [61].
[137] At [61].
[138] At [77].
[139] *Boscawen v Attorney General* [2009] 2 NZLR 229 at [50]-[56].
[140] Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613.

particular through the s 7 function of the Attorney General, not the courts.[141] For example, the Court said:[142]

> In an environment where there is room for genuine differences of view, we remind ourselves that Parliament entrusted the s 7 judgment and reporting obligation to the Attorney-General, *not to the courts*. [Emphasis added].

The function of the Attorney General will be discussed further shortly. For now though, the dicta in *Boscawen* suggests a reluctance to go against a political conception of rights. Therefore, *Taylor* could indicate a revival of judicial protection of rights and culture moving towards legal rights culture or it could indicate an anomaly. I suggest it indicates an anomaly. It is probable that other judges would not have been so ready to issue a declaration in favour of the New Zealand Bill of Rights Act especially if following *Boscawen.* It will be interesting to see whether or not Heath J's declaration is overturned on appeal.

Secondly, Geiringer argues that courts will only treat human rights as a legal constraint on state power where the breach of the human right is sufficiently serious.[143] This will depend on factors such as the nature of the breach and the clarity of parliamentary intent.[144] The court when faced with human rights disputes is forced to choose between purpose and principle.[145] I would suggest that this indicates a choice between political rights and legal rights. In the cases discussed the courts have deliberately strained the meaning of the relevant human rights provision to ensure the right at issue is upheld because they have considered the right in question sufficiently fundamental.[146] I would argue that this shows human rights issues are permitted within the political jurisdiction only so long as political power does not stray from wide-reaching parameters guarded by the judiciary. This would suggest that the courts permit a political approach to rights but there is a threshold. Only when such threshold is crossed rights have valid legal standing.

II The State

I argue that the attitude of the state also reflects a political conception of rights. Arguments in favour of this are more apparent than arguments regarding the attitude of the judiciary. First,

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[141] *Boscawen v Attorney General,* above n 128, at [12]-[20].
[142] At [20].
[143] At 95-96.
[144] At 95-96.
[145] At 95-96.
[146] For example, in *Poumako* the Court strained the meaning of the retrospective provision so that it would only read retrospectively back to the date enacted. This was clearly contrary to Parliamentary intent. Also see, Geiringer "The Principle of Legality and the Bill of Rights Act", above n 70, at 95-96.

the State's response to *Taylor v Attorney General* indicates a political conception of rights. The State has rebuffed Heath J's declaration of inconsistency. Ministry of Justice officials have publically stated that although the decision is being "considered" a declaration of inconsistency has no power to invalidate the legislation.[147] This response is consistent with New Zealand's constitutional approach to human rights. Domestic legislation passed by a sovereign Parliament is the ultimate authority and a declaration that the Electoral Act contravenes the right to vote does not render the offending provision invalid.[148]

New Zealand's legislative human rights structure may also point to a political conception of rights. New Zealand's approach to human rights law has been ad hoc and arguably informal.[149] Our constitution is unwritten, that is, it is "discernible from a range of sources" and is not supreme law.[150] Our dualist system means that international law, generally the origin for human rights ideals, is not directly enforceable in New Zealand unless incorporated into domestic law.[151]

New Zealand's primary rights protections are found in the Human Rights Act 1993 and the New Zealand Bill of Rights Act. Yet, neither Act encapsulates specifically a right to be free from domestic violence despite the Human Rights Act providing extensive protections against discrimination. A number of grounds are established including, including discrimination due to sex, marital status, religious belief, race, disability, age, political opinion, employment status, family status and sexual orientation.[152] The Human Rights Act primarily applies to private individuals, Part 2 sets out provisions prohibiting private individuals from discriminating against other private individuals. Part 1A provides a link mechanism between the New Zealand Bill of Rights Act and the Human Rights Act, establishing a procedure for individuals to make complaints about discrimination from a public actor (covered by provisions in the New Zealand Bill of Rights Act). Section 19 of the New Zealand Bill of Rights Act prohibits discrimination on the any of the grounds identified in the Human Rights Act.

The New Zealand Bill of Rights Act incorporates New Zealand's commitment to the International Covenant on Civil and Political Rights (ICCPR). The Legislature, Executive and

[147] Aimee Gulliver "Prisoners should be allowed to vote: High Court" *Stuff National* (Online ed, New Zealand, 24 July 2015).
[148] See Butler and Butler, *The New Zealand Bill of Rights Act,* above n 35, at [7.7].
[149] Justice Susan Glazebrook, Natalie Baird and Sasha Holden "New Zealand: Country Report on Human Rights" (2009) 40 VUWLR 57 at 58.
[150] At 57-58.
[151] Glazebrook, Baird and Holden, above n 90, at 62. Also see, Keith, above n 24, at 406.
[152] Glazebrook, Baird and Holden, above n 90, at 59.

Judiciary and any other person or body that performs a public function, duty or power conferred by statute are bound to comply with the New Zealand Bill of Rights Act provisions unless non-compliance can be demonstrably justified in a free and democratic society.[153] However, the New Zealand Bill of Rights Act is not entrenched and as noted the Judiciary has no power to strike down inconsistent legislation rendering the rights protections significantly weaker than perhaps ideal.[154] The courts only have an interpretative function. They may interpret legislation as consistently as possible with the rights provisions but cannot override clear statutory wording.[155]

Both the Human Rights Act and New Zealand Bill of Rights Act are considered part of the constitutional framework yet neither are entrenched nor able to be used by the judiciary to strike down laws that may be inconsistent with the rights prescribed.[156] The New Zealand Bill of Rights Act also fails to provide an express remedies provision so remedies under the Act have been made available only through the ingenuity of the Judiciary.[157] Therefore, despite the language of rights and the significance such rhetoric attaches, as discussed, the rights prescribed within New Zealand's human rights framework have indistinguishable legal status from that of ordinary rights and obligations under statutes such as the Crimes Act 1961 or the Employment Relations Act 2000. This means that mechanisms purporting to uphold human rights in New Zealand are significantly lacking.[158] I would argue that such framework suggests an unwillingness by political actors to give human rights full legal effect. The status of the New Zealand Bill of Rights Act and the Human Rights Act show a reluctance by the state to allow human rights to legally constrain political decisions.

Despite limited legal accountability, a breach of human rights obligations would create a negative state image. However, this is political not legal accountability. The limited legal redress within New Zealand's constitutional framework is in harmony with Griffith's political conception of rights. Griffith argued that the political sphere is a legitimate forum for disputes and perhaps more suited to rights issues than the courts.[159] This is because rights disputes, for

[153] New Zealand Bill of Rights Act 1990 ss 3 and 5.
[154] Glazebrook, Baird and Holden, above n 90, at 58.
[155] Claudia Geiringer "International Law through the Lens of Zaoui: Where is New Zealand At?" (2006) 17 PLR 300 at 309 and 319-321 and *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) Cooke P at 266.
[156] Glazebrook, Baird and Holden, above n 90, at 58.
[157] Andrew Butler and Petra Butler "Protecting Rights" in Morris and others (eds) *Reconstituting the Constitution* (Springer-Verlag, Berlin, 2011) 157 at 158.
[158] At 158.
[159] JAG Griffith *The Politics of the Judiciary* (4th ed, Fontana, London, 1991) a 277.

example disagreements regarding the bounds of the rights, the application of rights, the weighting and superiority of different rights and so forth, are inherently contentious and value-laden.[160] Allowing Judges to determine issues that have the potential to be politically divisive is inappropriate. Judges, because of their background education and training, make up a "strikingly homogenous collection of attitudes, belief and principles, which to them, represent the public interest."[161] Refusal to enact the New Zealand Bill of Rights Act or the Human Rights Act as supreme law ensures that disputes are constrained to the political arena.[162]

Further, and as already noted in brief, the function of the Attorney General per s 7 of the New Zealand Bill of Rights Act points towards a political conception of human rights. Section 7 requires that the Attorney General bring to Parliament's attention any provisions in proposed legislation that appear inconsistent with the New Zealand Bill of Rights Act. This occurs on the introduction or as soon as practicable after the introduction of a bill to Parliament.[163] This aspect of the parliamentary process ensures that human rights issues are discussed in the political arena.[164] Once the Attorney General has brought potential human rights issues to Parliament's attention Parliament is obliged to debate the issue and make a decision as whether or not it is acceptable to limit or undermine the right in question. Rishworth argues that the process ensures that there is "reasoned" discussion about potential rights breaches[165]. Parliament cannot legislate inconsistently with human rights obligations without deference to political debate.[166] Therefore, the courts must respect Parliament's ultimate decision even if the same decision would not be made by the courts.[167]

Enactment of s 7 was a deliberate decision to entrust human rights compliance to a political actor rather than the courts.[168] By the time an Act has been passed, even if it is contrary to fundamental human rights, it has been through a scrupulous democratic process and the courts should not undermine such process.[169] Rishworth argues that the current political process ensures that legislation is of better quality because it enables human rights issues to be talked

[160] JAG Griffith *The Politics of the Judiciary,* above n 159, at 279.
[161] At 275.
[162] Griffith, "The Political Constitution", above n 108, at 16.
[163] Section 7 New Zealand Bill of Rights Act.
[164] See discussion at *Boscawen,* above n 127 at [36].
[165] Paul Rishworth "Human Rights" (2005) NZ. L. Rev 87 at 105.
[166] At 105.
[167] *Boscawen v Attorney General,* above n 127, at [18]-[42].
[168] At [36].
[169] At [18]-[42].

about openly.[170] Similarly, Hiebert argues that often human rights issues are matters of finely balanced opinions and the best forum for such contentious matters is a democratically elected Parliament.[171] According to Hiebert s 7 "embodies the idea of political rights-vetting."[172] Again, these arguments are consistent with Griffith's desire for a political conception of rights.

III Scholars

Although I have argued that both the approach of the judiciary and the state suggest a political conception of rights this conclusion is not undisputable and there is certainly tension between a political and legal approach to rights. As suggested, the court may be permitting a political conception of rights only because Parliament has not made a decision that so severely breaches human rights. Such tension between the perceived judicial approach and political approach gives rise to the concept of dialogue which Petra Butler examines at length. This is the conversation between the courts and Parliament when a human rights issue is raised.[173] By enacting human rights legislation Parliament has granted the court jurisdiction to grapple with human rights issues.[174] The court is able to determine a human rights issue by identifying the breach and issuing guidance as to how such breach should be solved.[175] Perhaps this suggests human rights are legal rights. Parliament seems to be recognising that rights have valid legality by requiring that the courts govern their application. However, the nature of the New Zealand rights framework lends itself to dialogue rather than traditional legal redress.[176] In Joseph's words, the New Zealand Bill of Rights Act is "an instrument of political rights review."[177] Once a human rights breach is identified the court may make the state aware of such breach but ultimately redress is best suited to the state as the state is in the best position to have regard to political considerations.[178] The importance of considering political considerations when determining a human rights dispute indicates that human rights may be considered political in nature in New Zealand.

[170] Rishworth, above n 165, at 104.
[171] As cited in Rishworth, above n 165, at 104.
[172] As cited in Andrew Geddis "Inter-institutional 'Rights Dialogue' under the New Zealand Bill of Rights Act" in *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, New York, 2011) at 96.
[173] Petra Butler "15 Years of the NZ Bill of Rights: Time to Celebrate, Time to Reflect, Time to Work Harder?" Human Rights Research (online) 1 at 23.
[174] At 23.
[175] At 23.
[176] At 23.
[177] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed. Brookers Ltd., Wellington, 2014) at [28.5.6].
[178] At 23.

Geddis also considers that "dialogue" points towards a political conception of rights. Geddis seems to suggest more strongly than Geiringer (see discussion under *I Judiciary*) and Butler that rights are considered mere political claims in New Zealand. For example, Geddis argues that dialogue is a telling feature of a parliamentary rights framework because it creates a culture of justification.[179] Such justification is no more than a legal façade for a political decision.[180] Geddis states that the "provisions of the New Zealand Bill of Rights Act impose no more than a politico-moral, not legal, constraint on Parliament's power to make law."[181] In fact, Geddis goes as far as to argue that the New Zealand Bill of Rights Act is irrelevant.[182] Its ability to legally prevent the state from breaching rights is in Geddis's opinion, "so minimal in nature as to be almost irrelevant."[183] Parliament has shown willingness to act inconsistently with human rights obligations and also a willingness to interpret rights in a manner most politically suited to their preferred decision.[184] Geddis argues that this is because in general New Zealand constitutional culture is authoritarian, egalitarian and pragmatic.[185] Such attributes suggest that it is not necessary to determine rights issues in court and this works to negate the legal faculty of rights.

Butler and Butler consider the influence of international human rights law on rights disputes in New Zealand. Butler and Butler argue that the state has "deliberately chosen to under-incorporate certain international obligations" and that this significantly limits the legal application of such obligations.[186] Arguably such statement suggests that rights have a weak legal status in New Zealand.[187] Although the New Zealand Bill of Rights Act does give effect to certain human rights it deliberately restricts recognition of other rights, in particular, economic, social and cultural rights. As these rights have not been incorporated into domestic law courts have limited ability to give effect to such rights.[188] Therefore, although courts have

[179] Geddis, above n 172, at 88.
[180] At 92.
[181] At 92.
[182] At 92.
[183] At 92.
[184] At 100.
[185] Geddis, above n 172 at 105.
[186] Andrew S Butler and Petra Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173 at 173-174.
[187] At 173-174.
[188] Although this statement perhaps too strong. See *Claudia Geiringer* "Tavita and All That: Confronting the Confusion Around Unincorporated Treaties and Administrative Law" (2004) NZULR 66 and discussion around presumption of consistency. It seems that there is becoming greater scope and willingness for courts to uphold international obligations even in cases where the rights in question have not been directly incorporated into domestic legislation. The case for doing so may be even stronger when the issue in question is a human rights issue.

some ability to legally uphold rights ultimately such ability depends on a political decision by the state as to which rights deserve legal recognition. The ability to ensure legal protection of rights is delegated ability from a political decision. Again, this indicates that rights culture is primarily political. If rights were universal legal causes of action the judiciary would not be constrained in such a manner, they would have a duty to give effect to legal rights. I would argue that even the willingness of courts to apply the presumption of consistency is a strained attempt to get around a political conception of rights.[189]

In contrast, Rishworth supports a legal conception of human rights. Rishworth argues that the purpose of a bill of rights or human rights act is to "take social and political issues and make them legal issues for judicial resolution."[190] He argues that courts should not "shy away" from interpreting human rights disputes in a legal manner.[191] In fact, a legal approach is mandated by Parliament. The Human Rights Act explicitly allows declarations of inconsistency, a legal remedy.[192] And, the Attorney General's s 7 function is a legal function, albeit within a political process.[193] Moreover, the contentious nature of human rights disputes does not negate a legal approach to the dispute.[194] Rather, the legal test for inconsistency with human rights provisions must account for reasonable disagreement about the bounds and application of the right. This is certainly valid legal approach.[195]

There is certainly tension between a legal and political conception of rights within New Zealand human rights culture and there are valid arguments in favour of both a political or legal conception of human rights. I argue that a political conception of rights appears to outweigh a legal conception of rights. I am persuaded by the argument that although human rights do have recognised legal standing through the New Zealand Bill of Rights Act, the Human Rights Act and through judicial interpretation such legal standing is limited and there is clear indication that rights disputes should remain within the political arena. The next section addresses the implications of this conclusion, that is, that New Zealand tends to view rights as political claims rather than legal claims.

[189] See discussion of the presumption of consistency in Geiringer, "Tavita and All That" above n 188.
[190] Rishworth, above n 165, at 105.
[191] At 105.
[192] At 105.
[193] At 105.
[194] At 105.
[195] At 105.

B Implications of a Political Approach to Rights in New Zealand

It could be argued that a political conception of human rights will not provide adequate redress for victims of human rights abuses, as compared with a legal conception of human rights. In particular, a political approach to the right to be free from domestic violence may be inappropriate for those most vulnerable or at risk of domestic violence. The following section gives reasons for this.

First, as discussed a political approach to human rights means that judges are reluctant to hold the state to account for human rights breaches. A political conception of rights holds that the political sphere is the appropriate forum for human rights disputes.[196] The current legal framework for dealing with human rights issues is far from perfect. Access to justice for vulnerable groups in society is already a significant issue. Court costs and legal aid thresholds, backlogged courts and the length of time it takes for cases to be resolved, fear of an intrusive and adversarial system and a blunt Eurocentric approach to issues across all cultural groups already create significant hurdles for those seeking redress for domestic violence.[197] However, it is difficult to envisage how a political remedy would pose greater solutions. It would likely be difficult for victims of domestic violence to access a political forum. Victims may lack to confidence or resources to access Members of Parliament or advocacy groups, victims may not wish to bring their stories of domestic violence to the public fore.

Secondly, a political remedy for human rights issues would undermine a fair and objective response. Democratic politics so often becomes a politics of the majority.[198] In New Zealand this is especially true given the Executive's dominance in Parliament (despite the Mixed Membership Proportional system).[199] Therefore, those responsible for providing political redress may be prevented from acting impartially for fear of offending the majority and losing voter support. Redress would be determined by majority views. This is problematic because human rights issues are so often controversial and contrary to the majority standpoint. This argument is particularly problematic when considering a right to be free from domestic violence. Although it can be argued that gender is the primary risk factor for domestic violence;

[196] Butler and Butler "The Judicial Use of International Human Rights Law in New Zealand", above n 122, at 277.
[197] See Neville Robertson and others *Living at the Cutting Edge Women's Experiences of Protection Orders, Volume 2: What's to be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence* (Ministry of Women's Affairs and the University of Waikato, August 2007) and Fenrich and Contesse, above n 22.
[198] Geddis, above n 172, at 99.
[199] At 99.

statistics show that domestic violence is most prevalent within lower socio-economic and Maori and Pacific communities.[200] A political approach may not take into account needs of these vulnerable groups.

These above two arguments have considered the ramifications of a political approach to freedom from domestic violence in the abstract. It is unclear how a political right to be free from domestic violence would operate in practice in New Zealand. It may require formation of advocacy groups who worked to bring domestic violence policy before Parliament. It may require individual Members of Parliament to advocate on behalf of domestic violence victims within their constituencies. It may require public discussion of domestic violence issues. It would not, however, negate the status quo. Recognising a right to be free from domestic violence, as a matter of politics, would not invalidate the Domestic Violence Act or preclude ordinary legal redress for domestic violence.

Therefore, I argue that even though a political conception of a right to be free from domestic violence may not bring about radical changes to domestic violence policy and allow the court to hold the state legally accountable for domestic violence it would still be a positive approach to domestic violence. This is for the reasons already stated. A political conception of a right to be free from domestic violence will still have significant symbolic value and will bring domestic violence as an issue generally to the public fore which will create public awareness and discussion. These are positive ramifications. Such publicity will mean that advocacy and community groups will be strengthened as they will have greater political standing and the state will be encouraged to act consistently with a right to be free from domestic violence through democratic accountability.

C Effect of Positive Obligations

Recognising a right to be free from domestic violence would impose positive obligations on the state.[201] This is problematic because at present New Zealand human rights framework does not impose positive obligations and, as discussed, this was a deliberate decision.[202] The State did not want to be held to account regarding the efficacy of the discharge of such obligations

[200] Ministry of Justice "The nature and dynamics of family violence across population groups" <www.justice.govt.nz>.
[201] Fenrich and Contesse, above n 22, at 8.
[202] Opie, above n 43, at 494-495. Also see Jan Stemplewitz "Horizontal rights and freedoms: an analysis of the role and effect of the New Zealand Bill of Rights Act 1990 in private litigation" (LLM Research Paper, Victoria University of Wellington, 2005) at 221.

by an unelected and inferior court.[203] Again, this is consistent with a political conception of human rights. Nevertheless, the following section considers whether recognition of positive obligations would be valuable in the context of domestic violence. First positive obligations and their scope are considered in general. Then, it is asked whether requiring the state to take positive steps to prevent domestic violence would provide greater protection for victims of domestic violence.

Positive obligations denote a state's duty to "undertake specific affirmative tasks" or take positive action to uphold human rights obligations.[204] For example, the state may be required to investigate an incident, protect certain vulnerable persons, provide access to justice or enact specific legislation.[205] Positive obligations can be compared with negative or defensive rights which are rights of the individual that limit the powers of the state but do not require the state to take positive action.[206] Defensive rights, however, impose a duty on the state to "refrain from infringing them."[207]

It is generally accepted that recognising a right to be free from domestic violence would impose positive obligations on the state.[208] However, it is unclear how wide the scope of such obligations would be regarding freedom from domestic violence especially if the reluctance in New Zealand to draft the Bill of Rights Act in a way that imposes positive obligations is taken into account.[209] This issue would need resolving if New Zealand were to enact a right to be free from domestic violence. The efficacy of the right will depend on the scope of the obligations and the degree to which the court can hold the state accountable. Scope is considered now.

On one hand positive obligations may be limited to the enactment of legislation dealing with the right in question. This was case in *A v United Kingdom.* The state was held to have failed to discharge the required positive obligation to uphold the right to be free from domestic violence by failing to legislate against corporal punishment.[210] Once the state has enacted

[203] Opie, above n 43, at 495.
[204] Alastair Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, United States of America, 2004) at 2.
[205] At 2.
[206] Stemplewitz, above n 55, at 197.
[207] Opie, above n 43, at 476. Also see, Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] 1 AJHR A6 ["White Paper"].
[208] Fenrich and Contesse, above n 22, at 8.
[209] Opie, above n 43, at 494-495.
[210] *A v United Kingdom,* above n 91, at [24].

legislation that purports to uphold the human right in question the state has discharged its positive obligation.

If positive obligations were limited in this manner then no difference would be made to rates of domestic violence in New Zealand. This is because New Zealand's Domestic Violence Act is considered to be one of the best legislative regimes addressing domestic violence.[211] It is comprehensive and wide-reaching, domestic violence in *all* forms is considered unacceptable behaviour and domestic violence takes a wide meaning, going further than physical abuse and including psychological abuse.[212] Moreover, enforcement actors are equipped with ample remedies, police can instantly respond to domestic violence by issuing a police safety order and Judges have a wide discretion to consider all relevant factors when making a protection order.[213] As well, Judges have a statutory duty to compel perpetrators to attend stopping violence programmes and to make victims aware of safety programmes.[214] Yet New Zealand still has one of the highest rates of domestic violence in the developed world. Fenrich and Contesse state:[215]

> Over the last decade, New Zealand has made significant efforts to address an acute social problem-violence against women….In an effort to combat the problem, New Zealand has enacted legislation and regulations which aim to prevent and eliminate violence…nonetheless the levels of domestic violence remain surprisingly high.

An explanation for why this is the case is complex and goes beyond the scope of this paper.[216] However, two problems with the current domestic violence framework are considered in brief. These problems are lack of enforcement of provisions and requirements under the Domestic Violence Act and limited ability to access legal protection for domestic violence incidents. I argue that extending the scope of the state's positive obligations in regards to a right to be free from domestic violence would work to remedy these issues.

Regarding enforcement, police action in response to domestic violence has been extensively criticised. There have been reports of police failing to take action when called to a domestic

[211] Fenrich Contesse, above n 22, at 21.
[212] At 21.
[213] *Surrey v Surrey,* above n 13 at [96]-[104] and Fenrich and Contesse, above n 22, at 21.
[214] Domestic Violence Act 1995 ss 51C and 51D and Fenrich and Contesse, above n 22, at 21.
[215] Fenrich and Contesse, above n 21, at 4.
[216] For further reading around why New Zealand has such high rates of domestic violence despite a comprehensive legislative framework see: Mollie Matich and others "Harvard Violence Against Women Research Report" (paper presented to the Harvard Kennedy School of Government Violence Against Women Project, June 2015.)

violence incident because of the "good reputation" of the perpetrator or because police seemingly "could not be bothered" or did not view domestic violence as a priority,[217] and there are also concerns that once a protection order has been issued police fail to adequately enforce the order. Fenrich and Contesse noted that:[218]

> …when protection orders are not granted or served on respondents in a prompt manner, there is a failure to protect victims of domestic violence as intended. Similarly, when respondents who fail to observe protection orders are not sanctioned, not only are women put in danger; the whole system that has been put in place to prevent and eliminate domestic violence is undermined. We observed different problems with protection orders, including failure to serve protection orders [and] lack of enforcement of protection orders.

Access to justice also hinders victims' ability to obtain redress for domestic violence. Robertson found that "there are too many hurdles to getting a protection order."[219] Such hurdles include the high threshold for obtaining legal aid and the high cost of a protection order if such threshold is not met, lack of experienced lawyers taking domestic violence cases and lack of support for immigrant women.[220] Further, many women feel forced to self-represent and this also undermines access to justice.[221]

I argue that these issues may be mitigated if New Zealand's positive obligations were not limited to the mere enactment of domestic violence legislation (as such obligation has prima facie been discharged) but extended much further. Fenrich and Contesse argue that positive obligations require the state to act with *due diligence* to prevent rights violations.[222] Due diligence is a broad concept and would require the state to take active steps to investigate and punish acts of violence and provide adequate compensation for victims in addition to enacting and maintaining a prohibitive legislative framework.[223] Fenrich and Contesse's definition of due diligence is consistent with CEDAW obligations. Article 4 of CEDAW mandates that sates must exercise due diligence to prevent, investigate and in accordance with national legislation,

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[217] Neville Robertson and others *Living at the Cutting Edge Women's Experiences of Protection Orders, Volume 2: What's To be Done? A Critical Analysis of Statutory and Practice Approaches to Domestic Violence* (Ministry of Women's Affairs and the University of Waikato, August 2007) at 146-147.
[218] Fenrich and Contesse, above n 22, at 32.
[219] As cited in Fenrich and Contesse, above n 22, at 23.
[220] At 22-23.
[221] At 22-23.
[222] At 8-9.
[223] At 8-9.

punish acts of violence against women, whether those acts are perpetrated by the state or by private persons.[224]

Considering the pertinent issues in New Zealand, lack of enforcement and access to justice, due diligence would mean that the state must take active steps to counter such issues. For example, the state would have to ensure actors such as police, public officials, and lawyers receive appropriate training regarding best practice response to domestic violence. At present, this is not occurring. There is an "absence of coherent and robust training policies" and training that does go forward is "patchy…and not good."[225]

Moreover, due diligence would allow for greater scrutiny of agency failings in response to domestic violence incidents. For example, if it were found that police failed to appropriately respond to a domestic violence incident then the state would be required to provide redress to the victim to account for police shortcomings. Such sanction would mean that the state has greater interest in the workings of the domestic violence legal regime on the ground and this would incentivise the actions such as further allocation of resources and greater investment in training programmes.

Due diligence would also require that further resources be put into domestic violence policy. This could be allocation of resources into further research around domestic violence, at present the lack of empirical data around domestic violence has been criticised. It would require strengthening and extending stopping violence and safety programmes for those at risk of domestic violence.[226] Research has shown that although legislation mandates that perpetrators of domestic violence attend non-violence programmes follow through does not always occur, non-attendance and non-completion are common.[227]

These arguments suggest that recognising a right to be free from domestic violence and the resulting positive obligations on the state to act with due diligence would provide much greater redress for victims of domestic violence than the status quo. Ertürk argues that a due diligence standard "provides a framework for action" which can be used to hold the state to account as a matter of law.[228] However, positive action of the kind discussed may not be the most appropriate action within the context of domestic violence. Domestic violence occurs across

[224] Article 4 (c) CEDAW, above n 23. Also see Yakin Ertürk, above n 85, at 27.
[225] Fenrich and Contesse, above n 22, at 24.
[226] At 24-30.
[227] Matich, above n 204, at 7-9.
[228] Ertürk, above n 85, at 27.

all strata of society but is particularly prominent within Māori and Pacific families.[229] Our current western legal approach to due diligence would likely only promote further police action and state intervention.[230] It is foreseeable that increasing the responsibility of the state would lead to an increase in arrests, prosecutions and the removal of children from their families as these are the current means by which the state intervenes in domestic violence situations.[231] Such means may not be the most appropriate means of addressing domestic violence. Police action can be blunt and coercive and short term measures have little effect on preventing future violence.[232] For example, "arrest may enrage the abusive man, spurring him to seek revenge against his partner-thus creating separation, but not safety…"[233] Prosecution and conviction also raises this risk.[234] Imprisonment for domestic violence offences is rare and perpetrators are likely to return to their communities "angry about their exposure to criminal liability."[235] This would only damage the family unit and undermine the already precarious relationships.

These arguments may seem to oppose recognition of positive obligations in regards to domestic violence. However, I would argue that the concerns around further state intervention in domestic violence situations do not sufficiently rebut arguments in favour of recognising a right to be free from domestic violence. Instead they merely highlight issues that the state will need to carefully consider when deciding how best to exercise the requirements of due diligence. A careful and sensitive approach to positive obligations will not create the problems outlined. In fact, due diligence requires a careful and sensitive approach to domestic violence issues. For example, if the state chose to take action that it knows is likely to create further tension then such action is not an exercise of due diligence. If the state knows that increased arrest and removal of children is not the best approach to domestic violence then the state cannot be found to have discharged its positive obligations if this is the course of action it takes.

Due diligence will therefore require a creative response to domestic violence. The state must carefully consider the failings of the current domestic violence policy and look for alternative solutions. Detailed considerations of what such solutions would be are outside the scope of this paper. However, in brief I believe that the state should look to alternative dispute resolution

[229] Ministry of Justice "The nature and dynamics of family violence across population groups" <www.justice.govt.nz> and Fenrich and Contesse, above n 22, at 4.
[230] Matich, above n 204, at 7-9.
[231] See Goodmark, above n 1, at 85-86.
[232] At 85.
[233] At 85.
[234] Goodmark, above n 1, at 86.
[235] At 86.

mechanisms. In particular, the state should consider a "ground up" or restorative justice approach to domestic violence and ways in which at risk communities can be empowered in order to minimise the blunt and coercive approach that is the status quo.[236] Likewise, Gormley argues that due diligence requires a commitment to addressing social issues that underlie domestic violence rates, issues such as poverty, gender inequality, inadequate housing and financial benefits for vulnerable women and intersectional discrimination.[237] An approach such as this, albeit prima facie involving less state intervention, would still discharge the positive obligations that the right to be free from domestic violence requires. Ertürk argues that due diligence entails "tackling the root causes of the problem at all levels, from the home to the transnational arena."[238]

This conception of due diligence would enhance the claim that recognising a right to be free from domestic violence will empower women and denounce the degrading and demeaning nature of domestic violence. A broad conception of what positive obligations entail, that is, that positive obligations go further than negative protection, changes state focus from regarding women as victims to empowering them.[239] As discussed, empowerment of women is one of the main reasons for recognising a right to be free from domestic violence. In my opinion this shows that a human rights approach to domestic violence is appropriate despite possible implications of imposing positive obligations on the state.

V Conclusion

The underlying question I have grappled with is whether recognising a human right to be free from domestic violence will provide greater redress for victims of domestic violence. As stated throughout, New Zealand has one of the highest rates of domestic violence in the developed world and this social issue is considered our most significant human rights failing. The starting point for this paper was the 2014 Universal Periodic Review which showed that New Zealand was not meeting international expectations regarding promotion of human rights, in particular the right to be free from violence.

To begin, I asked whether it could be found that there is a right to be free from domestic violence in New Zealand. I concluded that there was no such right. Freedom from domestic

[236] Again, see Matich, above n 204, for further reading around possible problems and solutions with the current domestic violence framework in New Zealand. Also see Goodmark, above n 1.
[237] Gormley, above n 88, at173-184.
[238] Ertürk, above n 85, at 28.
[239] At 28.

violence is excluded from the New Zealand Bill of Rights Act and the Human Rights Act and policy reasons mean that such a right cannot be convincingly read into either instrument.

I argued that this status quo was insufficient given the atrocity of domestic violence that is so prevalent in New Zealand. Freedom from domestic violence should be recognised as a human right. Such argument stems from a natural law conception of human rights, that is, that all human beings are equal and deserving of dignity. Human rights are the way in which such dignity is validated. A human rights approach to domestic violence would symbolise the atrocity of the social issue, raise greater public awareness of the issue, ensure the issue is considered a political priority and empower women.

There are two problems that recognising a right to be free from domestic violence in New Zealand would pose. First, it was suggested on the basis of Griffith's argument that rights are mere political claims and as such a right to be free from violence would make little difference in reality. This is because it seems that New Zealand's rights culture is consistent with Griffith's theory. Rights tend to be treated as mere political claims rather than valid legal causes of action. This is because New Zealand's constitutional structure, in particular the New Zealand Bill of Rights Act and the Human Rights Act, gives human rights limited legal power. Ultimately the legal power of rights stems from political will.

Secondly, I argued that recognising a right to be free from violence would result in imposing positive obligations on the state to intervene in domestic violence situations. The scope of what such positive obligations would be was discussed and it was argued that a broad interpretation requiring the state to act with due diligence would be most effective in reducing domestic violence rates. It was noted that further state intervention may only aggravate domestic violence in New Zealand. However, it was concluded that due diligence would require a careful and sensitive approach to further state intervention.

These problems, a political conception of rights and difficulty with state intervention are valid. However, they do not outweigh the value of recognising a right to be free from violence. Although a human rights approach will not radically remedy the issue of domestic violence in New Zealand even a political conception of a right to be free from domestic violence will go some way to recognise and promote the idea that all women *deserve* to live a life free from violence. Such public enunciation is sufficiently important to recognise a right to be free from domestic violence even if such right only will only have political value.

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Bibliography

Cases

A v United Kingdom (1998) 27 EHRR 611 (ECtHR).

Boscawen v Attorney General [2009] 2 NZLR 229.

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

Minister of Home Affairs v Fisher [1980] AC 319 (PC).

Ministry of Transport v Noort [1992] 3 NZLR 439 (CA).

R v Poumako [2000] 2 NZLR 695.

Surrey v Surrey [2008] NZCA 565 2 NZLR 581.

Taunoa v Attorney General (2004) 7 HRNZ 379 (HC).

Tavita v Minister of Immigration [1994] 2 NZLR 257 (CA).

Taylor v Attorney General [2015] NZHC 1706.

Taylor v New Zealand Poultry Board [1984] 1 NZLR 394 (CA).

Legislation

Domestic Violence Act 1995.

Human Rights Act 1993.

The New Zealand Bill of Rights Act 1990.

Books and Chapters in Books

Alastair Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, United States of America, 2004).

Andrew Butler and Petra Butler "Protecting Rights" in Morris and others (eds) *Reconstituting the Constitution* (Springer-Verlag, Berlin, 2011) 157.

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A commentary* (Lexis Nexis, Wellington, 2005).

Andrew Geddis "Inter-institutional 'Rights Dialogue' under the New Zealand Bill of Rights Act" in *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, New York, 2011).

Beth A Simmons *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, New York, 2009).

Christian Tomuschat *Human Rights: Between Idealism and Realism* (2nd ed. Oxford University Press, New York, 2008).

Claudia Geiringer "The Principle of Legality and the Bill of Rights Act" A Critical Examination of *R v Hansen"* in (Claudia Geiringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 69 at 81.

JAG Griffith *The Politics of the Judiciary* (4th ed, Fontana, London, 1991).

Jessica Whyte "Human Rights: confronting governments? Michel Foucault and the right to intervene" in Matthew Stone (ed) *New Critical Legal Thinking: Law and the Political* (Routledge, New York, 2012).

JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, Lexis Nexis, Wellington, 2009).

Leigh Goodmark *A Troubled Marriage: Domestic Violence and the Legal System* (New York University Press, New York, 2012) at 85.

Lisa Gormley "Violence against Women by Non-State Actors, a Responsibility for the State under Human Rights Law: Amnesty International's Work on Domestic Violence" in Carin Benninger-Budel

(ed) *Due Diligence and its Application to Protect Women From Violence* (Martinus Nijhoff Publishers, Boston, 2008).

Malcom N Shaw *International Law* (7th ed, Cambridge University Press, Cambridge, 2014).

Martin Loughlin *Sword and Scales: An Examination of the Relationship between Law and Politics"* (Hart Publishing, Oxford, England 2000).

Matthew Stone, Illan rua Wall, Costas Douzinas *New Critical Legal Thinking: Law and the Political* (Routlege, Oxon, 2012).

Peter Bailey *Bringing Human Rights to Life* (The Federation Press, Sydney, 1993).

Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed. Brookers Ltd., Wellington, 2014) at [28.5.6].

Richard Ekins *Modern Challenges to the Rule of Law* (Lexis Nexis, Wellington, 2011).

Stephen Holmes and Cass R Sunstein *The Cost of Rights* (WW Norton & Company, New York, 1999) at 44.

Susan Deller Ross *Women's Human Rights: The International and Comparative Law Casebook* (University of Pennsylvania Press, Philadelphia, 2008).

Tom Campbell, KD Ewing and Adam Tomkins *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, New York, 2011).

William E Conklin *In Defence of Fundamental Rights* (Sijthoff and Noordhoff, Alphen aan den Rijn (the Netherlands) 1979, at 161.

Yakin Ertürk "The Due Diligence Standard: What Does It Entail for Women's Rights? In Carin Benninger-Budel (ed) *Due Diligence and its Application to Protect Women From Violence* (Martinus Nijhoff Publishers, Boston, 2008) at 27.

Journal Articles

A Gerwith *Human Rights* (University of Chicago Press, Chicago, 1982).

Adam Tomkins "The Role of the Courts in the Political Constitution" (2010) 60 UTLJ 1.

Andrew Butler and Petra Butler "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 VUWLR 173.

Claudia Geiringer "International Law through the Lens of Zaoui: Where is New Zealand At?" (2006) 17 PLR 300.

Claudia Geiringer "On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act" (2009) 40 VUWLR 613.

Claudia Geiringer and Matthew Palmer, "Human rights and social policy in New Zealand" (2007) 30 Social Policy Journal of New Zealand 12.

Dinah Shelton "An Introduction to the History of International Human Rights Law", (2007) 346 Legal Studies Research Paper 1.

Etienne Balibar "On the Politics of Human Rights" (2013) 20 Constellations 18.

Grahame Gee and Grégoire CN Webber "What Is a Political Constitution?" (2010) 30 OJLS 273.

J Fenrich and J Contesse "It's Not Ok: New Zealand's Efforts to Eliminate Violence Against Women" (2008) 1(1) Crowley Mission Reports 4.

Jack Donnelly "Cultural Relativism and Universal Human Rights" (1984) 6 Human Rights Quarterly 400 at 400.

JAG Griffith "The Political Constitution" (1979) 42(1) MLR 1.

Jan Stemplewitz "Horizontal rights and freedoms: an analysis of the role and effect of the New Zealand Bill of Rights Act 1990 in private litigation" (LLM Research Paper, Victoria University of Wellington, 2005).

Joseph Raz "Human Rights without Foundations" (2007) 14 University of Oxford Faculty of Law Legal Studies Research paper Series 1.

Joss Opie "A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990, (2012) 43 VUWLR 471.

Justice Susan Glazebrook, Natalie Baird and Sasha Holden "New Zealand: Country Report on Human Rights" (2009) 40 VUWLR 57.

Karen Morgaine "Domestic Violence and Human Rights: Local Challenges to a Universal Framework" (2006) 33 J Sociol Soc Welfare 109.

Mark Tushnet, "Civil and Social Rights" (1991) 25 Loy. L. A. L. Rev. 1207.

Martin Loughlin "The Constitutional Imagination" (2015) 78 MLR 1.

MD Kirby "The Struggle for Simplicity: Lord Cooke and Fundamental Rights" (1998) 24 Commw. L. Bull. 496.

Megan Walker "Domestic Violence, International Human Rights Law and State Responsibility" (LLM Research Paper, Victoria University of Wellington, 2007).

Mollie Matich and others "Harvard Violence Against Women Research Report" (paper presented to the Harvard Kennedy School of Government Violence Against Women Project, June 2015.)

Paul Rishworth "Human Rights" (2005) NZ. L. Rev 87.

Petra Butler "15 Years of the NZ Bill of Rights: Time to Celebrate, Time to Reflect, Time to Work Harder?" Human Rights Research (online) 1 at 23.

PJ Downey "Human Rights Legislation in New Zealand" (1980) 6 Commw. L. Bull. 297.

Randall Peerenboom "Human rights and the rule of law: what's the relationship?" (2005) 5 Public Law and Legal Theory Research Paper Series 1.

Sir Kenneth Keith "The Application of International Human Rights Law in New Zealand" (1997) 32 (3) Texas International Law Journal 401.

Sir Robin Cooke "Fundamentals" (1988) NZLJ 158 at 164.

The Hon Justice MD Kirby "The Struggle for Simplicty: Lord Cooke and Fundamental Rights" (1998) 24 Commonwealth Law Bulletin 496.

The Right Hon. Lord Justice Slade "A Personal View of Justice" (1988) 3 Denning LJ 155.

Reports

Centre for Social Research and Evaluation *Campaign for Action on Family Violence* (Ministry of Social Development, March 2010).

Denise Wilson and Melinda Webber *The People's Blueprint* (The Glenn Inquiry, November 2014.

Denise Wilson and Melinda Webber *The People's Report: The People's Inquiry into Addressing Child Abuse and Domestic Violence* (the Glenn Inquiry, 2014).

Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] 1 AJHR A6 ["White Paper"]. Ministry of Justice "Convention on the Elimination of All Forms of Discrimination towards Women" International Human Rights Instruments, <www.justice.govt.nz>.

Ministry of Justice "Human Rights: Monitoring Procedures" International Human Rights Instruments, <www.justice.govt.nz>.

Ministry of Justice "List of recommendations made during New Zealand's 2014 Universal Periodic Review" (2014) <www.justice.govt.nz>.

Ministry of Justice "New Zealand's Response to 2014 Universal Periodic Review Recommendations" (2014) <www.justice.govt.nz>.

Ministry of Justice "United Nations convention against torture: New Zealand draft periodic report (6)" (2008) <www.justice.govt.nz> and Statistics New Zealand "Vulnerable Children and Families: Some Findings from the New Zealand General Social Survey" (2012) <www.stats.govt.nz>.

Office of the High Commissioners for Human Rights "Human Rights Treaty Bodies-Individual Communications" (2011) <www.2onchr.org>.

Professor John Burrows and Sir Tipene O'Regan *New Zealand's Constitution: A Report on a Conversation* (Constitutional Advisory Panel, Ministry of Justice, November 2013) at 50.

The Universal Declaration of Human Rights GA Res 217 A III (1948) at article 2.

Other Sources

Aimee Gulliver "Prisoners should be allowed to vote: High Court" *Stuff National* (Online ed, New Zealand, 24 July 2015).

Green Party "UN-NZ failing on domestic violence and protecting children" (press release, 1 February 2014).

National Collective of Independent Women's Refuges "New Zealand Domestic Violence Statistics" <womensrefuge.org.nz>.

New Zealand Family Violence Clearing House "Respect position statement: gender and domestic violence" < nzfvc.org.nz>.

NZ Family Violence Clearing House https://nzfvc.org.nz/sites/nzfvc.org.nz/files/DS2-Violence-Against-Women-2015-0.pdf

NZPA "NZ worst for domestic violence-UN report" *Stuff National* (New Zealand, 24 July 2011).

Stacey Kirk "UN concern over violence in NZ" *Stuff National* (New Zealand, 28 January 2014).

United Nations Women "Text of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women" <www.un.org/womenwatch/>