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SOPHIE MACAULAY

**Judicial Enforcement of Children's Socio-
Economic Rights: Possible Effects on
Child Poverty in New Zealand**

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Faculty of Law
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Abstract

This paper explores the idea of judicially enforceable socio-economic rights for children in New Zealand. Child poverty is an issue that has received increasing attention in New Zealand in recent years, and judicial enforcement of socio-economic rights for children is one way in which children's socio-economic rights might be better realised. This paper identifies New Zealand's international obligations towards children and draws on the work of children's rights theorists. It argues that children are a unique category of rights-holders, and that this justifies prioritisation of judicial enforcement of their socio-economic rights. It explores the different ways in which courts have approached socio-economic rights enforcement, and makes a proposal as to how this might work in New Zealand. It concludes that the effect of judicial enforcement of children's socio-economic rights on child poverty levels in New Zealand will depend on the type of remedy the courts choose to implement.

Keywords

Child poverty, socio-economic rights, New Zealand Bill of Rights Act 1990, United Nations Convention on the Rights of the Child.

Word Count

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 15,040 words.

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I Introduction

There are just over a million children living in New Zealand.¹ Using one measure of poverty, based on household incomes after housing costs, as many as 270,000 of those children are living in poverty. This paper will explore the possibility of giving New Zealand's children judicially enforceable socio-economic rights, with a view to assessing the impact that this might have on child poverty in New Zealand.

Part II begins by explaining the reasons for considering judicially enforceable socio-economic rights for children in New Zealand. Firstly, I give a brief overview of child poverty in New Zealand, drawing on the recent work of the Expert Advisory Group on Solutions to Child Poverty, whose report was published in late 2012. Secondly, I explore the "Constitution Conversation" which took place in New Zealand in 2013. I argue that some of the contributions from participants in this constitutional review process suggest an openness to the concept of judicially enforceable socio-economic rights for children. The contributions also suggest that participants have concerns about a lack of recognition of the State's role in upholding children's socio-economic rights.

Part III begins with a brief acknowledgement of Wellman's philosophical objections to children possessing rights at all. It then identifies the rights which New Zealand's children possess at international law as a result of New Zealand's signing and ratifying of the United Nations Convention on the Rights of the Child (the UNCRC) and the International Covenant on Economic, Social and Cultural Rights (the ICESCR). Finally, it suggests that judicial enforcement of socio-economic rights for children would enable New Zealand to better meet its international obligations.

Part IV addresses the justifications for judicial enforcement of socio-economic rights for children. It argues that children are a unique category of rights-holders who require greater protection of their socio-economic rights. Part IV also notes the work of Freeman who brings a philosophical challenge to the presumption that children and adults can justifiably possess different rights.

¹ Statistics New Zealand, Census 2013. For the purposes of this paper, "child" is defined as a human being below the age of eighteen years. Most New Zealand legislation defines child in this way. Similarly, Article 1 of the United Nations Convention on the Rights of the Child defines child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

Part V discusses the concept of judicially enforceable socio-economic rights for children generally, and Part VI explores some of the practical questions around what judicial enforcement of children's socio-economic rights might look like in New Zealand. Part VI also explores which judicial socio-economic rights enforcement method might be the most effective in lowering child poverty levels in New Zealand.

II Context

A Child Poverty in New Zealand

If every child in New Zealand experienced the full realisation of his or her socio-economic rights as guaranteed by the UNCRC, no New Zealand child would be living in poverty.² Child poverty in New Zealand has received increasing attention in recent years. New Zealand's Office of the Children's Commissioner has identified child poverty as being an area of "immediate and fundamental concern" for New Zealand, and reducing child poverty has been named as one of the key priorities of the Office's work.³ The New Zealand Human Rights Commission has stated that the levels of poverty experienced by some of New Zealand's children is an issue of particular concern.⁴ In March 2012, Children's Commissioner Dr Russell Wills established an Expert Advisory Group on Solutions to Child Poverty (EAG). The EAG report, *Solutions to Child Poverty in New Zealand: Evidence for Action*, was published in December 2012.⁵ The Government's Ministerial Committee on Poverty was invited to respond to this report, and did so formally in May 2013.⁶

One of the initial difficulties the EAG identified in advising on child poverty in New Zealand is that New Zealand does not have an official poverty measure or an agreed definition of poverty. The EAG proposed their own definition of child poverty as:⁷

...[children] who experience deprivation of the material resources and income that is required for them to develop and thrive, leaving such children unable to enjoy their

² See Geraldine Van Bueren "Committee on the Rights of the Child" in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in Comparative Law* (Cambridge University Press, New York, 2008).

³ Children's Commissioner "Our Priorities" <www.occ.org.nz/our-work/our-priorities>.

⁴ Human Rights Commission *Human Rights in New Zealand 2010: Ngā Tika Tangata O Aotearoa* (Human Rights Commission, 2010) at 240.

⁵ Expert Advisory Group on Solutions to Child Poverty *Solutions to Child Poverty in New Zealand: Evidence for Action* (Expert Advisory Group Final Report, December 2012).

⁶ Government Response to the Children's Commissioner's Expert Advisory Group on Solutions to Child Poverty (28 May 2013).

⁷ Expert Advisory Group, above n 5, at 2.

rights, achieve their full potential and participate as equal members of New Zealand society.

In the EAG's view, this definition acknowledged that a lack of material resources and a lack of income are both key components of child poverty. However the EAG also wanted the definition to underscore the importance of the socio-economic rights of children as citizens of New Zealand, as enunciated in the UNCRC. The EAG suggested that this definition was consistent with definitions of child poverty adopted by other developed nations.⁸

There are two common approaches to measuring poverty in international literature: income-based and deprivation-based measures.⁹ Income-based measures look to the proportion of the population whose disposable household income is below a certain threshold, usually 50 or 60 per cent of median disposable household income. Disposable income is market income that is adjusted for direct taxes, social welfare benefits and tax credits. Income-based measures can also make adjustments for major fixed costs such as housing, and for the size and composition of households. Alternatively, deprivation-based measures look to measure the proportion of the population who cannot afford specific items that most people would regard as essential, such as shoes or a doctor's visit. These are known as "non-monetary indicators." A list of these items is made, and a threshold set for the number of items a family will lack in order to be considered to be living in poverty.¹⁰ Deprivation measures arguably provide a more direct indication of poverty, because they reflect the standard of living actually achieved by a household.¹¹

The number of children living in poverty in New Zealand will vary depending on the poverty measure used, and where the thresholds are set for either measure. The EAG also acknowledged the difference between abject poverty (being deprived of absolute essentials for life) and the type of poverty New Zealand children live in, which is relative. Nevertheless, the EAG used both measures to examine the extent of child poverty in New Zealand. They also attempted to draw comparisons between New Zealand's child poverty rate and the child poverty rates of other OECD countries.

⁸ Expert Advisory Group, above n 5, at 2.

⁹ UNICEF Innocenti Research Centre *Measuring Child Poverty: New league tables of child poverty in the world's rich countries* (Innocenti Report Card 10, UNICEF Innocenti Research Centre, Florence, 2012).

¹⁰ Bryan Perry *Household Incomes in New Zealand: Trends in Indicators of Inequality and Hardship 1982-2011* (Ministry of Social Development, Wellington, 2012).

¹¹ Expert Advisory Group, above n 5, at 3.

The EAG report found that approximately 270,000 children, around one quarter of New Zealand's child population, live in households where the disposable household income is below 60 per cent of the median disposable household income. Current child poverty rates are approximately double the rates of the mid-1980s. Children in New Zealand are consistently more likely to experience poverty than any other age group.¹² The younger the child, the more likely that child is to be in poverty (largely due to parental incomes tending to be lower when children are young).¹³ Using deprivation-based measures, around 20 per cent of children experienced some form of significant material deprivation. This has increased from approximately 15 per cent in 2007.¹⁴

The EAG noted that comparing child poverty rates across countries requires considerable care, because the relevant data is not always available or directly comparable. Moreover, any poverty measure which is based on some form of income threshold will not be particularly meaningful across countries given the variation of living standards and incomes. In these circumstances, non-monetary indicators of material deprivation are often more useful.¹⁵ Using a non-monetary indicator of material deprivation, New Zealand's child material deprivation rates are higher than the majority of West European countries, but lower than Eastern European countries such as Hungary and Poland. As the EAG observes however, New Zealand's rate of material deprivation for those aged 65 years and older is very low when compared with other countries. The EAG argues that this suggests New Zealand's children need not be more deprived than the children of Western Europe; it demonstrates the potential for New Zealand to have much lower rates of child deprivation if it were made a policy priority.¹⁶

What is clear as a result of the EAG's work is that there are a significant number of children in New Zealand who are living in conditions which can be said to constitute relative poverty, regardless of the measure used. These children would benefit from a fuller realisation of their socio-economic rights. I now move to consider whether the idea of judicial enforcement of children's socio-economic rights could be said to have any support in New Zealand's recent constitutional review.

¹² Expert Advisory Group, above n 5, at 4.

¹³ Expert Advisory Group, above n 5, at 5.

¹⁴ Perry, above n 10, at 181.

¹⁵ Expert Advisory Group, above n 5, at 11.

¹⁶ Expert Advisory Group, above n 5, at 11.

B *The Constitution Conversation*

As a result of the 2008 general election in New Zealand, a coalition government between the National Party and the Māori Party was formed. The 2008 Relationship and Confidence and Supply Agreement between the National Party and the Māori Party included an agreement to establish a group to consider constitutional issues.¹⁷ A constitutional review was formally announced in December 2010, and in August 2011 twelve people were appointed to the Constitutional Advisory Panel (the Panel), to be chaired by Professor John Burrows QC and Sir Tipene O'Regan.¹⁸

The Panel's role was to "listen, facilitate and record New Zealanders' views on constitutional issues."¹⁹ Thus, between February and July 2013, a "Constitution Conversation" took place. The Panel held more than 100 meetings around New Zealand and received 5,259 written submissions. Comments could also be made on the Constitution Conversation Facebook page. In December 2013 the Panel released its report.²⁰ The major recommendation of the report was simply that the Government "invites and supports the people of Aotearoa New Zealand to continue the conversation about our constitutional arrangements."²¹ However, the report is helpful for the purposes of this paper because it also provided an overview of the submissions the Panel received. One of the issues included in the review was the role of the New Zealand Bill of Rights Act 1990 (the NZBORA). Thus conversation took place about rights in New Zealand, and the role that the State should play in upholding those rights.

The Panel identified what it considered to be "common themes running through the Conversation."²² These themes were "factors most people considered and balanced while developing their views on the topics."²³ I suggest that a number of these themes could be said to support the possibility of greater State accountability for upholding children's rights and addressing child poverty.

"Justice and fairness" was identified as a strong theme throughout the discussion. An element of this theme was that "achieving equality requires or allows the state to take active

¹⁷ National Party and Māori Party "Relationship and Confidence and Supply Agreement between the National Party and the Māori Party" (16 November 2008) at 2.

¹⁸ Pita Sharples "Announcement of Constitutional Review" (press release, 8 December 2010), Bill English and Pita Sharples "Constitutional Advisory Panel Named" (press release, 4 August 2011).

¹⁹ Constitutional Advisory Panel "The Panel" <www.ourconstitution.org.nz>.

²⁰ Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (November 2013).

²¹ Constitutional Advisory Panel, above n 20, at 8.

²² Constitutional Advisory Panel, above n 20, at 11.

²³ Constitutional Advisory Panel, above n 20, at 11.

measures to achieve equality or prevent the perpetuation of existing injustices.”²⁴ Another dimension of the justice and fairness theme was “the state’s role in ensuring people’s dignity and quality of life.”²⁵

Interestingly, under the thematic heading of “Checks and Balances”, the Panel identified that many of those contributing to the Conversation were surprised by, and expressed unease at, Parliament’s ability to pass laws which are contrary to the NZBORA. The Panel also noted that some people did not understand the concept of possible limitations on rights provided that those limitations are justifiable in a free and democratic society, that is, the permissible limitations on rights as per s 5 of the NZBORA.²⁶

The Panel observed that there was no significant support among the submitters for a supreme fully entrenched written constitution. In the Panel’s words, “support appears to lie, for now, with contested issues being decided in Parliament through the legislative process or other negotiated processes rather than by the courts.”²⁷ Despite this, there was considerable support for entrenching elements of the constitution, specifically the NZBORA.²⁸ The Panel itself gave a number of specific recommendations regarding the NZBORA. It recommended that the Government:²⁹

Sets up a process, with public consultation and participation, to explore in more detail the options for amending the Act [the NZBORA] to improve its effectiveness such as:

- Adding economic, social and cultural rights, property rights and environmental rights
- Improving compliance by the Executive and Parliament with the standards in the Act
- Giving the Judiciary powers to assess legislation for consistency with the Act
- Entrenching all or part of the Act

A common theme in the Conversation around the NZBORA was the State’s role in fulfilling its citizens’ social, cultural and economic well-being. The proposed affirmation of social, cultural and economic rights in the NZBORA was seen by some submitters as a way of ensuring that decision-makers take account of these responsibilities. Submitters saw many

²⁴ At 11.

²⁵ At 11.

²⁶ At 15.

²⁷ At 25.

²⁸ At 16.

²⁹ At 17.

reasons for adding social, cultural and economic rights to the NZBORA, including: guaranteeing access to high quality education, health care, food, housing and affordable energy; ensuring people receive an income that meets essential needs; and fulfilling the rights of children, including addressing child poverty.³⁰

The Panel also noted some discussion as to whether the NZBORA should be supreme law. In the context of this discussion, there was debate over what the most appropriate consequence would be for a law conflicting with the NZBORA. Three commonly proposed consequences were that the courts could strike down legislation, could require the Government to report to Parliament in response to a declaration of inconsistency (similar to the current process under the s 92J of the Human Rights Act 1993), or could strike down legislation but allow the legislation to stay in force for a limited time while Parliament addressed the inconsistency.³¹

There was also a call from submitters for greater commitment to New Zealand's international obligations, specifically the obligations under the ICESCR and the UNCRC. Submitters thought that New Zealand's international obligations under these treaties would be better met by including those rights contained in the ICESCR and the UNCRC in the NZBORA.³² By contrast, one grouping of submitters suggested that adding any further rights to the NZBORA would overcomplicate it, that some rights would not have sufficiently widespread support and that the focus should remain on protecting and fulfilling the rights which are already recognised.³³

Overall, I suggest that the recent Constitution Conversation in New Zealand shows some support from New Zealanders for the incorporation of economic, social and cultural rights and even children's rights into the NZBORA. The Conversation also demonstrated a level of interest from New Zealanders about the ability for the courts to strike down legislation inconsistent with the NZBORA. Thus it can be said that there is at least some interest in the concept of judicially enforceable socio-economic rights for children in New Zealand. At the very least, the report recognises the possible role that socio-economic rights enforcement may play in addressing child poverty, and an acknowledgment of the State's role in ensuring quality of life for New Zealand citizens.

³⁰ Constitutional Advisory Panel, above n 20, at 50.

³¹ At 55.

³² At 53.

³³ At 53.

III *Children's Rights*

A *Children's capability to possess rights*

In examining the concept of judicially enforceable socio-economic rights for children, it is necessary to briefly acknowledge that some theorists deny that children are capable of possessing rights. Wellman suggests that infants cannot possess rights at all, and that children's rights gradually increase as children develop the capacities of a moral agent. This conclusion is based on his theory of rights in which the essential function of any right is "to confer autonomy, freedom and control... upon the right-holder."³⁴ He argues that a right must include at least one liberty and one power. The liberty permits the right-holder to act in a specific way, and the power gives the right-holder the ability to bring about a particular consequence as a result of an action. Only a being capable of acting in the morally relevant sense is capable of possessing a right. An infant cannot act as a moral agent, so cannot be a moral right-holder. As an infant develops the capacity to act morally, so he or she will gradually acquire moral rights.

Infants have no moral duties; a baby does not have a moral duty to keep his or her clothes clean or to refrain from biting his or her mother's breast. As a child grows and develops his or her capacities as a moral agent, so the child will gradually acquire moral obligations. Wellman argues that this should lead to an analogous thesis regarding children's rights.³⁵ For Wellman, it makes no sense to give someone a right until they have the ability to exercise the powers and liberties contained within it.³⁶

Using the example of the right to freedom of movement, Wellman identifies that children do not enjoy unrestricted freedom of movement. A child is free to go to his or her room to find a toy, or to refrain from attending the school dance, but he or she is not free to enter a bar or leave school during class time.³⁷ A newborn does not need a right to freedom of movement because he or she cannot yet participate in any meaningful movement. Wellman sees the liberty within a right as a bilateral ethical liberty; that is, the right holder is free to choose to move, or not to move. Therefore, an awareness of the possibility of moving or not moving, and an ability to choose one option over the other, is necessary in order to possess the right.³⁸ Clearly infants are not able to exercise psychological control, to make choices, or to act

³⁴ Carl Wellman *An Approach to Rights: Studies in the Philosophy of Law and Morals* (Kluwer Academic Publishers, Dordrecht, 1997) at 17.

³⁵ At 17.

³⁶ At 127.

³⁷ Wellman, above n 34, at 128.

³⁸ At 128-129.

freely. Therefore Wellman argues that it is “both pointless and misleading” to ascribe rights to infants.³⁹

While this argument has legitimacy when considering children's civil and political rights, it seems less applicable to children's socio-economic rights. For example, the right to an adequate standard of living should not be something a child gradually acquires as he or she develops the capacity to exercise it; it is something that a child should possess from birth. Wellman's answer to this is that a child does not possess a *right* to an adequate standard of living, but that others owe that child the duty to provide it. He rejects the notion that denying that children have rights must necessarily lead to the conclusion that child neglect and abuse are morally innocent. For Wellman, it is possible to have duties which are not based on rights. Thus it is possible that adults have moral duties regarding children, even if a child is not owed that duty as a result of some right which he or she possesses.⁴⁰ While a newborn may not have the ability to possess the right to freedom of movement, the parent has a moral duty not to leave a newborn in his or her crib all day and night.⁴¹

Wellman also one of the rights unique to children, that is, the right to enjoy special protection, as originally guaranteed under the Declaration of the Rights of the Child, and reaffirmed in the preamble of the UNCRC.⁴² He suggests that this right is a “claim-right”; when it is complete it consists of a set of ethical claims of the child against his or her parents, other individuals and the state. The parent has a moral duty to protect the child from malnutrition, physical injury, disease and so forth. These duties begin at birth and continue in varying degrees until the child becomes independent. But Wellman argues that to say a parent has a particular duty regarding the child is not the same as saying that the child has an ethical claim against his or her parents. The child must possess some ability to make a claim. That is, the child must also have the ethical power to claim performance of the duty, or to claim a remedy for non-performance.⁴³

Again, it is obvious that a newborn does not possess this power. Wellman posits that to make an ethical claim, one must also have some recognition of the duty being claimed, and an understanding of the relationship between the one owing to the duty and the one to whom the duty is owed. As Wellman writes, “Surely only after the child has had some experience of

³⁹ At 17.

⁴⁰ At 17.

⁴¹ At 132.

⁴² *Declaration of the Rights of the Child* GA Res 1386, A/RES/1386(XIV) (1959).

⁴³ Wellman, above n 34, at 132-133.

moral obligations and personal relations can the child be meaningfully said to possess any ethical power of claiming from the parents their moral duty to provide special protection.”⁴⁴

Wellman's argument is an interesting one. His theory regarding a child's ability to make an ethical claim for performance of a duty, or for a remedy for non-performance, has implications for my later discussion regarding who may be responsible for bringing claims for socio-economic rights enforcement on behalf of children. However, the distinction he makes between children possessing rights and children being owed duties will have little practical implication for the proposal of judicially enforceable socio-economic rights for children. Either the court will affirm a child's possession of a right, or they will affirm the State's duty towards that child, but the outcome of the decision will be the same regardless of characterisation.

In Freeman's words, “The case that children have rights has to a large extent been won: the burden now shifts to monitoring how well governments honour the pledges in their national laws and carry out their international obligations.”⁴⁵ Thus I now move to consider New Zealand's international obligations towards children.

B International Obligations

New Zealand's children have rights at international law, as recognised by both the UNCRC and the ICESCR. New Zealand became a signatory to the ICESCR in 1966 and the UNCRC in 1990, and ratified these treaties in 1978 and 1993 respectively. The UNCRC has been ratified by every member of the United Nations except Somalia and the United States of America, making it the most widely supported international human rights treaty.

The ICESCR, which has been ratified by 162 nations, contains socio-economic rights which apply to everyone, not just children. However, it also contains provisions which relate specifically to children: article 10(3) protects children from economic and social exploitation, and article 12(2)(a) provides for the healthy development of the child.

The socio-economic rights guaranteed to children by the UNCRC include the right to survival and development (Article 6), the right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health (Article 24), the right to benefit from social security (Article 26), the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development

⁴⁴ At 133.

⁴⁵ Michael D A Freeman “The Limits of Children's Rights” in Michael Freeman and Philip Veerman (eds) *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers, Dordrecht, 1992) at 42.

(Article 27), and the right to education (Articles 28 and 29). These are characterised by Lansdown as the “provision rights” of the UNCRC.⁴⁶

Article 4 of the UNCRC provides that “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention.” Notably, the obligation on States Parties with regard to the socio-economic rights contained in the UNCRC is that States Parties shall “undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”⁴⁷ The United Nations Committee on the Rights of the Child (the Committee) has stated that Article 4 introduces the concept of the “progressive realisation” of children’s socio-economic rights.⁴⁸

The UNCRC recognises that the primary responsibility for the upbringing and development of the child lies with that child’s parents or legal guardians.⁴⁹ However, it also specifies that the States Parties shall “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.”⁵⁰ Further discussion of the role of parents and of the state in fulfilling children’s socio-economic rights will take place later in the paper. For now, it is sufficient to say that the result of New Zealand’s ratification of the UNCRC is that the New Zealand government assumes some form of obligation towards the fulfilment of the socio-economic rights of its children.

The EAG consulted almost 300 children living predominantly in low socio-economic areas as part of their report. It is interesting to note that in this consultation, the main themes children and young people identified as important to them were: housing, family, education, health, and social, leisure and cultural activities.⁵¹ There is significant overlap between the themes identified by these children and the socio-economic rights provided for in the UNCRC.

New Zealand’s ratification of the UNCRC did not result in the socio-economic rights it contains being incorporated directly into New Zealand legislation. The NZBORA does not

⁴⁶ Gerison Lansdown “Children’s Rights” in Berry Mayall (ed) *Children’s Childhood: Observed and Experienced* (Falmer Press, London, 1994) at 33-34.

⁴⁷ United Nations Convention on the Rights of the Child, 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) art 4.

⁴⁸ Committee on the Rights of the Child *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* CRC/GC/2003/5 (2003) at [7].

⁴⁹ United Nations Convention on the Rights of the Child, art 18(1).

⁵⁰ United Nations Convention on the Rights of the Child, art 18(2).

⁵¹ Expert Advisory Group, above n 5, at 22.

contain any socio-economic rights, let alone rights specific to children.⁵² Some commentators such as Ludbrook have argued that New Zealand has taken its international obligations towards children too lightly, failing to implement the UNCRC in any meaningful way.⁵³ Ludbrook goes so far as to call New Zealand's ratification of the UNCRC "a false promise to the nation's children."⁵⁴ There is certainly more that could be done to ensure New Zealand fulfils the obligations it assumed as a result of ratification.

Under Article 44 of the UNCRC, New Zealand is obligated to submit a report on the measures it has adopted which give effect to the rights recognised in the UNCRC and on the progress made on the enjoyment of those rights. Such a report must be submitted to the Committee two years after ratification, and subsequently every five years.⁵⁵ The Committee considered New Zealand's last report in January 2011, and offered its concluding observations in February of the same year.⁵⁶

The Committee noted with appreciation an increase in New Zealand's expenditure on children in recent years. They also acknowledged the efforts of the Working for Families tax credit initiative in its attempts to reduce poverty. However, the Committee remained concerned that such efforts were "not sufficient to eradicate poverty and address inequalities."⁵⁷ There were also concerns noted in relation to the general standard of living for children in New Zealand:⁵⁸

The Committee notes with appreciation the efforts undertaken by the State party to improve the standard of living. However, the Committee, while noting that the extent of child poverty has declined in recent years, is nonetheless concerned that still about 20 percent of children in the State party are living under the poverty line.

Thus child poverty in New Zealand has been noted as an area of concern by the Committee, and an area in which New Zealand could better fulfil its obligations to children under the UNCRC. The Committee has also articulated in its General Comment on General Measures of Implementation of the Convention on the Rights of the Child that "For rights to have

⁵² Graeme Austin *Children: Stories the Law Tells* (Victoria University Press, Wellington, 1994) at 147.

⁵³ Robert Ludbrook "Victims of Tokenism and Hypocrisy: New Zealand's Failure to Implement the United Nations Convention on the Rights of the Child" in Anne B Smith, Megan Gollop, Kate Marshall and Karen Nairn (eds) *Advocating for Children: International Perspectives on Children's Rights* (University of Otago Press, Dunedin, 2000) at 123.

⁵⁴ Ludbrook, above n 53, at 123.

⁵⁵ United Nations Convention on the Rights of the Child, art 44(1)(b).

⁵⁶ Committee on the Rights of the Child *Concluding Observations: New Zealand* CRC/C/NZL/CO/3-4 (2011).

⁵⁷ Committee on the Rights of the Child, above n 56, at 3.

⁵⁸ Committee on the Rights of the Child, above n 56, at 8-9.

meaning, effective remedies must be available to redress violations...” The Committee has emphasised that socio-economic rights must be regarded as justiciable, and that domestic legislation must articulate children's entitlements in sufficient detail, to enable effective remedies for non-compliance with these entitlements.⁵⁹ Thus there is a strong directive from the Committee that judicial enforcement of children's socio-economic rights would enable New Zealand to better meet its international obligations.

IV A unique category of rights-holders

This paper specifically explores the possibility of judicially enforceable socio-economic rights for children. There is now a burgeoning academic literature on children's rights, largely as a result of the adoption of the UNCRC. Many academics have identified reasons why children's socio-economic rights are particularly important, and arguably in need of judicial protection.

At international law and in New Zealand domestic law, children have the same basic human rights as adults.⁶⁰ However, children in New Zealand are not necessarily able to exercise all their rights in the same way as adults. They also have additional rights which are unique to them, such as the right to know and be cared for by parents, and the right to rest, leisure and play.⁶¹ The UNCRC also recognises children's need for special protection; “The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”⁶²

There are three main arguments to be made to justify the justiciability of socio-economic rights for children in particular. The first is that children are disproportionately affected by socio-economic rights violations. The second is that children have a limited ability to fulfil their own socio-economic rights. The third is that children cannot exercise many civil and political rights. More specifically, the fact that children do not possess the right to vote can have important implications for how well their socio-economic rights are protected by the state. I address each of these arguments in turn.

A Children are disproportionately affected by socio-economic rights violations

The realisation of socio-economic rights is inherently more important for children than for adults, in that a child will often suffer greater harm if that child is deprived of any one of his or

⁵⁹ Committee on the Rights of the Child, above n 48, at [24]-[25].

⁶⁰ Human Rights Commission, above n 4, at 239.

⁶¹ United Nations Convention on the Rights of the Child, art 7(1) and 31(1).

⁶² United Nations Convention on the Rights of the Child, art 1.

her socio-economic rights. As Leary comments, while civil and political rights become increasingly important as a child ages, “economic and social rights are of critical importance to infants and children from the youngest age.”⁶³ The fulfilment of basic socio-economic rights is vitally connected to a child's mental and physical development. As a result of children being less mentally and physically developed than adults, they are likely to be more significantly affected by a socio-economic rights violation than an adult who suffers that same rights violation. This can be illustrated by the example of a violation of an individual's right to food.

A man who is deprived of food for a period of time will suffer hardship. He will feel hungry, and experience any number of symptoms associated with food deprivation. But once the violation ceases, that is, once the man has sufficient food again, he is likely to recover quickly and to continue to live in a largely normal manner. On the other hand, a young boy deprived of his right to food for the same length of time is likely to experience a significantly greater negative effect as a result of such deprivation. Given that the boy is still developing, both mentally and physically, he may suffer lower resistance to illness in the short term for example, and poor physical and mental development in the long term.⁶⁴ Thus the same socio-economic rights violation has a disproportionate effect on the boy because of his age.

Similarly, the former United Nations Special Rapporteur on the Right to Adequate Housing has emphasised the link between children's housing rights and their cognitive, physical, cultural, emotional and social development, stressing that children are “disproportionately vulnerable to the negative effects of inadequate and insecure living conditions.”⁶⁵ His observations were that children suffer disproportionately as a result of losing their homes because they lose psychological shelter and security, which affects children in both short term and long term ways, and does so more significantly than it affects adults.⁶⁶

I argue that there is justification for the prioritisation of children's socio-economic rights realisation over adults, because of the disproportionate effect of socio-economic rights violation on children.

⁶³ Virginia Leary “The Social and Economic Rights of the Child” (1995) 17 J. L. & Pol'y 353 at 353.

⁶⁴ Aoife Nolan *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing, Oxford, 2011) at 15.

⁶⁵ Miloon Kothari *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living* E/CN.4/2001/51 (2001) at [42].

⁶⁶ Kothari, above n 65, at [42].

B Children have a limited ability to fulfil their own socio-economic rights

A second reason for special protection of children's socio-economic rights in particular is that children are limited in their ability to fulfil their own socio-economic rights. The New Zealand Human Rights Commission sees children as autonomous rights holders, but acknowledges that they are dependent on others to give effect to their rights.⁶⁷ Similarly, Wringer emphasises the child's lack of ability to provide for him or herself. He argues that an adult, by virtue of his or her acquisition of knowledge and skills in reaching adulthood, and his or her physical strength, is able to "obtain or create sustenance from the resources of his environment."⁶⁸ Sometimes adults will not be able to do this, because they have suffered an injury, or because a change in external conditions mean that the survival skills that adult possesses are rendered useless. This is where an adult's right to social security becomes important; the right to social security provides for an adult when a contingency has impaired that adult's ability to provide for him or herself.

Wringer asserts that where an adult cannot survive by obtaining sustenance directly from his or her environment, he or she generally has the ability to work to earn a living.⁶⁹ An adult has knowledge of the needs of others and of prevailing social practices, enabling him or her to drive a bargain in order to survive. Article 6 of the ICESCR recognises the right to work, which includes "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." ICESCR rights apply to everyone including children, but this does not necessarily mean that children have the ability to work, nor that they should work. As Wringer argues, a child does not possess the same knowledge, skills or physical strength as an adult, which means a child is less able to provide for him or herself from the surrounding environment. Even if a child *can* work to survive, as does the child whose fingers roll cigarettes or sew buttons in a sweatshop, there is a general social consensus that a child should not *have* to work to support him or herself. Clearly these expectations change as a child grows older; Wellman would say that while a baby has no ability to provide for his or her own socio-economic rights, the same cannot be said of the seventeen year old. Nevertheless, it is true that to some extent, children in New Zealand have a more limited ability to fulfil their own socio-economic rights than adults do. This can be said to provide a justification for judicially enforceable socio-economic rights for children in particular.

⁶⁷ Human Rights Commission, above n 4, at 239.

⁶⁸ C A Wringer *Children's Rights: A Philosophical Study* (Routledge & Kegan Paul, London, 1981) at 136.

⁶⁹ Wringer, above n 68, at 136.

C Children have limited civil and political rights

The final argument for guaranteeing children's socio-economic rights by judicial enforcement is that children cannot exercise a number of the civil and political rights that adults can. This is not necessarily a formal or legal deprivation of rights, but an acceptance that children's civil and political rights are justifiably limited by those who care for and take responsibility for them. As Austin writes, "To accept that confining an adolescent to his or her room is not a matter for habeas corpus relief... is to accept that there are differences between private and public regulation of children's lives."⁷⁰ New Zealand's children do have the right to freedom of movement as guaranteed by s 18 of the NZBORA. Yet, society accepts a parent's limiting of their child's freedom of movement to a certain extent. New Zealand's children have the right to freedom of thought, conscience, religion, and belief under s 13 of the NZBORA, but in reality this right is limited for children because society accepts that parents can instruct their children in religious belief for example.

Moreover, to draw on Wellman's theory of children's rights, while children legally possess most civil and political rights, often they are simply incapable of exercising them. While children in New Zealand are guaranteed the right to freedom of peaceful assembly under s 16 of the NZBORA, they are not necessarily physically able to assemble where and with whom they would like.

However, a right which children are formally deprived of, and one which arguably has a significant impact on children's ability to guarantee fulfilment of their own socio-economic rights, is the right to vote. Under s 12 of the NZBORA, the right to vote is limited to those citizens who are of or over the age of eighteen years; New Zealand children do not possess the right to vote. There are more than a million children in New Zealand in a total population of just over 4.5 million. Thus almost a quarter of New Zealand's population has no say in the democratic process.

Boston and Chapple identify the disenfranchisement of children as one of the main reasons to explain why policy-makers in New Zealand "have taken only limited measures to address child poverty for over two decades."⁷¹ They acknowledge that while parents do have votes and are "very directly concerned with their children's best interests," an adult vote of a

⁷⁰ Austin, above n 52, at 147.

⁷¹ Jonathan Boston and Simon Chapple *Child Poverty in New Zealand* (Bridget Williams Books, Wellington, 2014) at 12.

parent has the same weighting as an adult vote of someone without dependent children.⁷² They also identify that participation in the democratic process can be more difficult for parents than those without dependent children, and this can be particularly true for poor parents. Moreover, a continually aging population means that the number of voters without dependent children will continue to grow, increasing the “democratic challenge” of under-represented children.

There are some who argue that children as citizens should have the same civil and political rights as adults, including the right to vote. There are many under the age of eighteen who are able to make reasoned decisions about who to vote for on the basis of well-informed political views. Despite these arguments gaining traction in various democracies, the lowest voting age remains at sixteen years.⁷³ Boston and Chapple are doubtful about the impact that lowering the voting age would have on child poverty in New Zealand. They point to probable low voter turnout among children and the fact that younger voters will not necessarily place a higher priority on reducing child poverty than older voters would.⁷⁴

Depriving children of the right to vote provides justification for greater protection of their socio-economic rights. One way to do this is to give these rights judicial protection. Adults who have the right to vote are in a better position to ensure their socio-economic rights are fulfilled by the state; they have the ability to vote for the government who they believe will best fulfil those rights for them. Children cannot vote for the government which they believe will best uphold their socio-economic rights. Nor are governments accountable to children if they fail to respect, protect and fulfil children's socio-economic rights. Governments are faced with many competing demands, and children are unlikely to be the highest priority.

In the words of Thomas Hammarberg, one of ten experts elected to the Committee in 1991:⁷⁵

Children have always been, and still are, the victims of hypocrisy. Politicians often pay lip service to the well-being of children, many of them are eager to be seen as child friendly. But in real terms when economy and other interests come into the picture, children tend to be let down.

⁷² Boston and Chapple, above n 71, at 12.

⁷³ Boston and Chapple, above n 71, at 125.

⁷⁴ Boston and Chapple, above n 71, at 125.

⁷⁵ Thomas Hammarberg, “The Rights of the Child and the Industrialised Countries” in K Ekberg and P E Mjaavatt (eds) *Children at Risk: Selected Papers* (Norwegian Centre for Child Research, Trondheim, 1993) at 296.

The Children's Commissioner described the position of New Zealand's children in similar terms. "Children and their interests are relatively invisible in public affairs in New Zealand and little priority is given to them, or their rights and interests, by decision-makers. For example, children have remained the group in our society most likely to be living in hardship or income poverty, a circumstance that has persisted for twenty years through times of growth and of recession."⁷⁶

Closely related to the disenfranchisement of children, Boston and Chapple identify a further reason for what they call the "policy neglect" of child poverty in New Zealand. Put simply, it will be expensive to provide policy solutions in the short term, and the benefits of reducing child poverty are "much less readily observed and many of them will occur only in the distant future."⁷⁷ They compare child poverty with environmental problems, in that both issues require a long term outlook and short term fiscal sacrifices, and thus neither issue is particularly well dealt with by the New Zealand political system. The Children's Commissioner has also criticised New Zealand's political processes as "not well suited to taking children's interests into account."⁷⁸ Governments are unlikely to spend large amounts of money on policies to better fulfil children's socio-economic rights when the beneficiaries of those policies will have no role in voting that government into power at the next election. This is an important argument for why the non-elected judiciary should play a role in guaranteeing the fulfilment of children's socio-economic rights in New Zealand.

D The appropriateness of double standards

In considering the justifications for judicial enforcement of socio-economic rights for children in particular, it is important to recognise that some argue there is no justification for treating children differently at all. Some such as Freeman have challenged the understanding that it is appropriate to have double standards for the rights guaranteed to children and those guaranteed to adults. He argues that a double standard is appropriate when the distinction upon which it relies is morally relevant; thus he suggests that it is not justifiable to give one person the right to vote and not the other based solely on the colour of their skin for example. But he challenges the validity of age as a distinction on which to base differences in rights.⁷⁹

⁷⁶ John Angus *Report of the New Zealand Children's Commissioner to the United Nations Committee on the Rights of the Child 2010* (Office of the Children's Commissioner, 2010) at 2.

⁷⁷ Boston and Chapple, above n 71, at 12.

⁷⁸ Angus, above n 76, at 2.

⁷⁹ Freeman, above n 45, at 34.

In order to give children some rights and not others, we must draw a line at which point a child becomes an adult. Most countries draw this line at age eighteen years. Freeman then points out that there is clearly no real distinction between an eighteen year old and someone who is seventeen years and 364 days old. Any line which is drawn by law will necessarily be arbitrary. There will be those on either side of the line who meet the criteria considered necessary to be granted that right. Consider the earlier example of the right to vote. Skin colour is not considered a valid distinction on which to base a double standard, but age is. The argument is that children do not yet possess the necessary competence to exercise the full rights of citizenship by making informed political choices. Therefore children are denied the right to vote. But as Freeman points out, there are many adults who arguably would not meet this competence test either. In his words, "Look at the governments voted in by adults in Britain, the United States, Israel in recent years!"⁸⁰ Freeman's argument is essentially that it is not difficult to undermine the arguments put forward to justify the distinction between children and adults in their ability to exercise their rights.

However, Freeman does not go so far as to suggest that there should not be differences between the rights of children and adults. He recognises that there is still a need for some distinction, especially on the basis of children's need for special protection. But Freeman argues for a middle ground: "to take children's rights seriously requires us to take seriously both protection of children and recognition of their autonomy."⁸¹ Freeman would interfere with children's autonomy only to the extent necessary to prevent their exploitation. He posits limitations on children's rights on the basis of "future-oriented consent". That is, we should ask of any distinction, "Looking back, would the child appreciate and accept the reason for the restriction imposed upon him or her, given what he or she now knows as a rationally autonomous adult?"⁸²

While it is important to remember to challenge the distinctions on which double standards are based, there are still good justifications for taking different approaches towards the protection of rights of children, as Freeman acknowledges. The reasons I have outlined above provide justification for the judicial enforcement of children's socio-economic rights, even if the same is not to be guaranteed for adults.

⁸⁰ Freeman, above n 45, at 35.

⁸¹ At 37.

⁸² At 39.

V *Judicially enforceable socio-economic rights for children generally*

This Part explores how judicially enforceable socio-economic rights for children might work in general. I begin with an introduction to the duties contained within socio-economic rights, and ways in which these duties can be enforced by the courts. I consider the tension between the duties of the parent and the state, and then move to a discussion of the remedies available for socio-economic rights enforcement. Finally I briefly address some of the risks posed by judicial enforcement of socio-economic rights.

A *Duties Contained Within Socio-Economic Rights*

Traditionally, distinctions have been made between negative and positive rights, which are also known as first and second generation rights. Civil and political rights are considered negative or “first generation” rights. They are negative in the sense that they protect individuals from certain interferences by the state. Socio-economic rights are considered positive or “second generation” rights, because they impose a positive duty on behalf of the state to provide them.

The validity of this distinction has been rightfully challenged. Henry Shue identifies three correlative duties contained in every right, whether the right is considered negative or positive. Every right contains a duty to *avoid* depriving an individual of the right, a duty to *protect* the individual from deprivation and a duty to *aid* the deprived individual.⁸³ Davis employs the example of the right to adequate food. Within this right there are three duties: the duty not to eliminate an individual's only available means of acquiring food, the duty to protect an individual from having their only food source eliminated, and the duty to provide food for those who cannot provide it for themselves. In this way, a socio-economic right, which is traditionally seen as a positive right, can be seen to contain both negative and positive obligations.⁸⁴

B *Calling Upon the Courts*

In her study of judicial enforcement of socio-economic rights for children, Nolan helpfully identifies the three categories in which the courts may be asked to intervene to secure enforcement of these rights. These categories correspond with the three correlative duties Shue recognises as being contained in any right. The first category is where the government has itself interfered with children's enjoyment of their socio-economic rights; the government has failed

⁸³ Henry Shue *Basic Rights* (Princeton University Press, Princeton, 1980) at 52.

⁸⁴ Dennis M Davis “Socio-Economic Rights: Has the Promise of Eradicating the Divide between First and Second-Generation Rights Been Fulfilled?” in Rosalind Dixon and Tom Ginsburg (eds) *Comparative Constitutional Law* (Cheltenham, Edward Elgar, 2011) at 521.

to *respect* children's rights. The second category is where the government has failed to prevent a third party from interfering with children's enjoyment of their socio-economic rights; the government has failed to *protect* these rights. The final incidence is where the government has failed to take positive steps to facilitate, promote or provide children's socio-economic rights; the government has failed to satisfy its obligation to *fulfil* the socio-economic rights of its children.

Of course, it will not always be clear which of these categories the court is addressing. There are situations where the difference between the court addressing an alleged failure to protect a right and an alleged failure to fulfil a positive obligation may depend on the way the claim is phrased or argued. Often a socio-economic rights violation will involve more than one of these incidences.

Judicial intervention in the first category of cases is likely to be the least controversial, as the If the court is called to intervene in the first category, as the court will be called to halt the interference, rather than prescribe a positive measure to be taken by the state to enable vindication of the right. New Zealand's relatively positive human rights record means it is difficult to imagine New Zealand's government interfering with children's socio-economic rights in this direct way. New Zealand's children are not often at risk of forced eviction from their homes at the hands of the government, as some Roma children are in Italy and France, for example.⁸⁵

The second category would require the courts to outline positive steps which the government must take to stop a third party from interfering with a child's enjoyment of his or her socio-economic rights. In similarity with the first category however, the court's aim is arguably to return the situation to the status quo, that is, to halt a rights violation which is occurring as a result of third party interference. Again, it is easy to look to extreme examples which would fall into this category: the Iraqi government's failure to protect Yazidi minority children's socio-economic right to food, currently being violated by Islamic State fighters, for example.⁸⁶

However, there are much more commonplace situations in New Zealand, where children could bring claims against the government for failing to protect them from socio-

⁸⁵ Amnesty International "Italy: Many Children Among Dozens Left Homeless by Forced Eviction in Rome" (9 July 2014) <www.amnesty.org/en/news>.

⁸⁶ Loveday Morris "Isis Fighters Trap Thousands of Iraqis up a Mountain – and They're Dying of Thirst" *The Independent* (online ed, United Kingdom, 6 August 2014).

economic rights violations by third parties. While New Zealand children may not be at risk of the government evicting them from their homes, they may be at risk of landlords doing so. A quarter of New Zealand's children are living in some form of poverty, being deprived of their socio-economic rights to adequate food, shelter, and healthcare. Sometimes this deprivation is at the hands of their parents. It is in these less extreme, more everyday situations, that characterisations such as Nolan's "retaining the status quo" become less helpful.

When a landlord evicts a family with children because the parents cannot pay the rent, that landlord can be characterised as a third party who is violating those children's right to adequate housing. When a New Zealand parent purchases cigarettes for him or herself before purchasing bread and milk for his or her children, that parent is a third party who is interfering with his or her children's right to food. In this case, the required outcome from the courts would be to outline positive steps which the government must take in order to halt the third party's interference with the enjoyment of the right. But in these situations, socio-economic rights enforcement is unlikely to be an order to retain or re-establish the status quo; it is more likely to require the government to step in and provide for the realisation of the right.

There is something inherently difficult about the situation in which the person violating the socio-economic right has a duty not just to respect, but also to fulfil that right. Is it appropriate to require the government to protect children from socio-economic rights violations at the hands of their parents, when their parents owe their children a duty to fulfil their rights?

Intuitively, it seems less controversial for the courts to outline positive steps for governments to take to protect children from socio-economic rights violations in the form of being deprived of their right to food by Islamic State soldiers, than by their own parents. The Islamic State fighter owes a duty to respect the child's socio-economic rights, that is, not to actively violate them. But he does not have a duty to fulfil the socio-economic rights of the child. The parent, on the other hand, has a duty to respect and to fulfil his or her child's socio-economic rights. Thus when the court outlines positive steps for the government to take in order to protect children's rights from being infringed by their parents, the court is telling the government to implement a policy to force parents to fulfil their duties, or to fulfil the parents' duties for them.

I return to the categories in which the courts may intervene to secure enforcement of children's socio-economic rights. The third category is when the government fails to satisfy its obligation to fulfil the socio-economic rights of children. In this situation, Nolan suggests that

the courts' role will become more controversial, as they will be required to alter the status quo, which will more often than not require an adjustment of resource distribution. Again, this is a situation in which both the government and the parents of the child have a duty to fulfil children's socio-economic rights.

C Duties of Parents and the State

The above discussion demonstrates that at the heart of the issue of socio-economic rights enforceability for children is a difficult question: who owes children what Wellman would call "moral duties"? Instinctively, we know that parents owe their children moral duties to fulfil their socio-economic rights. Indeed, this is confirmed by the UNCRC's approach to the duties of parents. In Article 3(2), States agree to ensure the child such protection and care as is necessary for his or her well-being, but they do so "taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him and her." States must also respect the responsibilities, rights and duties of parents, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the UNCRC.⁸⁷ The UNCRC also recognises the role of "members of the extended family or community as provided for by local custom" in the provision of this direction and guidance, which would cover situations such as whangai children in New Zealand (that is, children looked after by those who are not their birth parents, in accordance with tikanga Māori).

Article 18 of the UNCRC sets out the role of parents and of the state in ensuring children's enjoyments of their rights. It provides firstly that:

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of their child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

⁸⁷ United Nations Convention on the Rights of the Child, art 5.

Thus the primary responsibility for upbringing and development rests with the parents. However, Article 18 goes on to state that, for the purposes of guaranteeing and promoting the rights in the Convention:

States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

The primary responsibility of the parents is again recognised in Article 27, where parents are to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. Again, States Parties are to take appropriate measures to assist parents to implement this right, and, in case of need, provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.⁸⁸ However, States are only required to do so "in accordance with national conditions and within their means."

Of course, parents and families will not always fulfil their duties to realise their children's socio-economic rights. As Nolan writes, "the presumption that relationships within the family are necessarily underpinned by principles of social justice ignores the fact that the family is neither exempt from, nor unaffected by, the attitudes and practices of society."⁸⁹ She argues that the family is simply a social institution which will reflect social norms that are "adultist, gendered, racialised and heterosexist."⁹⁰ She also notes that there are many children who do not live with family or carers, who may be harmed by the presumption that the family will provide for a child's socio-economic needs.⁹¹

There will always be a tension between the role of parents and of the role of the state in socio-economic rights fulfilment. The UNCRC model is that parents have the primary responsibility, but that states are to assist. The UNCRC also presumes that the best interests of the child will be parents' primary concern. Of course, there are many situations when parents fail to make their children's best interests their primary concern. There are also many situations where parents are genuinely unable to fulfil their duties towards their children. Children's socio-economic rights are vital to their development and indeed to their meaningful participation in society. Therefore I suggest that while the primary responsibility for socio-

⁸⁸ United Nations Convention on the Rights of the Child, art 27(3).

⁸⁹ Nolan, above n 64, at 9.

⁹⁰ Nolan, above n 64, at 9.

⁹¹ Nolan, above n 64, at 9.

economic rights fulfilment should always rest with parents, when parents fail to fulfil their duties towards their children, it is the state's responsibility to recognise its international obligations and work towards children's socio-economic rights realisation in accordance with national conditions and within their means.

E Remedies

Landau identifies four possible approaches to remedies which are available to courts in the exercise of socio-economic rights enforcement. He examines how effective each approach is likely to be in terms of creating change in state practice, and who the likely beneficiaries of each approach will be. Landau's work is particularly helpful when considering the impact that judicially enforceable socio-economic rights for children may have on child poverty in New Zealand, because any impact is likely to depend on the effectiveness of the remedy, and whether or not the remedies will reach those in poverty.

The first approach is individualised rights enforcement. In this situation, an individual plaintiff would bring a claim to the court asking for enforcement of their right. The typical example is an ill plaintiff who brings a claim to the court for a particular medical procedure, based on his or her right to health. This form of socio-economic rights enforcement is very popular with courts because it means that they do not appear to be intervening in any significant way with public policy. Of course, the downside to this approach is that it has very little effect on government behaviour. Even if a court recognises that a single plaintiff is entitled to a remedy based on the fact that his or her socio-economic right is being infringed by a particular law or policy, there is little incentive for the government to change that law or policy.⁹²

Moreover, as Brinks and Gauri identify, the individualised form of remedy tends to benefit middle and upper-class groups overall, as they are the ones who can afford to litigate. Even if this remedy is made as accessible as possible, Landau argues that it is still likely to benefit the rich over the poor. He gives the example of the *tutela* in Colombia, which was a device created by the 1991 Colombian Constitution. A *tutela* is a constitutional complaint allowing citizens harmed by government actions in violation of their constitutional rights to bring suit.⁹³ The device was designed to be fast, informal, and inexpensive. The *tutelas* were well used, but when a study was undertaken by the Procuraduria (akin to a Colombian Attorney-General) as to who was using the *tutelas*, it was found that their use was strongly

⁹² David Landau "The Reality of Social Rights Enforcement" (2012) 53 Harv Int'l L J 189 at 201.

⁹³ Landau, above n 92, at 205.

concentrated among the middle and upper-class, and not the poor.⁹⁴ Those groups were much more likely to know their rights, so naturally filed the bulk of the tutelas.

Similarly, the Indian Supreme Court attempted to increase its accessibility by actively encouraging public interest lawsuits. Justice Bhagwati chaired a Committee for Implementing Legal Aid Schemes which aimed to provide the Indian citizenry with the means to claim their constitutional rights in the courts.⁹⁵ The Court loosened standing requirements, ruling that “any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law.”⁹⁶ Justice Bhagwati also began turning newspaper articles and letters to the Court into writ petitions for rights enforcement, under Article 32 of the Indian Constitution. Despite all this, the evidence was that there was no significant increase in litigation by lower-class groups.⁹⁷

Brinks and Gauri also identify that judicial enforcement of socio-economic rights may have a regressive effect on the distribution of public goods in the form of “beneficiary inequality.” This denotes the possibility of courts determining who will benefit from policies which are meant to be universal, but are in practice only accessible to those who can afford to litigate for realisation of the policy.⁹⁸ Their evidence suggests that in countries like Brazil, where judicial enforcement of rights is done largely through individual cases and with the awarding of narrow remedies, there seems to be a greater risk of beneficiary inequality.

The second approach to remedies is the negative injunction. This is where the courts issue an order striking down a law or policy which would withdraw an existing benefit. This is seen as a less controversial method because it means the courts are simply maintaining the status quo. They are not making complex budgetary allocations or constructing policy; they are simply preventing the State from putting a policy into effect. The negative injunction method is closely related to the non-retrogression principle created by the United Nations Committee on Economic, Social and Cultural Rights. The principle states that any deliberately retrogressive measures relating to existing social benefits “require the most careful

⁹⁴ Landau, above n 92, at 214.

⁹⁵ Charles R Epp *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (The University of Chicago Press, Chicago, 1998) at 85.

⁹⁶ *S P Gupta v Union of India* AIR 1982 SC 149 at [22].

⁹⁷ See Epp, above n 95, at 91-110.

⁹⁸ Daniel M Brinks and Varun Gauri *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, Cambridge, 2008) at 335.

consideration and would need to be fully justified by reference of the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”⁹⁹

Landau suggests that this negative injunction remedy will also favour more affluent groups, because it is the middle and upper class groups who tend to have pensions, health care and other subsidies, and it is these benefits which are most at risk of being reduced when governments need to cut budget deficits. Landau suggests that the poor do not have many benefits for the government to remove, so states are less likely to target these benefits in times of recession or structural adjustment. I also suggest that the negative injunction model could provide a disincentive for governments to pass legislation and implement policies which fulfil socio-economic rights if they know they will find it difficult to repeal or remove them.

The third approach is what Tushnet has called “weak form review.”¹⁰⁰ This approach describes the approach of the South African Constitutional Court in the famous decision of *Government of the Republic of South Africa v Grootboom* in 2000. The Court’s approach in this case was to find that the political branches of South Africa had violated the constitutional right to adequate housing. However, instead of granting an individual remedy, the Court simply stated that the State had an obligation to “devise and implement a coherent, coordinated programme” and reserve a “reasonable” part of its total housing budget to provide housing for those who were in desperate need.¹⁰¹ Tushnet’s characterisation of this decision was that it allowed the Court to judicially enforce the socio-economic right without encroaching on the prerogative of the legislative or executive branches of government.

Landau argues, however, that weak form review is not an effective way to judicially enforce socio-economic rights. In the particular case of *Grootboom*, the plan the Court requested was never produced, and many agree that the decision in the case has had no real effect on the realisation of the right to housing in South Africa.¹⁰²

The fourth approach is the one which Landau argues is the most likely to bring about real change in bureaucratic practice, and therefore offers the possible realisation of socio-

⁹⁹ Committee on Economic, Social and Cultural Rights *General Comment No. 3: The Nature of States Parties Obligations* E/1991/23 (1991).

¹⁰⁰ See Mark Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Princeton, 2008).

¹⁰¹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at [95] and [66].

¹⁰² See for example David Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press, New York, 2007), and Dennis M Davis “Socio-Economic Rights in South Africa: The Record after Ten Years” (2004) 2 NZJPI 47.

economic rights for the poor. He calls this approach “structural enforcement”, where, instead of issuing an individualised remedy to a particular plaintiff, the court issues structural orders to the government requiring it to change a policy in a particular area. The court can also maintain a supervisory jurisdiction over the case to ensure its orders are carried out.¹⁰³ For example, the Colombian Constitutional Court has twice issued “state of unconstitutionality” orders, in which they issued detailed orders to the government, instructing the government as to how they should address displaced persons and healthcare. Landau argues that these interventions by the courts have allowed them to target remedies towards lower class groups rather than the middle and upper classes, and have resulted in real changes in policy. The extent to which those policy changes have resulted in better socio-economic rights outcomes for the poor is still the topic of much debate.

Landau argues that the controversial nature of courts enforcing socio-economic rights by outlining positive steps for governments to take, in some cases going so far as to order the redistribution of resources or the creation of new programmes, means that courts are more likely in practice to enforce socio-economic rights by issuing negative injunctions or giving individualised remedies to individual plaintiffs. In his words, “such methods of enforcement will be least likely to get courts into serious trouble.”¹⁰⁴ However, these methods are also likely to be less effective at changing government practice, and they are less likely to benefit those who most require judicial protection of their socio-economic rights, that is, the poor.

Landau's work suggests that the effectiveness of judicial enforcement of socio-economic rights depends very much on the way the courts choose to enforce these rights. The more willing the court is to outline particular steps that a government must take, the more likely there is to be significant change in government policy.

Brinks and Gauri argue that there is no conclusive evidence of the overall effect of judicial enforcement of socio-economic rights on the way that public goods are distributed in a society. They suggest that there is also little evidence of the “deeply marginalised” benefiting from judicial enforcement of socio-economic rights, at least in the developing world. Brinks and Gauri argue that it is very difficult to find empirical evidence to support the proposition that judicial enforcement of socio-economic rights leads to a more just society than if those rights had been left to be enforced by majoritarian institutions such as parliaments. It is difficult

¹⁰³ Landau, above n 92, at 223.

¹⁰⁴ Landau, above n 92, at 196.

to show that more people have better access to higher quality health care in India for example, simply on the basis that India has given its courts the ability to enforce socio-economic rights rather than observing strict parliamentary supremacy.¹⁰⁵

While it is true that it is difficult to produce empirical evidence to support any claim to better protection of socio-economic rights by judicial enforcement than by majoritarian institutions, in the case of children's socio-economic rights it is significant that children have no part to play in electing the majoritarian institutions. Therefore it is certainly arguable that for children specifically, the judiciary are in a better position to protect their socio-economic rights than a majoritarian institution is.

F Risks of judicial enforcement

Brinks and Gauri identify that a possible risk of socio-economic rights enforcement by the courts is the creation of "policy area inequality." Assuming that only those who can afford to litigate will take cases to the courts, this could have the unintended effect of focusing the government's attention on issues that are important to the wealthy, rather than the poor. That is to say that courts would effectively end up "shaping the overall policy offering of the state" to disproportionately benefit those who can afford to litigate their rights.¹⁰⁶

Nolan also identifies possible negative indirect effects of judicial enforcement of children's socio-economic rights. She suggests that a controversial judicial decision may provoke a knee-jerk law change so as to reverse the effects of the ruling. The ability of the New Zealand legislature to pass laws quickly in response to unpopular judicial decisions was clearly demonstrated in the immediate aftermath of the Court of Appeal's decision in *Ngati Apa v Attorney-General* in 2003 and the subsequent *Foreshore and Seabed Act* 2004. Thus Nolan's concern about quick legislative overriding of judicial decisions may be particularly relevant in the New Zealand context.

Nolan also identifies the risk that to give the courts the ability to enforce children's socio-economic rights may lead to a sense of apathy by the elected branches of government. If the courts are remedying the problem, perhaps there is no need for the executive or legislature to do so. As I have argued earlier however, there is already a degree of political apathy towards child poverty as a result of the disenfranchisement of children and the need for long term solutions which will be expensive to implement in the short term. Nolan's concern about

¹⁰⁵ Brinks and Gauri, above n 98, at 336.

¹⁰⁶ Brinks and Gauri, above n 98, at 335.

judicial enforcement of socio-economic rights *creating* a sense of apathy is arguably less relevant in the New Zealand context.

VI *Judicially enforceable socio-economic rights for children in New Zealand*

Having canvassed some of the ways in which socio-economic rights can be enforced, I now seek to evaluate the effect that judicially enforceable socio-economic rights for children might have on child poverty in New Zealand. One of the difficulties of this task is the fact that socio-economic rights jurisprudence, much like comparative poverty measures, is “inevitably embedded in particular cultures and contexts that may not ‘translate’ to other jurisdictions.”¹⁰⁷ However, it is possible to identify some of the factors which impact the effectiveness of socio-economic rights adjudication and to apply those to the New Zealand context.

The following discussion is based on the presumption that the remedy which the courts provide is implemented by the government. That is, I presume that if the courts issue a negative injunction against a government policy, that policy is not implemented, or if a structural enforcement remedy is issued, it is complied with. Clearly this is a substantial presumption, and in many jurisdictions it is implementation of the courts' socio-economic rights enforcement remedies which has proved the biggest barrier to realisation of socio-economic rights. However, I suggest that if New Zealand were to take the step of implementing judicially enforceable socio-economic rights for children, it would do so on the understanding that the decisions of the courts were to be implemented by the state.

This Part begins with a brief discussion of how New Zealand might incorporate judicially enforceable socio-economic rights for children into its constitution. I then address how children might make claims for enforcement of their socio-economic rights. Finally I explore the possible direct and indirect effects of judicial enforcement of children's socio-economic rights on child poverty in New Zealand.

A *Children's socio-economic rights in the NZBORA*

For New Zealand's children to have judicially enforceable socio-economic rights, the rights would need to be set out in legislation. Given New Zealand's lack of a written constitution, the most suitable place to incorporate children's socio-economic rights would be in the NZBORA. As noted earlier, this was suggested by some of the participants in the Constitution Conversation. If children's socio-economic rights were to be judicially enforceable, they

¹⁰⁷ Nolan, above n 64, at 188.

would need to be given supremacy. Therefore, they would need to be excluded from s 4 of the NZBORA, which provides that “No court shall, in relation to any enactment, hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective, or decline to apply any provision of the enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights.”

The NZBORA currently only applies to “acts done” by the legislative, executive or judicial branches of the Government of New Zealand or any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.¹⁰⁸ Thus if courts were to be able to issue structural enforcement remedies for children's socio-economic rights, the NZBORA would need to be amended so that it applied not only to acts, but also to lack of action by the executive.

Consideration would also need to be given to whether children's socio-economic rights would be limited by s 5. Socio-economic rights tend to be limited in some way, though as Butler points out, there does not seem to be any norm when considering the articulation of rights limitation in different jurisdictions.¹⁰⁹ The socio-economic rights in the UNCRC are themselves qualified by requiring States only to undertake measures “to the maximum extent of their available resources”.¹¹⁰ Therefore it would be reasonable to subject children's socio-economic rights in the NZBORA to s 5.

I would observe however that a section 5 analysis does not apply particularly easily to the limitation of a socio-economic right. Consider, for example, the child's right to adequate housing. Section 5 requires limitations on rights to be “prescribed by law.” This has been held to mean that limits must be “identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law.”¹¹¹ However, this is impossible in the context of socio-economic rights limitation; the government cannot prescribe every limitation by law. Imagine the government implements a policy to realise the right to adequate housing by ensuring every New Zealand child lives in an insulated home. This policy impliedly places limitations on the way the government interprets the right to adequate housing; it does not include the right to multiple guest bathrooms, or to a view of the sea. These are reasonable

¹⁰⁸ New Zealand Bill of Rights Act 1990, s 3.

¹⁰⁹ Andrew S Butler “Limiting Rights” (2002) 33 VUWLR 537 at 539.

¹¹⁰ United Nations Convention on the Rights of the Child, art 4.

¹¹¹ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [180].

limitations of course. But they are not prescribed by law. Thus socio-economic rights may need to be exempted from the “prescribed by law” requirement.

A proportionality test is used in New Zealand to determine whether limitations on rights are “demonstrably justifiable in a free and democratic society.” The test looks to whether the limit serves a purpose sufficiently important to justify curtailment of the right, and whether it is rationally connected with its purpose, impairing the right no more than is reasonably necessary for achievement of the purpose.¹¹² However, the Supreme Court has noted that when a limitation involves “major political, social or economic decisions” the court will review the limitation less intensely than if it involves substantial legal content, giving greater deference to the elected branches of government when the limitation is policy-based.¹¹³

If the courts were tasked with enforcing children's socio-economic rights, this would significantly lessen the courts' deference to the elected branches under s 5. The Court of Appeal has held that a section 5 analysis should consider all issues “whether they be social, legal, moral, economic, administrative, ethical or otherwise.”¹¹⁴ This broad approach to s 5 would become particularly important in an analysis of a limitation on a child's socio-economic right. To use my earlier example, a case brought against the housing policy because it did not include provision for guest bathrooms will not succeed when all social, legal, moral, economic, administrative, ethical or other issues are considered. That limitation on the right can be demonstrably justified in a free and democratic society. On the other hand, if the policy proposed that insulation would only be provided once all five-bedroom homes had been provided with ensuites, this is much less likely to be considered “demonstrably justifiable.” An enquiry into the administrative, ethical, moral and economic issues surrounding this policy would enable the courts to reach this decision.

B Claiming for socio-economic rights enforcement

If children are to have judicially enforceable socio-economic rights, the question arises as to how children will bring claims for rights enforcement. Children in New Zealand do not have access to the courts. As the Committee has emphasised, “Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights.”¹¹⁵

¹¹² Hansen, above n 111, at [104].

¹¹³ Hansen, above n 111, at [116].

¹¹⁴ *Moonen v Film and Literature Board Review* [2000] 2 NZLR 9 (CA) at [18].

¹¹⁵ Committee on the Rights of the Child, above n 48, at [24].

Feinberg acknowledges the argument put forward by Wellman and others, that a child cannot possess a legal right if that child is not able to initiate legal proceedings to enforce the right. Feinberg asserts that the response to this argument is that “children... start legal proceedings, not on their own direct initiative, but rather through the actions of proxies or attorneys who are empowered to speak in their names.”¹¹⁶

Wellman unsurprisingly rejects this solution. He suggests that there is a “crucial ambiguity” in saying that a parent or guardian is acting “for” a child. For Wellman, there is a difference between acting “on behalf of” someone, as an agent in the place of that person, and “in behalf of” another, when the person acts in the best interests of or for the benefit of the other. Given that Wellman (and Feinberg) articulate theories of rights in which acting, by claiming or exercising autonomy, is an essential element of being a right-holder, Wellman argues that an adult must act “on behalf of” the child, as the child’s agent. It is as if the adult is claiming the right “on behalf of” the child. Wellman asserts that it is impossible for an adult to truly act in the place of a young child, because that young child is incapable of acting in that way at all. Therefore what the adult is really doing is acting “in behalf of” the child, that is, in the child’s best interests.

To Wellman, this “fails to capture the special standing by virtue of which only the right-holder, or someone authorized by her, can exercise a right.” It is also morally dangerous. To say that an adult is exercising a right of the child is to suggest that the child him or herself is acting, doing so through an agent or proxy rather than directly. Wellman points out that an adult appointing an agent does so freely, and retains control over the agent both by specifying the terms of the agent’s authority and by retaining the ability to withdraw or restrict that authority at any time. This is clearly not the case when an adult acts as an agent of a child in exercising or claiming for fulfilment of that child’s right.¹¹⁷

Despite Wellman’s objections, there seems to be little alternative to adults bringing claims to the courts on behalf of children. While Nolan and others would point out that we must avoid making “disputable presumptions about the vulnerability, incapacity, immaturity and irrationality of children”¹¹⁸ it is also indisputable that very young children do not have the

¹¹⁶ Joel Feinberg *Rights, Justice and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press, Princeton, 1980) at 163.

¹¹⁷ Wellman, above n 34, at 19.

¹¹⁸ Nolan, above n 64, at 12.

ability to bring a claim to the court. Even older children are likely to need assistance in bringing claims, as indeed such assistance is needed by most adults.

The Committee has instructed that States must pay particular attention to “ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance.”¹¹⁹

Part of the Children's Commissioner's current role is to “act as an advocate for children's interests, rights, and welfare generally (except before any court or tribunal), and, in that regard, to advance and monitor the application of the Convention [the UNCRC] by departments of State and other instruments of the Crown.”¹²⁰ While it may not be appropriate for the Children's Commissioner to bring cases against the State given that the Commissioner is a Crown entity, there are a number of groups who could be given standing to bring claims for socio-economic rights enforcement for New Zealand children generally. For example, the non-government organisations who are involved in the UNCRC Monitoring Group such as Unicef New Zealand and the Child Poverty Action Group could bring these claims.

C Indirect effects

Nolan identifies a number of extra-judicial effects which may result from the judicial enforcement of children's socio-economic rights. Firstly, judicial decisions about socio-economic rights enforcement for children may lead to heightened public awareness about such issues. Heightened public awareness may enable the enfranchised public to exert pressure on the elected branches of government regarding children's socio-economic rights enforcement. It may also encourage the government to implement the court's decision in a timely manner.¹²¹ Similarly, Brinks and Gauri note that sometimes litigants may bring a case to court with almost no chance of success, simply to “open negotiations, generate publicity, or highlight government failures.”¹²² In these situations, litigation can be a viable alternative when existing policy infrastructure fails to recognise the deeply felt needs of citizens.

This indirect outcome of socio-economic rights adjudication could have a positive effect on the levels of child poverty in New Zealand. Children's Commissioner Russell Wills

¹¹⁹ Committee on the Rights of the Child, above n 48, at [24].

¹²⁰ Children's Commissioner Act 2003, s 12(1)(f).

¹²¹ Nolan, above n 64, at 190.

¹²² Brinks and Gauri, above n 98, at 306.

recently commented that New Zealand needs a “national conversation about child poverty” noting that “there’s a high level of tolerance for this [child poverty] still.”¹²³

Nolan suggests that if the court gives a specific order regarding a particular case, this may encourage more general law and policy reform by the executive and legislature.¹²⁴ A decision regarding the enforcement of a particular socio-economic right may place pressure on elected representatives to re-examine other laws or policies relating to children’s socio-economic rights, to prevent those laws or policies being the subject of future claims.

In a more general sense, Nolan argues that judicial decisions have the ability to alter the views of politicians and society in general, by “affecting the intellectual climate.”¹²⁵ A judicial decision in favour of children’s socio-economic rights enforcement may increase the likelihood that future laws and policies will be more favourable towards children’s socio-economic rights.

D Direct effects

Brinks and Gauri argue that “the courts are most engaged and most effective when they act in dialogue with political, bureaucratic, and civil society actors.”¹²⁶ Their research into judicial enforcement of socio-economic rights was based on jurisdictions in the developing world, and their conclusions were that in order for litigation of socio-economic rights to produce significant “real-world” effects, the ability to litigate these rights must be coupled with positive state, social and political conditions. I would suggest that at least in comparison to many of the governments in the developing world, New Zealand can indeed be said to enjoy positive state, social and political conditions which could provide a context for “real-world” effects as a result of socio-economic rights litigation.

However, I suggest that perhaps the most important factor in determining the effect that judicially enforceable socio-economic rights enforcement might have on child poverty in New Zealand would be the approach the New Zealand courts decided to take regarding remedies. This is because the nature of child poverty in New Zealand is likely to influence how effective a particular remedy might be. As identified at the beginning of my paper, approximately a quarter New Zealand’s children can be said to be living in some of form of poverty.

As the Children’s Commissioner argued in his report to the United Nations Committee on the Right to the Child, New Zealand has generally good outcomes when it comes to areas

¹²³ Karl du Fresne “Our Smallest Citizens” *New Zealand Listener* (New Zealand, 6 September 2014) at 20.

¹²⁴ Nolan, above n 64, at 190.

¹²⁵ Nolan, above n 64, at 190.

¹²⁶ Brinks and Gauri, above n 98, at 306.

such as education and the health status of children. Not all New Zealand's children are poor, and the majority of New Zealand's children experience the realisation of their socio-economic rights. Yet there is a group of approximately 25 per cent of New Zealand's children who consistently "fall well behind" in these areas.¹²⁷

The Children's Commissioner has identified the kind of poverty that these children live in as a "persistent feature" in New Zealand. They are victims of "persistent disparities". For example, in his report the Committee, the Commissioner commended the government on the implementation of Working for Families, which has made many New Zealand children better off. However, he noted that despite the Working for Families system, there remains a persistent 25 per cent of children living in poverty. Most of these children do not benefit from a tax credit system, because their parents are not employed (and often never have been). They are also the children who may never find a job themselves, because, for instance, they missed too much of their early schooling, as they were ill with rheumatic fever, as a result of their houses being too cold and overcrowded. The parents of these children have failed to fulfil their children's socio-economic rights, some for a lack of trying, but others for a genuine lack of resources. If we recognise that the state has a role in the fulfilment of children's socio-economic rights when parents fail to fulfil their duties towards their children, then these children may indeed benefit from socio-economic rights enforcement if the remedy granted by the courts is effective.

An individualised rights enforcement remedy is unlikely to have a significant impact on child poverty in New Zealand. As discussed earlier, individualised remedies tend to only benefit those who can afford to litigate. For those parents whose children are living in poverty, litigating for realisation of their child's socio-economic rights is not likely to be a high priority. While it is possible that the non-government organisations identified above may bring cases on behalf of individual children, this is unlikely to have a significant impact on levels of child poverty in New Zealand, simply because individualised remedies only enforce one child's right at a time.

The negative injunction method may bring a greater benefit for poor children in New Zealand than Landau would suggest. While Landau argued that this remedy tends to primarily benefit the middle and upper classes because they have existing social benefits, I argue that New Zealand does not necessarily fit within this identified trend. New Zealand's welfare state origins and its refusal to adopt a social insurance approach to social security means that it is

¹²⁷ Angus, above n 76, at 2.

not the upper and middle classes who would necessarily benefit most from the court's adoption of a negative injunction method. Pensions and health care subsidies are not distributed on a contributory model in New Zealand, and therefore the poor are just as likely to benefit from the court's striking down of retrogressive laws and policies as the rich. Of course, New Zealand does not pay benefits directly to children, but it is easy to envisage an argument being made on behalf of a child that his or her socio-economic rights would be infringed if the parent who supported them was to have his or her benefits removed.

The fact that child poverty in New Zealand is relative rather than abject may also mean that a negative injunction remedy is more effective in New Zealand than in some developing world jurisdictions. Take for example, a government's proposal to remove an existing policy which subsidises insulation for rental properties. Landau would argue that in the South African context, the court's granting of a negative injunction to prevent the removal of this policy will not benefit the poorest children, because they do not live in rental properties at all; they live in tin shacks in slums. In New Zealand on the other hand, a negative injunction to prevent removal of this policy is likely to have a significant impact on the poorest children, because they will benefit greatly from better insulation in their families' rental homes.

However, the negative injunction method also requires that those who require socio-economic rights enforcement have access to the courts. Therefore this method's success would also be predicated on there being groups willing to bring claims on behalf of children, as discussed above.

The possible impacts of weak form review and the stronger structural enforcement remedy are particularly interesting to consider in a New Zealand context. The major downfall of weak form review is that a court's order is at risk of being ignored by the government, or that the steps the government takes to address the court's order will not be sufficient to have any real impact on its failure to provide the socio-economic right in question. Structural enforcement remedies avoid this by providing a more prescriptive set of steps for governments to take in order to provide for the socio-economic right.

I suggest that the impact of these remedies will depend on the reasons for why there is a persistent group of children who experience poverty in New Zealand. Do they remain in poverty because of government apathy towards their socio-economic rights realisation, or is it because the government is putting in place laws and policies that simply are not working? It is probably a combination of both, and this may influence the extent to which socio-economic

rights enforcement by the courts in the form of weak form review or structural enforcement will have an effect on child poverty. If those children in the deepest poverty are suffering from government apathy towards their lack of socio-economic rights realisation, then weak form review may be sufficient to draw government attention to the issue and require some form of policy attempt to address enforcement of the socio-economic right. As suggested above, the New Zealand context means that the government is less likely to simply ignore a weak form review court order in the same way that the South African government was prepared to.

However, a structural enforcement remedy may be necessary in situations where the courts perceive that current government policies are insufficient in bringing about realisation of socio-economic rights for New Zealand's very poorest children. Take, for example, the number of New Zealand who currently go to school without having eaten breakfast. There is a strong argument that this is a violation of those children's socio-economic right to a standard of living adequate for physical development under Article 27 of the UNCRC. While the government may argue that the Working for Families tax credit system is a legitimate attempt to fulfil this socio-economic right for these children by providing their parents with extra money for food, as the Children's Commissioner has pointed out, the poorest of New Zealand's children receive no benefit under this scheme because their parents are not in work. In this situation, a structural enforcement remedy may be necessary to truly enforce the right to an adequate standard of living for these children.

VII Conclusion

This paper began by introducing the issue of child poverty in New Zealand, showing that child poverty is something that affects nearly a quarter of those in New Zealand under the age of eighteen. It demonstrated that child poverty has become a priority of the Office of the Children's Commissioner, whose role it is to advocate for New Zealand's children. It also drew on the results of the recent Constitution Conversation in New Zealand, suggesting that there is some public interest in the idea of judicially enforceable socio-economic rights, and certainly interest in the impact that better recognition of socio-economic rights for children may have on child poverty. It then considered the foundational international human rights treaties affirming children's socio-economic rights, that is, the ICESCR and the UNCRC, suggesting the New Zealand has obligations under these treaties to respect, protect and fulfil the socio-economic rights of children in this country.

I presented for reasons why there is a strong case for judicially enforceable socio-economic rights for children as a particular group. Children are disproportionately vulnerable to socio-economic rights violations and have a limited ability to realise their own socio-economic rights. They are reliant on others to fulfil their duties towards them in order for their socio-economic rights to be fully realised. Children also have limited civil and political rights, and perhaps most importantly, are denied the right to vote. Children's lack of ability to influence the democratic process and the lack of governmental accountability toward them means that the judiciary arguably has a more important role in ensuring the fulfilment of their socio-economic rights.

The paper then addressed the idea of judicial socio-economic rights enforcement generally, paying particular attention to the ways in which courts can enforce socio-economic rights. It also posited that while parents clearly owe duties towards their children in relation to socio-economic rights realisation, the state also owes duties towards children when parents are unable to fulfil these duties.

I then addressed the idea of judicially enforceable socio-economic rights for children in New Zealand. I suggested that New Zealand could incorporate such rights into the NZBORA, and that there would be groups who could bring claims on behalf of New Zealand's children for enforcement of their socio-economic rights. I argued that New Zealand's social and political context may lead to positive indirect effects of socio-economic rights enforcement on child poverty.

Finally, I argued that the effect of judicial socio-economic rights enforcement in New Zealand would largely depend on which remedy the courts were willing to implement. I suggested that individual rights enforcement would not have a particularly significant effect on a problem which affects nearly a quarter of New Zealand's children. However, the negative injunction method may be more effective in New Zealand than it has proved in other jurisdictions, because child poverty in New Zealand is relative rather than abject. Weak form review and structural enforcement remedies may both have a positive impact on child poverty in New Zealand, either by requiring the government to address a particular socio-economic right which has not been the subject of policy considerations, or by providing a more specific order which requires the government to fulfil socio-economic rights which are not being sufficiently addressed by current government policy.

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