

Children's Socio-Economic
Rights, Democracy
and the Courts

Aoife Nolan



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Children and Socio-economic Rights

INTRODUCTION

THIS CHAPTER SETS the scene for the investigation carried out in the book, explaining who and what I am talking about. It centres on the question of why it is necessary to look at children and their socio-economic rights. It also considers when and how the courts may be called upon to enforce such rights.

Having opened with a discussion of definitions employed throughout the book, I proceed to address the key issues that arise in relation to the conceptualisation of children as socio-economic rights-bearers. This entails a consideration of the implications of various constructions of children and childhood for societal, political and legal perceptions and treatment of children. Next, I outline the particular position occupied by children with regard to socio-economic rights violations and consider whether children qualify as a 'special case' vis-a-vis such rights when compared to other social groups. This is followed by a discussion of the definition and alleged characteristics of socio-economic rights with a view to rebutting objections to such rights being subject to judicial enforcement. I also highlight the role, and justify references to, international law in the book's argumentation. Finally, the chapter introduces the book's discussion of the role of the courts by outlining the situations in which the courts might intervene and what action they might take.

OF DEFINITIONS AND OTHER THINGS

The first, necessary, step is to define the subjects of this work: that is, children. The meanings of 'child' and 'childhood' vary greatly between different societies, in the same society over time, or even within one society at the same time.¹ In contemporary societies, a child may qualify as an adult

¹ For more on the evolution or history of the notion of 'childhood' in Western society, see P. Ariès, *Centuries of Childhood* (London, Cape, 1962). While this work is celebrated and often cited, it has also been the subject of much justified criticism. See, eg. L. Pollock, *Forgotten Children: Parent-Child Relations from 1500 to 1900* (Cambridge, Cambridge University Press, 1983). On the approach of historians to childhood and children generally,

of the non-binding 1959 Declaration of the Rights of the Child recognising that 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'.⁵ This 'silence' of the CRC reflects the absence of a universally agreed-upon age when childhood begins.

Nor does regional human rights law appear to provide a clear, consistent definition of when the protection of childhood begins, albeit that the relevant treaty and case law on this issue indicates a predominant view that 'childhood' is protected from birth, rather than beforehand. Alone amongst international and regional human rights law instruments, Article 4(1) of the American Convention on Human Rights (ACHR, 1969), provides explicitly that the right to life 'shall be protected by and, in general, from the moment of conception'. There has not, however, been Inter-American case law involving the rights of the unborn and neither of the Inter-American Court of Human Rights' two key statements on the definition of the child has made reference to the unborn, referring instead to the language of Article 1 CRC.⁶ The European Court of Human Rights has held that, in the absence of a European consensus on the scientific and legal definition of the beginning of life, the question of when the right to life under Article 2 of the European Convention on Human Rights (ECHR) begins comes within states' margin of appreciation.⁷ In the circumstances examined to date by the ECHR institutions (that is, in the various laws on abortion that have been raised in complaints before them), the unborn child has not been regarded as a 'person' directly protected by Article 2. The issue of the right to life of the unborn has not been addressed by the European Committee of Social Rights, which does not monitor an instrument that explicitly enshrines the right to life. However, given that body's extensive reliance on the jurisprudence of the European Court of Human Rights (ECtHR) in areas of overlap between the instruments,⁸ should a question of the rights of the unborn come before it, it would not be unreasonable to assume that it would adopt a similar approach to that of the ECtHR. The EU Charter of Fundamental Rights does not define 'child' but the child-specific provision of that instrument,

⁵ While not imposing legally binding obligations in the way that other Convention provisions do, the Preamble is part of the context of that instrument for the purposes of interpretation (Vienna Convention on the Law of Treaties 1969, Art 31(2)).

⁶ Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/2002, 28 August 2002, Inter-Am Ct HR (Ser A) No 17 (2002) para 42; *Villagrán Morales et al v Guatemala* (the 'Street Children' Case), Judgment of 19 November 1999, Inter-Am Ct HR (Ser C) No 63 (1999) para 188.

⁷ *Vo v France*, Application No 53924/00, Judgment of 8 July 2004, para 82. Confirmed in *Evans v United Kingdom*, Application No 6339/05, Judgment of 10 April 2007, para 54.

⁸ For further discussion of this, see H. Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) 9 *Human Rights Law Review* 61, 72-74.

for religious, cultural or certain civil law purposes while still being a child for others: a Catholic child in Poland who has undergone confirmation is regarded as an adult within a religious context, while remaining a child for civil law purposes. Similarly, an African boy in Southern Africa who has undergone initiation ceremonies may be regarded as an adult by the community in which he lives while lacking the independent legal capacity generally associated with such status. In recent years, there has been a move away from the employment of a purely developmental model of childhood, most famously associated with Piaget, towards a model that views definitions of children, as well as the varied childhoods which children experience, as predominantly social constructs shaped by a range of social, historical and cultural factors.² This move from a developmental to a socio-biological framework of childhood has been particularly notable amongst commentators working in the field of the sociology of the child. A retreat from a view of child development as the unilinear, natural, inevitable and universal progression of children from 'simple' childhood to 'complex' adulthood potentially has major implications for the approach of the law to children and their rights. This is particularly so when it comes to recognising and giving effect to children's capacity for decision-making in different contexts. Certainly, it poses complications for legal efforts to create distinct categories of 'children' and 'non-children'.

As Van Bueren notes, there are two points of contention in the definition of a 'child': the beginning and the end of childhood.³ The first challenge is to address the question of when childhood begins. When defining the word 'child' for the purposes of the UN Convention on the Rights of the Child (CRC), the negotiating states parties differed sharply on the starting point of childhood.⁴ As a result of this dissensus, there is no mention of a 'minimum' age in the CRC. The sole brief reference to the position of the unborn child in the CRC occurs in the Preamble, which quotes a section

see L. Jordanova, 'Children in History: Concepts of Nature and Society' in G. Scarre (ed), *Children, Parents and Politics* (Cambridge, Cambridge University Press, 1989) 3.

² B. Franklin, 'Children's Rights and Media Wrongs: Changing Representations of Children and the Developing Rights Agenda' in B. Franklin (ed), *The New Handbook of Children's Rights: Comparative Policy and Practice* (London, Routledge, 2002) 15, 17. For more on the social construction of 'childhood' and 'children' in different societies, see A. James, C. Jenks and A. Prout, *Theorising Childhood* (Oxford, Polity Press, 1998); A. James and A. Prout, *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (London, Falmer Press, 1997). For a comparison of contemporary concepts of childhood from various social and academic disciplines, see J. Fionda (ed), *Legal Concepts of Childhood* (Oxford, Hart Publishing, 2001).

³ G. Van Bueren, *The International Law on the Rights of the Child* (London, Martinus Nijhoff, 1998) 33. For a discussion of the definition of the child under international law, see ibid 33-38.

⁴ For an account of the negotiating process on the definition of 'child' in the CRC, see S. Detrick, *The United Nations on the Rights of the Child: A Guide to the 'Treaty Preparations'* (The Hague/London, Martinus Nijhoff Publishers, 1992) 115-19.

Article 24, is based on the CRC.⁹ Thus, it can be assumed to employ the CRC understanding of 'child'. In turn, the African Charter on the Rights and Welfare of the Child, the key African children's rights instrument, follows the CRC's lead in failing to specify the beginning of childhood.¹⁰

In light of the preponderant approach of international and regional human rights law, as well as the wide diversity of approaches at the domestic level, this work takes childhood to begin at the time of birth. That is not to ignore the fact that in some jurisdictions, the constitutional framework accords the right to life to unborn children.¹¹ The right to life may be, and in some jurisdictions has been, interpreted to have clear socio-economic aspects and implications, albeit not in the context of the unborn.¹² However, the arguments in this book are restricted in their application to born children so as to avoid the complications inherent in dealing with the rights of the unborn, including potential conflicts between the rights of the mother and the judicial enforcement of the socio-economic rights of the unborn child.

I will now turn to the 'end' of childhood. In international law terms, Article 1 of the CRC provides two tests for childhood. First, it states that a child is any person under the age of 18. Secondly, it provides that under national law applying to the child, majority can be attained earlier.¹³ Of the regional instruments, only the African Charter on the Rights and Welfare of the Child prescribes one set age as the 'end' of childhood: 18.¹⁴ As stated earlier, the Inter-American Court of Human Rights (IACtHR) has primarily relied on the wording of Article 1 CRC in defining childhood. However, the Court has been prepared in at least one case to recognise that, where the national age of majority is higher than 18, then a child under

that age qualifies as a child for the purposes of Article 19, even if she is over 18.¹⁵ In terms of the ECHR, Kilkelly has noted that once a child falls within the definition of a minor or juvenile for the purposes of the relevant domestic law, then this will not be an issue when the matter is reviewed by the ECtHR, unless the age limit is arbitrarily or illegally applied.¹⁶ Thus, while international law favours the age of 18 as being the 'cut-off' for the purposes of childhood, it explicitly recognises that there can be, and are, significant variations in the practice of signatory states.

The law has a tendency to think in terms of binary classifications. Consequently, the workability (in terms of clarity and administrative efficiency) of an age-based definition of 'child' in a legal context is taken to outbalance the arbitrariness of such a definition; a fact that is based on the perceived 'costs' and subjectivity associated with alternative processes entailing individual determinations of maturity, as well as concerns about the measurement of persons against a particular norm of the 'able bodied prime age adult', such as 'capability' or 'merit' in order to determine the treatment of those persons.¹⁷ The 'arbitrariness' in question arises from the fact that an individual may not conform with the presumptions about competence, maturity, autonomy, knowledge, levels of education, participatory capabilities, etc, upon which such an age-based definition is based.

Many of the arguments presented in this work are concerned with the inability of children to exert effective influence on political decision-making processes and the appropriate role to be adopted by the judiciary in relation to their rights and interests in light of this. The key reason for children's incapacity to exercise influence on democratic processes is their unenfranchisement. Therefore, I define a 'child' as any person who has not yet reached adulthood in terms of being of an age to participate in democratic decision-making processes by exercising their right to vote. Upon reaching voting age, a person may be regarded as an adult, capable of exercising influence on the legislative and executive organs directly, as opposed to being dependent on others to ensure the enforcement and protection of his or her rights within the democratic system.

The undoubtedly somewhat arbitrary fixing of the minimum voting age is demonstrated by the variety in ages of enfranchisement in different jurisdictions,¹⁸ as well as the existence of varying ages of enfranchisement for

¹⁵ *Case of the Juvenile Reeducation Institute v Paraguay*, Judgment of 2 September 2004, Inter-Am. Ct HR (Ser C) No 112 (2004).

¹⁶ U Kilkelly, *The Child and the European Convention on Human Rights* (Aldershot, Ashgate Dartmouth, 1999) 22.

¹⁷ S Freedman, 'The Age of Equality' in S Freedman and S Spencer (eds), *Age as an Equality Issue* (Oxford, Hart Publishing, 2003) 21, 40.

¹⁸ Of the 192 members of the United Nations, the vast majority (including Canada, Australia and all the EU Member States except Austria) have a minimum voting age of 18. The following countries and Crown Dependencies have minimum voting ages that differ from 18: 16

⁹ Council of the European Union, *Charter of Fundamental Rights of the European Union: Explanations relating to the Complete Text of the Charter* (Office for Official Publications of the European Communities, 2001) 41.

¹⁰ African Charter on the Rights and Welfare of the Child, Art 2.

¹¹ See, eg Argentine Constitution, s 75(22), which accords constitutional status to the socio-economic right for the unborn requiring the state '[t]o issue a special and integral social security system to protect children from abandonment, since pregnancy up to the end of elementary education, and to protect the mother during pregnancy and the period of lactation'; Irish Constitution, art 40.3.3, in which the state acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate that right.

¹² See, eg the well-developed right to life (Indian Constitution, art 21) jurisprudence of the Indian Supreme Court under which, in the context of children's socio-economic rights, the Court has held, for instance, that the fundamental right to education flows from art 21 (*Unni Krishnan, JP and others v State of Andhra Pradesh and others* 1993 AIR 217). This jurisprudence does not, however, concern the right to life of the unborn.

¹³ For more on the definition of 'child' under the CRC, see P Alston, 'The Legal Framework of the Convention on the Rights of the Child' (1992) 91(2) *Bulletin of Human Rights* 1, 2-4.

¹⁴ Above n 10.

the Indian Constitution accord rights to 'children' but these child-specific rights appear to be reserved to persons under the age of 14.²⁰ The age of enfranchisement is 18 while the definition of a 'child' or 'minor' for other purposes varies depending on the context.²¹ Where children cannot vote and are excluded from the rights accorded to 'children' in terms of the constitution, they are in a particularly vulnerable position as they have neither the ability to exert direct influence on democratic decision-making, nor can they rely on the 'special rights and protections' associated with childhood.

This book does not sub-divide the class of 'children' into other categories (such as 'infant', 'teenager', 'juvenile', 'adolescent' and 'youth') although these terms are employed descriptively. The vagueness and lack of consistency in the usage of these terms, as well as the fact that arguments based on children's exclusion from democracy apply to *all* children below the age of enfranchisement, lead me to avoid dividing children up into further age-based groupings. Although my arguments may apply varying degrees to different groups of children, this is not always simply attributable to age. For instance, groups of children may occupy quite different positions in relation to exerting pressure on democratic decision-making processes depending on factors such as their socio-economic class, level of education and the degree of political participation or views of their parents.

THE EMERGENCE AND REFRAMING OF CHILDREN AS SOCIO-ECONOMIC RIGHTS-HOLDERS

Having defined *who* we are talking about, it is time to make it clear *why* it is necessary to talk about them. It is crucial that more attention be paid to children as socio-economic rights-bearers, independent of the society or family unit of which they may form part. Children are now formally recognised as a minority rights group through the provision of their own UN Convention, and share many experiences of oppression with other minority groups in society.²² They wield no significant political, legal or (strategic) economic power and are generally utterly excluded from the vast majority of important societal institutions (elected bodies, banks, trade unions, etc) whether political, financial or labour-related.²³ Moreover, they are excluded from those decision-, policy- or law-making bodies which are of the greatest importance to them, such as school boards, government committees on education, juvenile justice and child health services. Traditionally, when

²⁰ See Indian Constitution, arts 21A, 24, 45 and 51A(6).

²¹ See A Baipai, *Child Rights in India: Law Policy and Practice*, 2nd edn (New Delhi, Oxford University Press, 2006) 2–15.

²² M John, *Children's Rights and Power: Charging Up for a New Century* (London, Jessica Kingsley Productions, 2003) 196.

²³ For more on this, see Chapter 2.

different elections within individual jurisdictions. Furthermore, the age of enfranchisement will not necessarily correspond to the age at which children 'achieve' adulthood in terms of reaching full legal capacity or other aspects of adult status; nor will it necessarily match the age at which children may exercise functions and jobs that are traditionally associated with adulthood, such as driving or working. For instance, in the Republic of Ireland, a person of 17 can serve in the army but will not be treated as an adult in terms of having reached full legal majority, enfranchisement and constitutional rights purposes.¹⁹ Certainly, the difference between the *de facto* and the *de jure* competence of an individual may not be perfectly reflected in the age chosen by the legislature (or specified in the constitution) as the voting age. The same is undoubtedly true of any 'age-based' classification due to the vast differences in development and maturity between individuals.

The linkage of the end of 'childhood' to enfranchisement becomes particularly complicated when applied to jurisdictions where children become enfranchised for different elections at different ages. For instance, in various Länder in Germany, the voting age in local elections is 16 rather than 18. On the other hand, in Italy, an individual cannot vote in elections for the Senate until the age of 25. The question arises whether children become adult when they are enfranchised for *any* or for *all* public elections. The simplest answer seems to be 'any' as this is the age at which children are able to exert some influence on democratic decision-making processes. However, it must be borne in mind that where a person is enfranchised for some elections and not for others they may not participate on equal terms with other 'fully enfranchised' members of society and some of the arguments made in this work may apply to them to varying degrees (as, indeed, they may to any politically disadvantaged or excluded minority).

Problematically, in some of the countries discussed in this work, the age of enfranchisement does not coincide with the definition of a child for the purposes of constitutional rights. For instance, a number of provisions of

in Austria, Brazil, Cuba, Guernsey, Isle of Man, Jersey and Nicaragua; 17 in East Timor, Indonesia, North Korea, the Seychelles and the Sudan; 19 in South Korea; 20 in Cameroon, Japan, Nauru, Taiwan and Tunisia; 21 in the Central African Republic, Fiji, Gabon, Kuwait, Malaysia, Maldives, Monaco, Morocco, Oman, Pakistan, Samoa, Singapore, Solomon Islands, Tokelau and Tonga.

¹⁹ While the Irish Constitution does not expressly define 'child', there is a statutory definition contained in both the Child Care Act 1991 and the Children Act 1997, stating that every person under the age of 18 years is a 'child' for the purpose of these Acts, while the Age of Majority Act 1985 provides that the age of majority is 18, unless someone has already married. In *Simost v Minister for Education* [2001] IESC 39, the Supreme Court held that the state's constitutional obligation to provide free primary education applies to children only, not adults, and ceases at the age of 18. In *TD v Minister for Education* [2001] IESC 86 all parties, the High Court and the Supreme Court proceeded on the basis that the state's duty to vindicate the constitutional socio-economic rights at issue ended upon the applicants reaching the age of 18.

societies have considered children as a discrete group, it has generally been in order to dismiss them as irrational, legally incompetent beings who are inferior to adults and whose enjoyment of rights is subject to the views of their parents or the state, or both.

Admittedly, the observations made above and later in this chapter about 'children' can be challenged as sweeping generalisations, which suggest that children are a homogenous group whose interests and opinions are necessarily identical and who invariably face the same challenges. Clearly, they are not. Like many other social groups, children will differ from each other in terms of gender, race, socio-economic status and other condition. However, I would argue that children are sufficiently similar (and differentiated from other groups) in terms of shared characteristics (for instance, age, needs, interests) and social, legal and political position, for it to be justifiable to refer to 'children' as a whole in constructing my argumentation.²⁴

The principal reason that there has been such limited consideration of children as a social group and as bearers of socio-economic rights is that, until relatively recently, children were regarded as objects of parents' rights and duties, rather than as individual rights-holders themselves. Historically, children's socio-economic status was considered to be dependent upon (indeed, inextricable from) that of their family. As a consequence, they did not warrant separate consideration. There has been public neglect of children as an aggregated group, justified by the theory that they are solely the responsibility of their parents. Effectively, children's family status has served to locate them outside the polity.

The perception of children as rooted in a family that is willing and able to meet their needs fails to take into account the fact that the close relationship between parents and children, coupled with the dependency of children on adults, do not establish an identity of their interests such that the consideration of parental interests derivatively ensures equal consideration of children's interests.²⁵ Indeed, as McLeod highlights, a refusal to consider the child's entitlement to resources as independent of the child-parent relationship amounts to a failure to acknowledge the status of children as distinct members of the moral community with distinct interests who are appropriately viewed as self-originating sources of valid moral claims with an equal moral status.²⁶

²⁴ For more on the conceptualisation of social groups, see Iris Marion Young, *Inclusion and Democracy* (Oxford, Oxford University Press, 2000) ch. 3.

²⁵ C. Macleod, 'Liberal Equality and the Affective Family' in D. Archard and C. Macleod (eds), *The Moral and Political Status of Children* (Oxford, Oxford University Press, 2002) 212, 219.

²⁶ *Ibid.* 219–20.

Children's socio-economic conditions are undoubtedly almost invariably linked to those of parents or relatives who live with them. However, although important resources are often delivered to children from parents, this is not always the case. 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. The family, like other social institutions, reflects public assumptions and norms that are adultist, gendered, racialised and heterosexist.²⁷ For instance, sexism in the broader societal sphere is reflected by the relatively disadvantaged position experienced by many girl children in terms of the distribution of socio-economic rights-related resources within the family context, such as food and education.²⁸ In addition, the presumption that children's socio-economic rights-related needs will be met by their family/carers and the traditional tendency of the state to provide for children's socio-economic rights through the unit of the family does not serve (and, indeed, may disadvantage) those children who, for various reasons, do not have, or reside with, family/carers. There has also been a failure to take proper account of children's needs when considering the needs of 'households', resulting in the underestimation of the needs of child-members of households and the over-weighting of those of adults. For instance, Eurochild highlights that in the European Community Household Panel, CHP weighting of an adult was 1, with each additional adult or child above 14 as 0.5 and children under 14 as 0.3, a weighting scale that could underestimate the 'weight' of children in the household.²⁹

Crucially, the frequent delivery of socio-economic rights-related resources from parents to children neither removes nor nullifies the obligation of the state to children. In addition to its default role to provide socio-economic rights where adult care-givers or parents cannot do so, there are certain rights, such as elements of the rights to social security,³⁰ that only the state is in a position to deliver. It is crucial, therefore, that children's entitlement to

²⁷ M. Moosa-Mirza, 'A Difference-Centred Alternative to Theorization of Children's Citizenship Rights' (2005) 9(4) *Citizenship Studies* 369, 384, 385.

²⁸ For more on gender discrimination and discrimination against children in relation to the right to food in the family and other contexts, see, eg Human Rights Council Advisory Committee, *Preliminary Study of the Human Rights Council Advisory Committee on Discrimination in the Context of the Right to Food*, UN Doc. A/HRC/13/32 (22 February 2010).

²⁹ EURONET, Contribution to the European Roundtable on Social Exclusion, Workshop 2, *The Instruments for the Governance of Multilevel Welfare Systems (European, National, Regional and Local) and for the Promotion of the Mobilisation of the Actors* (2003) 2.

³⁰ For instance, child support benefit and social services. For more on the child's right to social security, see Committee on Economic, Social and Cultural Rights (ComESCR), General Comment No 19 on the Right to Social Security (art 9), UN Doc E/C.12/GC/19 (2008) paras 18 and 26.

resources should be viewed as independent of the parent/adult care-giver-child relationship.

There has been definite progress in terms of attitudes towards children. Children are generally no longer regarded merely as the property or extension of their parents, but as individuals with their own rights.³¹ However, children are still severely disadvantaged in society when compared to adults and certainly do not occupy a position of equality with them. Indeed, some commentators have gone so far as to argue that 'adulthood'—the oppression of children by adults—has the same power dimension in children's lives as sexism or racism.³² One does not, however, have to go as far as this to agree with Mayall that, when one studies children as a social group in any society, one is forced to recognise the subordination of that group in the social order. Childhood as social status is defined within the generational order as inferior to adulthood.³³

Children occupy a different position in society from that of other socially disadvantaged groups. Maslow Cohen notes that, in comparison to older persons, people living with disabilities and the incarcerated (three other groups of 'public dependants'), children's dependency is arguably the more complete and profound due to the absence of a suitable engine to forward their claims to public resources.³⁴ One might claim, as O'Neill does, that, unlike other socially disadvantaged groups who have benefited from the use of judicial activism by the courts to achieve social reform, children suffer from a natural rather than an artificially produced dependence on adults, based as it is on factors such as children's relative physical weakness, inexperience and immaturity.³⁵ On such a view of children, child dependence cannot be ended merely by social or political change. The only escape for children is to grow up. Children are, inevitably, dependent. Similarly, children will always be a vulnerable group due to the fact that their vulnerability cannot be fully remedied by empowerment measures.³⁶ O'Neill's claims

are open to strong criticism for their failure to acknowledge the way in which the 'dependence' (or, indeed, the vulnerability) of children is, at least partially, the outcome of specific social, historical and cultural attitudes towards, and treatment of, children, rather than being an inevitable result of childhood itself. Inaccurate conceptualisations of children as vulnerable, dependent and passive—and their resultant location in positions in which their agency goes unrecognised and unexercised—has given rise to a vicious circle. False perceptions of children are reinforced by, and give rise to, the limited opportunities available to children to demonstrate their competence and agency.

In the same vein, O'Neill's presumption that childhood is a stage of life from which children are helped and urged to emerge by those who have most power over them fails to take into account the interest that adult society may have in perpetuating childhood in order to maintain existing power relations, which privilege them.³⁷ Evidence for this is provided by the frequent reluctance of adults to cede power to children in terms of decision-making in family, health and other contexts. However, while it is important not to overstate the extent of children's inherent biological, physical and psychological dependence and/or vulnerability, there can be no doubt that there are many children, particularly younger children, whose dependence and vulnerability cannot be fully (or even largely) addressed through empowerment measures. Nor should such dependence and vulnerability be ignored by the courts and other decision-makers when addressing children's rights.

I am certainly not suggesting that there is no role for protectionism and paternalism in law and society's treatment of children. Children are not identical to adults and differential treatment of them (or at least, the less 'adult-like' of them) by the drafters and enforcers of law and policy is not necessarily unacceptable or, indeed, undesirable.³⁸ This is true when dealing with either a formal or a substantive model of equality.³⁹

³¹ For a treatment of children as parental property in a particular domestic context (the United States) see B Bennett-Woodhouse, 'Who Owns the Child?: Meyer and Pierce and the Child as Property' (1992) 33 *William and Mary Law Review* 995, 1036–51.

³² See, eg J Roche, 'Children: Rights, Participation and Practice' (1999) 6 *Childhood* 475, 478.

³³ B Mayall, 'The Sociology of Childhood: Children's Autonomy and Participation Rights' in A Smith, M Gallop, K Marshall and K Nair (eds), *Advocating for Children: International Perspectives on Children's Rights* (Dunedin, University of Otago Press, 2000) 126, 132.

³⁴ Examples of engines to forward disadvantaged groups' claims to public resources would be the vote in the case of the elderly; the equality principle in the case of the disabled; and the public's apprehensions of urgency and necessity in the case of the incarcerated (J Maslow Cohen, 'Competitive and Cooperative Dependencies: The Case for Children' (1995) 81 *Virginia Law Review* 2217, 2227).

³⁵ O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge, Cambridge University Press, 1989) 202.

³⁶ Children are, of course, not the only group for whom vulnerability cannot be remedied by empowerment measures. In her work, for example, Fineman argues for a conception of

vulnerability 'as a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility' (M Fineman, 'The Vulnerable Subject' (2008) *Yale Journal of Law and Feminism* 1, 8).

³⁷ O'Neill, above n 35, 203.

³⁸ For a discussion of the permissibility or not of differential treatment of children in terms of international human rights law on equality and non-discrimination, see C Breen, *Age Discrimination and Children's Rights: Ensuring Equality and Acknowledging Difference* (Dordrecht, Martinus Nijhoff Publishers, 2006).

³⁹ A model of formal equality, which is premised on the notion of 'like' cases being treated alike, would not require those in dissimilar situations (ie adults and children) to be treated the same. In turn, a model of substantive equality may necessitate the enactment of positive measures aimed at the advancement of children in order to counteract the socio-economic disparities and power relations, which reinforce and perpetuate inequality between children and adults.

decision-making.⁴³ However, ultimately it would not require that the child's decision on matters affecting them or their rights should be automatically implemented where this would have negative implications for their future capacity for autonomy.

Judicial awareness of the interplay between socio-economic rights, paternalistic protections and child autonomy/agency (both current and future) is clearly demonstrated in the jurisprudence of the Inter-American Court of Human Rights. In its Advisory Opinion on the Juridical Condition of the Child,⁴⁴ the Court stated that:

education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by the children, *who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights.* (emphasis added)⁴⁵

This statement clearly reflects a perception of children as vulnerable, largely passive, beings who require positive intervention on their behalf to ensure the realisation of their rights. However, the IACrHR had previously commented in this decision that:

[the best interests principle] is based on the very dignity of the human being, *on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child.* (emphasis added and footnotes omitted)⁴⁶

Here, the Court specifically justified the paternalistic best interests principle in terms of, amongst other things, the need to develop the child's potential; that is, to maximise the child's future capacity for autonomy.

CHILDREN: A SPECIAL CASE?

This work focusses on socio-economic rights due to the fundamental importance of those rights to children. While civil and political rights become increasingly relevant as children advance in age, socio-economic rights are of critical importance from birth.⁴⁷ This is due to their direct link with the child's physical and mental development. Admittedly, there is no question that some civil and political rights, such as those rights relating to the protection of life and bodily integrity, are fundamental to ensuring that a child's current welfare and future development are not impaired. This is

The work of 'child liberationists' such as John Holt and Richard Farson, which argues for the extension of the rights, privileges, duties and responsibilities of adults to children, fails to adequately appreciate the way in which the exercise of such rights (not to mention duties) may impact on the child's enjoyment of other rights, both now and in the future.⁴⁰ It is, however, important to bear in mind that paternalistic laws and policies are frequently premised on disputable presumptions about the vulnerability, incapacity, immaturity and irrationality of children, rather than the genuine characteristics of the children subject to them. Such measures also generally fail to take into account and accord equal weight to the incapacity and irrationality of adults. As a result, they can serve to reinforce and perpetuate negative conceptualisations, stereotypes and perceptions of children. There is thus a need to consider the determination and/or the justification of the parameters of acceptable paternalism. This will entail the adoption of a self-conscious approach to the understandings of children upon which the determination of such parameters is based.

I would agree with arguments made by Freeman in favour of 'liberal paternalism' (based on a Rawlsian conception of the social contract underpinned by a substructure of equality and autonomy) which legitimises intervention directed at conduct that is irrational when judged against a neutral theory of the good.⁴¹ Such a test of 'irrationality' must not be based on the subjective values of the 'would-be protector' but must be limited so that it justifies intervention only to the extent necessary to prevent the immediate harm or to develop the capacities of rational choice by which the individual may have a reasonable chance of avoiding such harms.⁴² Freeman's proposed limitations on children's autonomy accommodate the needs both to ensure the protection and support for the child and to develop the child's capacity for self-determination. Relying on the child's capacity for autonomy, rather than actual autonomy, such an approach serves to protect the child's future autonomy while permitting pluralistic visions of the good. It thus maximises the autonomy and equality of the child while shielding him/her from danger. I would add to Freeman's model by arguing that paternalistic constraints on children must be consistent with the right of the child who is capable of forming her own views to express those views freely in all matters affecting her and have them given due weight in accordance with the age and maturity of the child. Such a requirement would acknowledge the child's agency and promote the child's capacity for self-determination and autonomy by requiring consultation and participation in

⁴³ This condition would also accord with Art 12 CRC on the right of the child to be heard. For more on Art 12, see Chapter 2.

⁴⁴ Advisory Opinion OC-17/2002, above n 6.

⁴⁵ *Ibid* para 86.

⁴⁶ *Ibid* para 56.

⁴⁷ V Leary, 'The Social and Economic Rights of the Child' (1995) *Law and Policy* 353, 353.

⁴⁰ See R Farson, *Birthrights* (New York, Macmillan, 1974); J Holt, *Escape from Childhood* (New York, Dutton, 1974).

⁴¹ M Freeman, 'The Limits of Children's Rights' in M Freeman and P Veerman (eds), *The Ideologies of Children's Rights* (Dordrecht, Martinus Nijhoff Publishers, 1992) 29, 37-39.

⁴² *Ibid* 38.

not necessarily the case, however, with regard to others, such as the right to freedom of peaceful assembly and association. Wringe highlights two crucial points that must be borne in mind when considering children vis-à-vis their enjoyment of socio-economic rights. First, due to their nature and condition, children have a reduced capacity to meet their socio-economic needs either by obtaining or creating sustenance from the resources of their environment.⁴⁸ Secondly, they are less likely to have the skills necessary to gain a stake in the resources of the community by negotiating special rights (ie rights which arise from transactions or relationships) for themselves.⁴⁹ Thus, children have only a limited capacity to guarantee their socio-economic rights themselves.

There are a number of other ways in which children are in a significantly different position from adults with regard to their enjoyment of socio-economic rights. First, child and adult members of the same family or society are not necessarily accorded the same socio-economic rights. In a number of constitutional frameworks, children are accorded rights that differ from those of adults in terms of the range of the rights accorded. One frequent example is the reservation of the right to primary education to persons of a particular age. In addition, there may also be a difference in terms of the obligations imposed by such rights. Article 44 of the Colombian Constitution describes children's socio-economic rights as 'fundamental' and hence subject to immediate application by the courts. This contrasts with the constitutional socio-economic rights of other groups, which have generally only been held to adopt a fundamental character in specific, limited circumstances. Indeed, there may even be a difference in the rights accorded to older and younger children in different jurisdictions, with the latter group being extended more extensive entitlements and protections. Looking at Colombia again, while article 44 furnishes 'children' generally with a broad range of socio-economic rights, article 50 states that any child under a year old who may not be covered by any type of protection or social security will be entitled to receive free care in all health institutions that receive state subsidies. Meanwhile, the special rights of 'adolescents' are the focus of article 45, which includes the provision that 'the state and society guarantee the active participation of adolescents in public and private organisations that are responsible for the protection, education, and progress of youth'. Moreover, those rights that children do share with adults may need to be implemented and enforced in a different way than they would be for the adult group. It is vital that this be taken into account by decision-makers if children's rights are to be adequately given effect to.

⁴⁸ C. Wringe, *Children's Rights: A Philosophical Study* (London/Boston, MA, Routledge and Kegan Paul, 1981) 135–36.

⁴⁹ *Ibid.*

Furthermore, children are often affected in a different way from adults by violations of a similar nature.⁵⁰ The physical and psychological effects that children suffer as a result of violations of their socio-economic rights will generally be greater than those experienced by adults due to their age and lower level of physical and mental development. This is true both in relation to (a) the immediate impact that violations of the right to health may have on a child's physical and psychological state, and (b) the long-term detrimental effects on the child's development and future capacity for autonomy resulting from such a violation. This can be demonstrated by three brief examples.⁵¹

The first concerns the right to food. An adult who lives through a situation in which he suffers from malnutrition over a protracted period may generally be expected to continue his life in a largely normal manner once this period of hardship has come to an end.⁵² On the other hand, a child suffering from a violation of the right to food/nutrition over the same length of time is likely to suffer far greater effects, both in the short and the long term. In the short term, such a child may suffer from, amongst other things, lower resistance to illness. Long-term effects may include poor physical and cognitive development.⁵³ While an adult may suffer health complications stemming from malnutrition, their long-term health and development is unlikely to be as gravely affected as would be that of a child. Thus, identical violations of the right to food will have a far greater impact on children than on adults.

The former Special Rapporteur on the Right to Adequate Housing highlighted the fact that children are disproportionately vulnerable to the negative effects of inadequate and insecure living conditions.⁵⁴ Homeless children, and particularly younger children, are considerably more vulnerable than their adult counterparts, both physically (in terms of size, strength and their resultant decreased ability to provide for their physical needs) and psychologically (due to lack of life experience and maturity, which renders them susceptible to both psychological trauma, exploitation and abuse).

⁵⁰ 'Children's Rights' in Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring* (Geneva, OHCHR, 2001).

⁵¹ There are undoubtedly groups of adults within society that are at least as vulnerable as children due to having a disability, being pregnant, older or illiterate in a developed country, etc. The observations above are based on a comparison of the relative situations of an adult of reasonable good health and education by the standards of the society of which she forms part with that of an average child in the same society.

⁵² The term 'malnutrition' is used to refer to a number of diseases, each with a specific cause related to one or more nutrients (for example, protein, iodine or calcium) and each characterised by cellular imbalance between the supply of nutrients and energy, on the one hand, and the body's demand for them to ensure growth, maintenance and specific functions, on the other. (Source: WHO, World Health Information Fact Sheet 199, available at www.who.int.)

⁵³ *Ibid.*

⁵⁴ For more, see UN Special Rapporteur, *Report on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, UN Doc A/HRC/7/16 (2008) para 42.

well-being has too rarely been taken into account in political and economic planning and measurement holds true of children, who have also been treated as parts of a larger unit, rather than valued as sources of agency and worth in their own right.⁵⁹ Key concerns and rights-related issues of both groups and the regulation thereof have been, and continue to be, relegated to the private sphere. Many of the generalisations that were (and sometimes still are) made about women in order to justify their social subjugation and exclusion from important decision-making institutions and processes are similarly applied to children (for instance, labelling them as irrational, incapable, morally inferior, incompetent, emotional, immature, not to mention child-like!). Crucially, however, women have greater economic and social power than children and are more likely to be able to meet their socio-economic needs themselves. Their enfranchisement makes them a constituency to which politicians have an interest in catering. This, together with the fact that women can serve as politicians themselves, ensures that their socio-economic rights are more likely to be taken into account and given effect by the elected branches of government than those of children.

The same is true of older persons. Indeed, bearing in mind the 'ageing' population of both developing and developed countries,⁶⁰ the political influence of older persons is likely to increase proportionately in relation to that of other social groups in the future.⁶¹ Older persons can also rely on the increased awareness of, and proscription of, age discrimination in seeking to advance their rights.⁶² Unfortunately for children, the relatively recent interest in ageism, as well as the activities of law and policy-makers, academics and other actors on this issue, have been primarily motivated by concern about treatment of an ageing population in the global North (and particularly Europe).⁶³ There has thus far only been extremely limited

Children are likely to suffer more than adults in terms of their health in the short term, while in the long term their education will be impacted due to their homelessness resulting in reduced access to educational institutions and programmes.

Finally, children are also more acutely affected than adults by violations of their right to education. While there can be no doubt that the interruption of an adult's right to education may impact detrimentally on their future in terms of, for example, employability, it is probable that the interruption of a child's education will have more serious consequences. The nature of education that the child is likely to be receiving (generally primary or basic) is more fundamental than that generally undertaken by an adult. Amongst other things, the failure to ensure that a child benefits from education will impact on her developmental needs, diverse evolving capacities and her acquisition of life-skills to a much greater extent than it would on an adult who has already received the benefit of basic education. In the long term, her opportunities for employment will also suffer.⁵⁵

While the nature of the socio-economic rights violations experienced by children and other socio-economically disadvantaged groups may be similar, it is important to bear in mind that children face different challenges in terms of the vindication of their socio-economic rights than do many other vulnerable groups. It is not that children are necessarily more vulnerable than all other social groups but that they are *differently* vulnerable.

Children and women are often spoken about in the same breath.⁵⁶ Indeed, Minow has argued that 'children's rights owe some portion of their origins to struggles for women's rights, and the conceptual and practical problems raised by children's rights help to illuminate obstacles encountered by women's rights as well'.⁵⁷ However, concern has been expressed that the emphasis on the social linkage between women and children in relation to child-bearing and childcare, as well as the conglomeration of women and children into one group for consideration in the context of rights, potentially pose obstacles to the emergence and recognition of the rights of both groups.⁵⁸ Nussbaum's observation that women's individual

⁵⁵ For a discussion of how education (in particular, literacy) impacts upon people's other 'capabilities' (some of which correspond to the ability to exercise particular civil and political and socio-economic rights), see M. Nussbaum, 'Women's Education: A Global Challenge' (2004) 29 *Signs* 325, 332-35. While Nussbaum focuses primarily on education for women, many of her comments apply to education of members of both sexes.

⁵⁶ For a comparison of the characteristics of social status of women and children as groups, see A. Oakley, 'Women and Children First and Last: Parallels and Differences Between Women's and Children's Studies' in B. Mayall (ed.), *Children's Childhoods: Observed and Experienced* (London, Falmer Press, 1994) 13, 14-19.

⁵⁷ M. Minow, 'Rights for the Next Generation: A Feminist Approach to Children's Rights' (1986) 9 *Harvard Women's Law Journal* 1, 3.

⁵⁸ See, eg the report of the discussion between proponents of the Committee on the Elimination of All Forms of Discrimination Against Women and the UN Committee on the

Rights of the Child (ComRC) at two meetings co-hosted by the International League for Human Rights and UNICEF in March 1996 set out in C. Price Cohen, 'The United Nations Convention on the Rights of the Child: A Feminist Landmark' (1997) 3(29) *William and Mary Journal of Women and the Law* 27, 68-71. For an argument in favour of considering women's rights and children's rights together, see J. Todres, 'Women's Rights and Children's Rights: A Partnership with Benefits for Both' (2004) 10 *Cardozo Women's Law Journal* 603.

⁵⁹ M. Nussbaum, *Sex and Social Justice* (New York/Oxford, Oxford University Press, 1999) 163.

⁶⁰ For more on the 'ageing' global population, see K. Kinsella and W. He, *US Census Bureau, An Aging World: 2008* (Washington, DC, US Government Printing Office, 2009).

⁶¹ For more on this point see Chapter 2.

⁶² For a general discussion of the key issues surrounding the treatment of age as a ground of prohibited discrimination, see N. Bamforth, M. Malik and C. O'Connell, *Discrimination Law, Theory and Context: Text and Materials* (London, Sweet & Maxwell, 2008) 1102-19.

⁶³ See Freedman, above n 17, 23-24.

consideration of differential treatment of children as a discrimination issue in terms of either domestic or international human rights law.⁶⁴

People living with disabilities are another vulnerable group. The disabled share many of the problems experienced by children, including historical 'invisibility' as subjects of international human rights law, infantilisation, and subjection to legal and non-legal paternalistic measures.⁶⁵ Unlike poor children, however, they constitute a cross-class group (although there is evidence that people living with disabilities are more likely to live in poverty than others).⁶⁶ People living with disability are not uniformly disenfranchised and barred from running for public office. Moreover, in theory at least, they may generate more sympathy than children, particularly socio-economically disadvantaged children, who may be perceived negatively by other enfranchised societal groups.⁶⁷ If persons living with disabilities are more 'sympathetic' figures than poor children, then there is arguably more likely to be a lobby group or constituency prepared to campaign or vote for measures intended to vindicate their rights than would exist for socio-economically disadvantaged children. (Such an assertion is belied, however, by a growing awareness of the incidence of disablist 'hate-crime' in some jurisdictions,⁶⁸ as well as the widespread discrimination faced by people living with disabilities globally). Furthermore, while discrimination on the grounds of childhood status is still regarded as widely permissible (and, indeed, necessary in some circumstances), discrimination on the grounds of disability has come to be generally recognised as unacceptable, on paper at least. This is testified to by the recent adoption and relatively rapid entry into force of the International Convention on the Rights of Persons with Disabilities, which strongly prohibits discrimination on the grounds of

⁶⁴ One of the few works in this area is by Breen, above n 38, which, amongst other things, contains a discussion of age-based discrimination in relation to children and the way in which numerous jurisdictions have proscribed age-based discrimination in relation to older persons but not children. For more recent examples of domestic prohibitions on discrimination against children on the basis of age, see Child Rights Information Network, *Global Report on Laws Protecting Children from Age Discrimination* (London, CRIN, 2009), available at www.crin.org/docs/Global_age_discrim_final.pdf.

⁶⁵ For more on the traditional invisibility of people with disabilities under international human rights law and more broadly, see G Quinn *et al*, *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (New York/Geneva, OHCHR, 2002).

⁶⁶ See, eg the discussion of the interrelationship or 'vicious circle' between poverty and disability in R Yeo, *Disability, Poverty and the New Development Agenda* (DfID/Disability Knowledge and Research Programme, 2003), available at www.healthlink.org.uk/projects/disability/poverty_new-development.html.

⁶⁷ See Chapter 2 for more on negative societal perceptions of children.

⁶⁸ See, eg in a UK context, Crime Prosecution Service, *Hate Crime Report 2008-2009* (London CPS, 2010), which showed prosecutions for disablist hate crime increasing from 183 in 2007-08 to 393 in 2008-09.

disability.⁶⁹ (Notably, while the CRC is the most ratified of all UN human rights treaties, it does not explicitly prohibit discrimination on the basis of the status of childhood.)

Prisoners are also differently situated to children in terms of having their socio-economic rights guaranteed. Although they are a far less 'sympathy-generating' group than children, it is easier to convince society of the government's responsibility towards them, even to the extent of vindicating their socio-economic rights. This is due to the fact that when the state takes away an individual's liberty and thus renders him unable to meet his socio-economic needs himself, the state's responsibility for ensuring those needs are satisfied is clear. In contrast, the extent of state responsibility to address poverty generally is the subject of much greater controversy. This is particularly so in light of moves in many jurisdictions in recent years to restructure the delivery of welfare and other socio-economic rights-related goods and services along neo-liberal lines, as well as the widespread 'stigmatisation' of poverty and the poor by politicians and the media.⁷⁰ In addition, in a number of jurisdictions, prisoners at different stages of incarceration have the right to vote.⁷¹ They can thus have direct, albeit limited, influence on democratic decision-making processes.⁷²

In considering the position of children's enjoyment of their socio-economic rights vis-à-vis such enjoyment by other groups, it becomes clear that while children are in a unique position, a number of the factors that contribute to their societal, political and economic exclusion also apply to non-children to varying extents, resulting in an overlap in the nature of the marginalisation and exclusion experienced by children and other vulnerable social groups. Thus, while premised on the specific situation of children, elements of the argumentation in this work will apply to the position of other non-child groups to some extent. This will be particularly true of certain categories

⁶⁹ See, eg International Convention on the Rights of Persons with Disabilities, Art 4, Article 3(b) on 'General Principles', Art 7 on 'Children with Disabilities' and Arts 24 and 25 on 'Education' and 'Health', respectively, of the Convention are of particular importance to the enjoyment of socio-economic rights by children living with disabilities.

⁷⁰ These observations are made by Margot Young in relation to Canada specifically but they are true of a large number of jurisdictions (M Young, 'Introduction' in M Young *et al* (eds), *Poverty, Rights, Social Citizenship, and Legal Activism* (Toronto, UBC Press, 2007) 1.

⁷¹ For further discussion of prisoner voting and an analysis of specific practices in a wide range of countries, see B Rottinghaus and G Baldwin, 'Voting Behind Bars: Explaining Variation in International Enfranchisement Practices' (2007) *26 Electoral Studies* 688.

⁷² For instance, the right of all prisoners to vote in Canada was established by the Supreme Court in *Sauvé v Canada* [2002] 3 SCR 519. Media reports on the 2006 election suggested that prisoners were voting in large numbers in an effort to prevent the election of the Conservative Party which favoured the reduction of rights and benefits for prisoners, including the right to vote. CTV.ca News Staff, 'Prisoners exercise their right to vote', available at www.ctv.ca/servlet/ArticleNewsStory/CTVNews/2006/11/12/eln_prisoners_vote_060111/20061113?_name=election2006&no_3ds.

'intersectional' discrimination.⁷⁹ Indeed, violations of the child's socio-economic rights are often the result of deeply-rooted systemic inequality.⁸⁰ Furthermore, children whose socio-economic rights have been violated may become victims of discrimination on that ground also (for instance, due to stigmatic attitudes about street children or persons living with mental illness or HIV/AIDS).

SOCIO-ECONOMIC RIGHTS: A QUESTION OF DEFINITION AND THE CHALLENGE OF 'NATURE'

Having discussed one key focus of this work—children—it is necessary to address the second: socio-economic rights. By socio-economic rights, I mean those rights that deal with minimum conditions for welfare and well-being.⁸¹ For my purposes, 'socio-economic rights' include health rights, the rights to housing, food, water, education and an adequate standard of living, as well as social security rights and the right to work.

There is increasing academic and legal support for the view that socio-economic rights (including those of children) impose obligations on non-state actors of both an enforceable and non-enforceable nature. Indeed, some of the constitutional frameworks considered in this work make provision for the direct and/or indirect horizontal application of children's socio-economic rights against non-state actors.⁸² The analysis in this work, however, will focus only on the judicial enforcement of socio-economic rights against the state.

While socio-economic rights are frequently provided for at the domestic level in legislation or as part of the common law, the primary focus of this work is socio-economic protections that are either (a) explicitly set out in

of non-citizens,⁷³ such as illegal migrants and irregular migrants. Like children, non-citizens are generally disenfranchised, resulting in their being excluded from participating in, or influencing, democratic law and policy-making processes.⁷⁴ In addition, specific groups of non-citizens, including economic migrants and asylum seekers, are frequently the subject of societal hostility or discrimination, often to a greater extent than children. Admittedly, as adults, they are arguably more capable of fending for their own socio-economic needs and, thus, are less likely to suffer from violations of their socio-economic rights. Furthermore, while they are arguably even less likely to be able to rely on other voting members of society to forward their interests than children are,⁷⁵ they are less likely to be excluded from participation in institutions such as trade unions or social movements which can operate to exert indirect effect on democratic decision-making instructions.⁷⁶ In practice, non-citizens in a number of jurisdictions make up or are represented by lobby groups whose activities impact on political decision-making relating to their rights.⁷⁷

A final crucial point to note is that children who form part of other social minority groups are likely to be more vulnerable to violations of their socio-economic rights than children who do not. This is due to their suffering from both the vulnerabilities and disadvantages of the status of childhood and those associated with disability, gender, detention, non-citizenship, status as an indigenous person, mental illness, etc. For instance, it is more probable that children living with disabilities will suffer socio-economic rights violations than those living without—a fact that is due to the particular discrimination and exclusion experienced by such children—as well as the inextricable link between poverty and disability.⁷⁸ It is arguable that children who suffer such multiple, multidimensional disadvantages are the victims both of multiple discrimination and of what Crenshaw has termed

⁷³ David Weissbrodt states that "Non-citizens include refugees, asylum seekers, and immigrants who have entered a new country. There are also "non-immigrants" [who] include, for example foreign workers who have temporary permission to remain, foreign students, business visitors, tourists and unsuccessful asylum seekers as well as persons who have been subject to trafficking, or who otherwise lack the requisite documentation to remain" (citations omitted) (D Weissbrodt, *The Human Rights of Non-citizens* (New York, Oxford University Press, 2008) 2).

⁷⁴ Non-citizens are not always disenfranchised. For international examples of non-citizens being permitted to vote in local and national elections, see Immigrant Voting Project, 'Non-citizen Voting Around the World', available at www.immigrantvoting.org/material-world.html.

⁷⁵ For more on the representation of children by other, enfranchised members of society, see Chapter 2.

⁷⁶ For further consideration of the respective situations of children and non-citizens, see Chapter 3.

⁷⁷ See, eg the immigrant and non-citizen lobby groups in the United States that campaign on immigration reform.

⁷⁸ See Innocenti Research Centre, *Promoting the Rights of Children with Disabilities* (Florence, UNICEF, 2007) Editorial and ch 5.

⁷⁹ See K Crenshaw, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139. Crenshaw does not deal with the position of children specifically but her argumentation applies to a range of groups suffering multidimensional discrimination.

⁸⁰ See, eg *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SA 721 (CC) (TAC), in which only those HIV-infected mothers in a few designated pilot sites could receive anti-retroviral treatment to prevent mother-to-child transmission of the HIV/AIDS virus, while mothers in other public hospitals could not. Women and new-born infants using public hospitals were likely to be members of groups previously discriminated against under the apartheid regime and were disadvantaged by the persistent inequalities (for instance, on the grounds of race) in South African society. This case is discussed further in Chapters 4 and 6.

⁸¹ P Veerman, *The Rights of the Child and the Changing Image of Childhood* (Dordrecht, Martinus Nijhoff Publishers, 1992) 25.

⁸² See, eg Irish Constitution, art 42.1, which provides that parents are obliged 'to provide, according to their means, for the religious and moral, intellectual physical and social education of their children'; see also South African Constitution, art 8, which makes provision for direct application of rights set out in the Bill of Rights, including, potentially, children's socio-economic rights.

the constitution; (b) implied from the constitution; or (c) form part of the constitutional framework by means of the domestic incorporation of international socio-economic rights standards through affording constitutional rank to international human rights protections (thereby, in effect according them equal status or legitimacy to the constitutional text).⁸³ The one exception is the rights at issue in the US state education cases, which are set out in, or derived from, state constitutions. For simplicity's sake, all such rights will be referred to as 'constitutional rights'. The key reason for my interest in constitutional socio-economic rights is that legislation, the common law and the rights provided thereunder are ultimately subordinate to the constitution.⁸⁴ Judicial decisions involving such non-constitutional socio-economic rights may be relatively easily overruled or reversed by the enactment of legislation. Therefore, they do not pose the same issues in relation to counter-majoritarianism and the separation of powers that judicial enforcement of constitutional socio-economic rights does.

Before moving on to discuss the legal legitimacy and efficacy of the courts' enforcement of children's socio-economic rights, it is necessary to deal (very briefly) with some of the objections that have traditionally been posed to the courts becoming involved in the adjudication of socio-economic rights generally. Chapters 3 and 4 will address the objections allegedly posed by the separation of powers doctrine and the counter-majoritarian objection, while concerns about the institutional capacity of the courts to enforce children's rights will be outlined and countered in Chapter 5. This section, however, addresses objections to judicial enforcement of socio-economic rights based on the characteristics that commentators opposed to such activity have associated with those rights.⁸⁵

Alston and Quinn point out that these 'characterisations' of socio-economic rights are generally put forward in the context of comparisons between civil and political rights, on the one hand, and economic, social and cultural rights, on the other.⁸⁶ The essence of such claims is that the

nature of socio-economic rights renders them an inappropriate subject for judicial review. The rebuttals set out below demonstrate that the presumptions are based on an incorrect view of the nature of both socio-economic and civil and political rights. These 'objections' to socio-economic rights enforcement, as well as related arguments concerning the alleged institutional capacity of the courts, are founded less on a 'true' understanding of the nature of socio-economic rights than on opposition to such rights due to the implications that effective implementation of them will have for current resource and power distributions.

One misguided view of socio-economic rights, which underpins the hostility of many of those who object to the constitutionalisation and the judicial enforcement of socio-economic rights, is that, in contrast to civil and political rights, such rights are inherently 'ideological' in terms of necessitating 'an unacceptable degree of intervention in the domestic affairs of states and to be inherently incompatible with a free market economy'.⁸⁷ The association of socio-economic rights with socialist or communist ideology was at least partially attributable to the historical and political context of the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR). During negotiations, the Soviet and Latin American delegations expressed support for the inclusion and prioritisation of socio-economic rights in the International Bill of Rights. This has traditionally been regarded as having taken place in the face of Western opposition to the inclusion of socio-economic rights, resulting in the ultimate adoption of two separate Covenants.⁸⁸ Most notably, the growing inclusion of justiciable socio-economic rights in the constitutions of states with a variety of different economic systems, together with the widespread ratification of the ICESCR and other international instruments providing for such rights by countries working on the basis of a free market economic model, have effectively rendered claims about the ideological nature of socio-economic rights moot. Notably, the UN Committee on Economic, Social and Cultural Rights (ComESCR) has stated that the Covenant is neutral in terms of political and economic systems and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of, a socialist or a capitalist system, or a mixed, centrally planned or *laissez-faire* economy, or upon any other particular approach.⁸⁹

Furthermore, all rights may be ideological in nature when considered in terms of their practical application and implementation. The right to life

⁸⁷ Alston and Quinn, above n 86, 160.

⁸⁸ For a contrasting view, see D. Whelan and J. Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight' (2007) 29(4) *Human Rights Quarterly* 908. Even Whelan and Donnelly, however, agree that the West was resistant to socio-economic rights giving rise to justiciable claims subject to quasi-judicial international monitoring.

⁸⁹ ComESCR, General Comment No 3 on the Nature of States Parties' Obligations, UN Doc E/1991/23 (1990) para 8.

⁸³ This is a feature of numerous Latin American constitutions in particular. See, eg Colombian Constitution, art 44, which provides that '[children] will also enjoy other rights upheld in the Constitution, the laws, and international treaties ratified by Colombia'. For a discussion of the different ways in which international human rights instruments form part of the constitutional frameworks of (Latin American) civil law jurisdictions, see E. García Méndez, 'A Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Civil Law Countries' in UNICEF (ed), *Protecting the World's Children* (New York, Cambridge University Press, 2007) 100, 117–19.

⁸⁴ The US state constitutions are subordinate to the Federal Constitution and federal law in terms of art 6, clause 2 of that instrument.

⁸⁵ Elements of this part of the chapter have previously appeared in an abbreviated form in A. Nolan, M. Langford and Bruce Porter, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, NYU Centre for Human Rights and Global Justice Working Paper Series, No. 15 of 2007.

⁸⁶ P. Alston and G. Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, 159.

(a classic 'civil and political' right) has been employed by numerous groups forwarding different ideological agendas in relation to divisive issues such as abortion and euthanasia. Indeed, it is arguable that the right to take part in the conduct of public affairs of one's country directly or through freely chosen representatives, and the right to vote, are as 'inherently' ideological as any 'socialist' socio-economic right, founded as they are on the presumption that liberal democracy based on universal suffrage is the optimum form of government. The right to property has been employed to pursue a range of ideological purposes, ranging from the pursuit of indigenous people's rights to the facilitation of a liberal model of economic exchange.⁹⁰ A child-specific 'ideological' example of civil and political rights is the employment of the right to freedom from torture and inhuman and degrading treatment to combat the practice of female genital mutilation.

Flawed presumptions about socio-economic rights and their civil and political counterparts include (i) the negative/positive nature of such rights in terms of the duties they impose on states; (ii) the notion that socio-economic rights may not be practicable where resources are scarce, while civil and political rights are cost-free and therefore always practicable or realisable; and (iii) the belief that the obligations imposed by socio-economic rights are too vague and indeterminate to be enforceable or justiciable—in contrast to the more precise civil and political rights. I will only discuss these arguments briefly as they have been (in my view) effectively repudiated by numerous commentators. In practice, debate has now largely moved beyond whether socio-economic rights are justiciable in principle to more nuanced judgments and discussions over the appropriate principles and boundaries to be applied in practice.⁹¹ This has been demonstrated in the domestic jurisprudence of numerous jurisdictions, as well as in the discussions that surrounded the formulation and adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.⁹² It is, however, necessary to refer to these allegations about the 'nature'

of socio-economic rights, even if only to refute them, as they continue to influence judicial perceptions of, and approaches to, socio-economic rights, including those of children.

The traditional identification of civil and political rights as negative (and therefore 'true' rights) on the one hand, and social and economic rights as positive (and therefore not true rights) on the other, is based on the classical liberal conception of rights as 'freedom rights'; that is, the view that rights operate to protect autonomous individuals from the interference of others and the state, and that they are correlated with exclusively negative duties.⁹³ According to this conception of rights, the state is merely required to refrain from interfering in the sphere of individual rights and freedoms and is obliged to provide a framework within which the individual can enjoy maximum freedom from state action.⁹⁴ The state is under no legal obligation to take positive action in support of individuals regarding their social and economic situation.

This liberal conception of 'rights-holders' as rational and autonomous, and of rights as negative freedoms, poses a particular problem when it comes to considering children's socio-economic rights. First, the incapacity and lack of autonomy on the part of children (or at least some children) seems to preclude them from qualifying as rights-bearers, resulting in their being perceived as 'becomings', rather than 'beings' under liberal theory.⁹⁵ In addition, the notion of rights as imposing exclusively negative obligations significantly reduces their usefulness as tools to address many of the socio-economic rights violations suffered by children. This is due to such violations being caused by inaction, rather than action, on the part of state.⁹⁶

The idea of socio-economic rights (or, indeed, moral welfare rights)⁹⁷ as objectionable on the basis that 'true' rights only impose negative obligations

⁹³ In ch 1 of *On Liberty*, John Stuart Mill described rights as immunities from governmental interference (see JS Mill, *On Liberty*, G. Himmelfarb (ed) (London, Penguin Books, 1974) 6. Libertarians such as Robert Nozick and other thinkers of the 'New Right' are contemporary adherents to this notion of rights as exclusively negative freedoms.

⁹⁴ B. De Villiers, 'Social and Economic Rights' in D. Van Wyk et al. (eds), *Rights and Constitutionalism: The New South African Legal Order* (Oxford, Clarendon Press, 1996) 599, 602. For a critique of the liberal notion of autonomy and a proposal of a more substantive form of autonomy, see S. Woolman and D. Davis, 'The Last Laugh: Du Plessis v De Klerk, Classical Liberalism and the Applications of Fundamental Rights under the Interim and Final Constitutions' (1996) 12 *South African Journal on Human Rights* 36.

⁹⁵ For more on liberal theory's approach to children, see B. Arneil, 'Becoming Versus Being: A Critical Analysis of the Child in Liberal Theory' in D. Archard and C. Macleod (eds), *The Moral and Political Status of Children* (Oxford, Oxford University Press, 2002) 70, 71–75.

⁹⁶ For a discussion of state action and inaction, see Chapter 4.

⁹⁷ It should be noted that here I am using the terms 'welfare rights' and 'socio-economic rights' as synonymous. The socio-economic rights under consideration in this book are 'legal' rights, while 'welfare rights' is a terminology generally employed in the discussion of 'moral' rights. However, the arguments dealt with in this section apply whether the rights are

⁹⁰ For the former use, see, eg Arts 11 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295, 13 September 2007. For the latter, see, eg the use of the right to property under the ECHR by companies in M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Provisions* (Oxford, Oxford University Press, 2006).

⁹¹ M. Langford, 'Background Assessment and Strategy Paper', presented at the ESCR-Net International Strategy Conference, Nairobi, Kenya, 1–4 December 2008, 1. For general discussions of the key issues arising in relation to the justiciability of socio-economic rights, as well as an account of comparative case law, see Nolan et al., above n 85 and C. Courtis, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva, ICJ, 2008).

⁹² For a synopsis of this process see C. Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8(4) *Human Rights Law Review* 617. See also the session reports of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, available at www2.ohchr.org/english/issues/escr/escrIntro.htm.

has been challenged most effectively by showing that the claim that 'classical' civil and political rights give rise to exclusively negative duties and do not require action on the part of the government is flawed.⁹⁸ This has been demonstrated by commentators both in the context of legal socio-economic rights and in discussions of moral welfare rights.⁹⁹ All human rights, including those of children, require a combination of negative and positive conduct from states and varying levels of resources.¹⁰⁰ For example, a child's right to bodily integrity is unlikely to be realised unless the state takes steps to provide an effective police force. Furthermore, it is clear that socio-economic rights do not merely impose positive obligations. Where a child

expressed as moral rights or legal rights. For more on the relationship between moral welfare rights and socio-economic rights, see Chapter 3 n. 53.

⁹⁸ For a useful discussion of how non-socio-economic/non-welfare rights require governmental action, see S Holmes and C Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York, WW Norton and Co, 1999). For a discussion of how the negative/positive distinction does not operate in relation to political rights, see J Waldron, 'Participation: The Right of Rights' (1998) 98 *Proceedings of the Aristotelian Society* 307, 308–11.

⁹⁹ Commentators who have dealt with this issue in the context of legal socio-economic rights include G Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in P Alston and K Tomasevski (eds), *The Right to Food* (Dordrecht, Martinus Nijhoff Publishers, 1984); M Scheinin, 'Economic and Social Rights as Legal Rights' in A Eide *et al* (eds), *Economic, Social and Cultural Rights: A Textbook*, 2nd revised edn (The Hague, Kluwer Law International, 2001) 29. Those who have considered it in relation to moral rights or general theories of rights include W Sadurski, 'Economic Rights and Basic Needs' in C Sampford and D Gailigan (eds), *Law, Rights and the Welfare State* (1986) 49, 54–58; R Plant, 'Needs, Agency and Rights' in C Sampford and D Gailigan (eds), *Law, Rights and the Welfare State* (London, Croom Helm, 1986) 22 and H Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton, NJ, Princeton University Press, 1980) ch. 2.

¹⁰⁰ S Liebenberg, 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 *South African Journal on Human Rights* 359, 362. Cecilia Fabre has challenged the view of Shue and others that all rights impose both negative and positive duties. (For more on these claims, see C Fabre, *Social Rights under the Constitution: Government and the Decent Life* (Oxford, Oxford University Press, 2000). She argues that there are indeed some negative rights that only give rise to negative duties of non-interference and some positive rights that give rise solely to positive duties to help. Rejecting as inaccurate the traditional conflation of the difference between civil and political rights and socio-economic rights on the one hand, and the difference between negative and positive rights on the other, she argues that rights giving rise to solely positive or negative duties cannot be classified as either exclusively socio-economic or civil and political. She argues that Shue's thesis does not account for the conceptual possibility of talking of more specific rights into which general rights can be broken down, and removes the possibility of describing certain demands as being protected by rights as opposed to merely duties on the part of others (ibid 43–53). Fabre has a point. However, legal rights are normally phrased quite generally for practical reasons. Enshrining every demand in the form of a right would be impracticable in a constitution or legislation due to length issues. Thus, I think it is perhaps more useful to regard such generally-phrased rights as imposing multiple duties to meet different demands which fall within that general right. This way, each demand is protected by the right, although the duty imposed by the right may vary in relation to the demand that is being asserted.

enjoys a socio-economic right, the state is prohibited from acting in a way that would interfere with or impair the individual's enjoyment of that right. For example, the introduction of school fees by the state resulting in some children no longer being able to attend school will constitute a violation of the right to education of those children.

The combination of duties imposed by rights has been expressly recognised in the statements of the international treaty-monitoring bodies (particularly the ComESCR), the case law of regional tribunals,¹⁰¹ and in national constitutional jurisprudence, where domestic courts have imposed positive duties on the state on the basis of children's civil and political rights, and children's socio-economic rights have been held to give rise to negative ones. The different layers of obligations are commonly expressed as a tripartite typology of obligations: the obligations to respect, protect and fulfil.¹⁰² The obligation to respect is generally negative, the obligations to protect and fulfil positive. The obligation to respect requires states to refrain from interfering with the enjoyment of socio-economic and cultural rights.¹⁰³ The duty to respect is described as 'generally' (as opposed to 'completely') negative because state efforts to meet this obligation may involve positive action on the part of the state or its agents, such as amendment, preparation or passing of legislation, reform of institutional practices, the introduction of sanctions to secure compliance with forbearance and abstinence from action, and the budgeting of necessary funds. The obligation to protect requires states to take measures that prevent third parties from interfering with the enjoyment of such rights. The obligation to fulfil incorporates the duties to promote, facilitate and provide, and will involve states taking steps to facilitate individuals and communities in enjoying the right. When, for reasons beyond their control, an individual or group is unable to realise the right themselves by the means at their disposal, the duty to fulfil will entail the state providing that specific right.¹⁰⁴ Where relevant, this typology (the one most commonly used by international treaty-monitoring bodies in analysing the obligations imposed by socio-economic

¹⁰¹ See generally A Nolan, 'Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9(2) *Human Rights Law Review* 225.

¹⁰² The evolution of the tripartite typology is well-rehearsed and will not be considered further here. For more on the evolution of, and variations on, this typology, see Nolan, above n 101; Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 *Human Rights Law Review* 81, 84–87; and M Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford, Oxford University Press, 1995) 109–14.

¹⁰³ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22–26 January 1997, published in (1998) 20 *Human Rights Quarterly* 691 para 6.

¹⁰⁴ Paraphrased from ComESCR, General Comment No 13 on the Right to Education (art 13), UN Doc E/C.12/1999/10 (1999) para 47.

rights)¹⁰⁵ will be employed in this book when analysing the different obligations imposed by the socio-economic rights at issue.¹⁰⁶

Thus, while socio-economic rights require relatively greater state action for their realisation than do civil and political rights, this difference separates the two sets of rights more in terms of degree than kind.¹⁰⁷ Both kinds of rights engender positive and negative obligations on the state; both involve a combination of state action and state abstention.

Another frequently-made objection to the courts dealing with socio-economic rights is that socio-economic rights differ from civil and political rights on the grounds that the former require the use of resources by the state, while the latter do not. On this account, as civil and political rights are resource-independent, they are always immediately practicable or realisable.¹⁰⁸ In contrast, socio-economic rights are said to be inevitably resource dependent and, therefore, cannot be satisfied where there is a scarcity of resources. This has led some commentators to describe socio-economic rights as 'relative', in contrast to 'absolute' civil and political rights.¹⁰⁹

Yet, the claim that one set of rights is costless while the other always involves the expenditure of resources is unsustainable. Whether or not a right is cost-free will depend on the obligation in question, rather than the classification of the right imposing that obligation as either civil and political or socio-economic in nature. The provision and maintenance of the infrastructure crucial to the realisation of children's civil and political rights, such as the right to a fair trial, will not be costless. Sunstein observes that even the classic individual liberal right to private property cannot exist without a governmental apparatus, ready and able to secure people's holding

¹⁰⁵ For examples of the Committee on Economic, Social and Cultural Rights using the typology in analysing the obligations imposed by socio-economic rights, see ComESCR, *ibid* para 46; ComESCR, General Comment No 15 on the Right to Water (arts 11 and 12), UN Doc E/C.12/2002/11 (2003) para 20; ComESCR, General Comment No 14 on the Right to the Highest Attainable Standard of Health (art 12), UN Doc E/C.12/2000/4 (2000) para 33; and ComESCR, General Comment No 12 on the Right to Adequate Food (art 11), UN Doc E/C.12/1999/5 (1999) para 15. For the Committee on the Rights of the Child's use of this tripartite typology of obligations, see ComIRC, General Comment No 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/4 (2003) para 3. This framework may also be employed in relation to civil and political rights. For a review of the key literature in this area, see A Ronga and M Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, New York University Public Law and Legal Theory Working Paper 20/2008, n 43.

¹⁰⁶ For more on what these different obligations entail, see the ComESCR, General Comments mentioned above and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, above n 103.

¹⁰⁷ Alston and Quinn, above n 86, 183–84.

¹⁰⁸ See C Fried, *Right and Wrong* (Cambridge, MA, Harvard University Press, 1978) 110.

¹⁰⁹ See, eg M Bossuyt, *L'interdiction de la discrimination dans le droit international des droits de l'homme* (Brussels, Fata Morgana, 1976) 186–87.

as such.¹¹⁰ On the other hand, the state's duty to respect socio-economic rights may cost nothing at all. The claim that civil and political rights do not entail expenditure is arguably at least partially rooted in the fact that the societal structures necessary to ensure such rights are already in place in developed countries, rather than on whether or not such societal structures required resource allocation and expenditure in the first place. Providing the legal, policy, administrative and physical infrastructure necessary to give effect to the child's right to freedom of bodily integrity from the ground up will certainly not be costless.

Leaving aside the 'cost' issue for a moment, it should be noted that constitutional rights are binding on all branches of government and should necessarily be taken into account by the legislature and the executive when it comes to determining budgetary allocations and expenditures. As such, all constitutional rights can be said to have 'budgetary' implications in the sense that where such rights exist, budgetary decisions should not contravene them.

The belief that socio-economic rights inevitably require resources has led to doubts about their potential to be fully realised. Sadurski points out that, even where a right cannot be realised in a particular society at a given time due to a shortage of resources, this does not necessarily mean that such a right fails to meet the conditions of rights *sensu stricto*.¹¹¹ Thus, even if one accepts that socio-economic rights are not, in fact, realisable in a specific society at a given time, this does not mean that they are merely aspirational goals. Not all civil and political rights are immediately realisable in all societies, yet their status as rights generally goes unquestioned. This is due to the greater societal and political acceptance or perception of the 'fundamental' status of these rights, rather than resulting from their nature as such. Indeed, pointing to existing distributions to justify the 'reality' of rights is highly dubious.

While neither category of right either is always cost-free or unfailingly requires the expenditure of resources, states' efforts to vindicate socio-economic rights are often more likely to entail the expenditure of resources than efforts to assure civil and political rights. This is due to the more

¹¹⁰ C Sunstein, *Social and Economic Rights: Lessons from South Africa*, Public Law and Legal Theory Working Paper No 12 (2001) 2. See also C Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (Cambridge, MA, Basic Books, 2004) 198–99. For more on 'resource-dependent' non-socio-economic or non-welfare rights, see *ibid* at 199–200; E Michelman, 'The Constitution, Social Rights and Liberal Political Justification' (2002) 1 *International Journal of Constitutional Law* 13; Holmes and Sunstein, above n 98, 35–83, 114–17; M Tushnet, 'Civil Rights and Social Rights: The Future of the Reconstruction Amendments' (1992) 25 *Loyola of Los Angeles Law Review* 1207, esp 1214.

¹¹¹ Sadurski, above n 99, 63. For a contrasting view, see M Cranston, *What are Human Rights?* (New York, Tappinger Publish Co, 1973) 66–7, who argues that 'where it is impossible for a thing to be done, it is absurd to claim it as a right' (at 66).

directly resource-dependent nature of socio-economic rights, as well as the fact that the mechanisms necessary to ensure civil and political rights are more likely to already be in place. Therefore, like the assertion about the alleged negative/positive dichotomy, this difference between socio-economic rights and civil and political rights is also one of degree, rather than of nature.

The final claim frequently proffered about socio-economic rights is that they are 'vague', 'unenforceable' and 'non-justiciable'. It is alleged that this contrasts with 'precise', 'enforceable' and 'justiciable' civil and political rights.

The different attitudes of domestic and regional courts to the justiciability of socio-economic rights (and other kinds of rights), as well as the diverse treatment of such rights under different legal systems, make it clear that it is incorrect to regard 'justiciability' or 'non-justiciability' as inherent to particular rights. In Scott and Macklem's words, justiciability is a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a particular time, as well as on its changing character and evolving capability.¹¹²

The claim that socio-economic rights are inherently so indeterminate as to be non-justiciable and incapable of enforcement by the courts is belied by the growing body of jurisprudence relating to such rights at the international, regional and national levels. Socio-economic rights have been litigated directly and indirectly before regional bodies,¹¹³ including the African Commission on Human Rights,¹¹⁴ the Inter-American regional human rights bodies,¹¹⁵ the European Committee of Social Rights¹¹⁶ and the European Court of Human Rights.¹¹⁷ Furthermore, domestic courts in numerous jurisdictions have accepted that certain socio-economic rights are

112. C. Scott and P. Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution' (1992) 141 *University of Pennsylvania Law Review* 1, 17.

113. For summaries of many of the key cases brought before these bodies, see A. Nolan *et al.*, *Loading Cases on Economic, Social and Cultural Rights: Summaries* (Geneva, Centre on Housing Rights and Evictions, 2009).

114. See, eg D. Chirwa, 'The African Regional System: The Promise of Recent Jurisprudence on Social Rights' in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, Cambridge University Press, 2008) 327.

115. See, eg M. Tinta, 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions' (2007) 29 *Human Rights Quarterly* 431.

116. See, eg U. Khaliq and R. Churchill, 'The European Committee of Social Rights' in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, Cambridge University Press, 2008) 428.

117. For more, see E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford, Hart Publishing, 2007) 49; E. Brems, 'Indirect Protection of Social Rights by the European Court of Human Rights' in D. Barak-Erez and A. Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Oxford, Hart Publishing, 2007) 135.

justiciable and enforceable by the courts.¹¹⁸ In light of this jurisprudence, it cannot be said that socio-economic rights are, by their very nature, incapable of being the subject of judicial determination or enforcement.

Liebenberg has pointed out that:

it is through recourse to the conventions of constitutional interpretation and their application to the facts of different cases that the specific content and scope of a right emerges with greater clarity ... The fact that the content of many socio-economic rights is less well-defined than civil and political rights is more a reflection of their exclusion from processes of adjudication than of their inherent nature.¹¹⁹

Indeed, as courts become more willing to adjudicate socio-economic rights issues, a more precise sense of both the substantive content and the qualification on those rights has emerged. This has been accompanied by detailed analyses of specific rights in the form of interpretive statements by UN treaty-monitoring bodies (General Comments/Recommendations) and the development of analytical frameworks by international human rights bodies (such as the tripartite typology of respect, protect and fulfil, discussed above) which operate to render the substantive content of socio-economic rights, and the duties imposed by them, more precise.

In addition, the claim that socio-economic rights are phrased so vaguely as to render them non-justiciable ignores the fact, first, that often civil and political rights, such as the rights to 'freedom of speech', 'human dignity' and 'privacy', are also often expressed in a vague, open-textured way and are far from self-defining. This is consistent with the desirability that human and constitutional rights should be capable of general application to a variety of individual circumstances and different contexts over time.¹²⁰ Secondly, some socio-economic rights and the duties imposed by them are precisely phrased. One example of this is Article 24 CRC, which specifies the duties imposed by that right in considerable detail. Amongst other things, the provision refers to the obligation of states to take measures '[t]o develop preventive health care, guidance for parents and family planning education and services' and to 'diminish infant and child mortality'. Another constitutional example of a detailed socio-economic right is article 196 of the Brazilian Constitution, which states that:

[h]ealth is the right of all persons and the duty of the State and is guaranteed by means of social and economic policies aimed at reducing the risk of illness and

118. For discussions of jurisdictions in which socio-economic rights have been deemed judicially enforceable, see Langford, above n 114; F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen/Oxford, Intersentia, 2006); R. Gargarella *et al.* (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot, Ashgate, 2006).

119. S. Liebenberg, 'Socio-Economic Rights' in M. Chaskalson *et al.* (eds), *Constitutional Law of South Africa* (Cape Town, Juta, 1996) paras 41-1, 41-11.

120. Nolan *et al.*, above n 85, 14.

other hazards and at universal and equal access to all actions and services for the promotion, protection and recovery of health.

This provision forms part of a detailed section on 'Health' which prescribes duties and other elements of the healthcare system in considerable detail.¹²¹

It is arguable that the question of whether a right is capable of judicial enforcement is not linked to the classification of that right as civil or political or socio-economic. Rather, it is dependent on the particular obligation imposed by that right which is at issue. For example, it is relatively easy for a court to determine that the state has failed to meet its obligation to respect and protect rights, as such activity fits in easily with the traditional judicial review function of evaluating state action against constitutional standards. However, the tertiary duty to 'fulfil' (ie to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights)¹²² is arguably a less appropriate subject of judicial review, requiring, as it does, not just a consideration of state action but also of state inaction.

This assertion will be dealt with further in Chapter 4 in the context of discussions of the separation of powers. At this point, it is sufficient to note that courts worldwide are gradually becoming more willing to take on the task of evaluating whether both state inaction and action amount to a violation of constitutional rights and obligations. Thus, the claim that the obligations imposed by socio-economic rights are always too vague and indeterminate to be enforceable or justiciable does not stand up to scrutiny.

CHILDREN'S SOCIO-ECONOMIC RIGHTS; THE ROLE OF INTERNATIONAL LAW

The socio-economic rights in many of the cases referred to in this book are expressed differently from those set out under international law. However, where relevant, they will be considered in light of international treaty provisions and the statements and rulings of international judicial and quasi-judicial bodies, such as the ComESCR and the UN Committee on the Rights of the Child (ComRC). Children's socio-economic rights have been enshrined in numerous international human rights instruments,¹²³ most

¹²¹ Constitution of Brazil, Title VIII, ch II, s II.

¹²² See para 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, above n 103.

¹²³ International instruments providing for children's socio-economic rights include the Convention on the Rights of Migrant Workers and Their Family Members, the Convention on the Rights of Persons with Disabilities, the Convention on the Elimination of All Forms of Discrimination Against Women and the Universal Declaration of Human Rights.

notably in the CRC and ICESCR.¹²⁴ Such rights have also been provided for under regional human rights systems, including those of the African Union, the Council of Europe and the Organisation of American States.¹²⁵

It is important to consider children's constitutional socio-economic rights in light of international law for a number of reasons. First, until recently, there was very little socio-economic rights case law at a national level in any jurisdiction.¹²⁶ Looking at how international bodies have dealt with international standards in this area provides a sense of the different approaches that might be adopted in relation to the interpretation and application of socio-economic rights by domestic courts. This is particularly true in jurisdictions such as the United States and Ireland, where the courts have generally been reluctant to engage with constitutional socio-economic rights, resulting in a lack of a proper analytical framework for such rights.

In addition, some of the jurisprudence referred to in this work comes from jurisdictions such as Colombia and Argentina in which international human rights law instruments form part of the constitutional hierarchy and have priority over domestic laws.¹²⁷ Thus, the approach adopted by international adjudicative and treaty-monitoring bodies to such international human rights standards will play a key role in fashioning the approach of domestic courts directly applying those standards. Other constitutional socio-economic rights have clearly been directly influenced by international law in their formulation. For instance, the socio-economic rights provisions of the South African Constitution (CRSA) are closely based on those enshrined in international human rights treaties and were specifically chosen because of their general acceptance in international human rights instruments and national constitutions.¹²⁸

¹²⁴ While the rights contained in the ICESCR apply to everyone, not just children, it does contain child-specific provisions. See Arts 10(3), 22(a) and 13.

¹²⁵ For a full list of children's socio-economic rights set out in regional human rights treaties, see M Langford and A Nolan, *Litigating Economic, Social and Cultural Rights: Legal Practitioners' Dossier* (Geneva, COHRE, 2006), ch 7.

¹²⁶ By this statement, I mean case law involving socio-economic rights specifically, as opposed to jurisprudence which forwarded socio-economic rights indirectly through the adjudication and application of civil and political rights.

¹²⁷ See Colombian Constitution, art 93 and Argentinian Constitution, s 75(22).

¹²⁸ P De Vos, 'Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution' (1997) 1 *South African Journal on Human Rights* 67, 73. For a list of international instruments from which the child-specific rights provisions of the Interim (and, ultimately, the Final) Constitution were derived, see A. Pantazis and T. Mosizatsana, 'Children's Rights in M Chaskalson et al (eds), *Constitutional Law of South Africa* (Cape Town, Juta, 1996) para 33-1. For more on the role played by international standards and particularly the CRC in the formulation of the child's rights provisions of South Africa's Interim Constitution of 1993, see M Chaskalson and R Spitz, *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* (Oxford, Hart Publishing, 2000) 364-66 (focussing on the Interim Constitution); H Corder and L Du Plessis, *Understanding South Africa's Transitional Bill of Rights* (Cape Town, Juta, 1994) 186. On the role of

Thirdly, international law imposes obligations on states in relation to children's socio-economic rights. All the jurisdictions referred to in this monograph, except the United States, have signed and ratified the CRC. Only South Africa and the United States have not ratified the ICESCR, although both have signed that instrument. All of those countries that have ratified the CRC and ICESCR are obliged to give effect to the relevant socio-economic rights obligations. Under Article 18 of the Vienna Convention on the Law of Treaties 1969,¹²⁹ South Africa and the United States are required to avoid retrogression in any of the areas covered by the ICESCR.¹³⁰

Finally, international law may have implications for the treatment of children's constitutional socio-economic rights by national courts. The South African Constitution provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation.¹³¹ However, in the event of Parliament not providing for the incorporation of an international treaty into domestic law upon ratification (as has been the case with the ICESCR), the courts will nonetheless be presented with an opportunity to invoke that treaty to interpret ambiguous statutes.¹³² With regard to constitutional interpretation, section 39(1) CRSA states that when interpreting the Bill of Rights, a court, tribunal or forum *must*, amongst other things, consider international law and *may* consider foreign law. The Constitutional Court made it clear in *S v Makwanyane* that international law in this context is to include non-binding as well as binding law.¹³³ The Constitutional Court has referred to international law in all

international instruments in the formulation of the non-child-specific socio-economic rights provisions under the CRSA, see Liebenberg, above n 119, para 41-4.

¹²⁹ Vienna Convention on the Law of Treaties, Art 18, states that even where a state party has tacitly signed a treaty, upon doing so it undertakes to 'refrain from acts which would defeat the object and purpose of a treaty'.

¹³⁰ For more on South Africa's obligations upon having signed the ICESCR, see Liebenberg, above n 100, 371-72.

¹³¹ CRSA s 231(4). The exception to this rule is a 'self-executing' provision of an agreement that has been approved by Parliament, which becomes law in South Africa unless it is inconsistent with the CRSA or an Act of Parliament (CRSA s 231(4)). For more on 'self-executing provisions' of the International Covenant on Economic, Social and Cultural Rights, see ComESCR, General Comment No 3, para 5, above n 89. In addition, customary international law is law in South Africa unless it is inconsistent with the Constitution or an Act of Parliament (CRSA s 232). Thus, those aspects of international treaties such as the CRC and ICESCR that may be regarded as forming part of customary international law also form part of South African law, regardless of whether or not they have been expressly incorporated into municipal law.

¹³² Liebenberg, above n 100, 372. CRSA s 233 states that: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

¹³³ *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC), para 35. The *Makwanyane* case actually involved s 35(1) of the Interim Constitution but the Constitutional

the cases that have come before it in relation to children's socio-economic rights. That said, the Constitutional Court has also occasionally been quite selective in terms of what it is willing to adopt from international law, stating that '[t]he relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary'.¹³⁴

Even in those jurisdictions such as Ireland, in which there is no such obligation to have regard to international law and where international law is not binding in the absence of domestic incorporation, international agreements may have a persuasive value. There have been numerous instances of courts using such instruments, including the CRC, as an aid to the interpretation of national rules.¹³⁵ The US Supreme Court, a body that is not celebrated for its receptivity to international and comparative law standards, has referred to the CRC as providing 'respected and significant confirmation'

Court held in the *Grootboom* case that the comments made in relation to that provision also applied to s 39 of the Final Constitution (*Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 26, 2001 (1) SA 46 (CC)).

¹³⁴ Per Yacoob J in *Grootboom*, para 63. An example of this is the Constitutional Court's rejection in *Grootboom*, TAC, above n 80, and *L. Mazibuko and others v City of Johannesburg and others* [2009] ZACC 28, of arguments based on the concept of the 'minimum core', reference to which is a recurring feature of the ComESCR's jurisprudence. (See para 10 of General Comment No 3, above n 89, for an explanation of the concept of the minimum core.) For a criticism of the Constitutional Court's approach to the minimum core, see D. Bilchitz, 'Giving Socio-economic Rights Teeth: The Minimum Core and Its Importance' (2002) 119(3) *South African Law Journal* 383. For a defence of the Court's approach, see M. Kende, 'The South African Constitutional Court's Construction of Socio-economic Rights: A Response to Grimes' (2004) 19 *Connecticut Journal of International Law* 617; and M. Wesson, 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20(2) *South African Journal on Human Rights* 284. This 'selective' approach towards the jurisprudence of the ComESCR may prove problematic when South Africa ratifies the ICESCR, as the Constitutional Court's jurisprudence with regard to the minimum core is not consistent with that of the ComESCR. There is debate as to the extent to which ratification would impact upon the Court's approach to socio-economic rights. For a convincing explanation of why socio-economic rights should be interpreted so as to give rise to minimum core obligations, as well as suggestions as to the circumstances in which the state should be required to realise such core obligations, see D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford, Oxford University Press, 2007) ch 6.

¹³⁵ Cases where the Irish courts have referred to the Convention on the Rights of the Child in their judgments to support their findings include *O'Donoghue v Minister for Health* [1996] 2 IR 20 (O'Hanlon J in the High Court referred to the rights of a mentally or physically disabled child under the CRC to a full and decent life, including education); *Sumrott v Minister for Education*, above n 19 (Hardiman J of the Supreme Court cited the definition of a 'child' set out in the CRC when dealing with the issue of the demarcation of a childhood); *M(TM) v D(M)* [1999] IESC 8 (where the Supreme Court, per Denham J, noted Art 12 CRC when discussing the right of the child to have her/his views taken into account in determining whether s/he should be returned to her/his mother under the Hague Convention on the Civil Aspects of International Child Abduction 1980).

for their own conclusions in the context of finding particular sentences for juvenile offenders to be unconstitutional cruel and unusual punishment in terms of the Eighth Amendment to the US Constitution.¹³⁶

Many of the rights guaranteed under international and regional human rights treaties relating to civil and political rights also have socio-economic aspects or implications. For instance, in its General Comment No. 17 on the Rights of the Child, the UN Human Rights Committee stated, 'that such measures [of protection as are required by the child's status as a minor, on the part of his family, society and the state], although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural'.¹³⁷ The acknowledged interdependence and indivisibility of both sets of rights have led to elements of children's socio-economic rights being protected by means of the application of these instruments.¹³⁸ A key example is the jurisprudence of the Inter-American Court of Human Rights.

Article 26 ACHR provides that:

the States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires.

However, the IACtHR has thus far failed to engage properly with Article 26, preferring to base its decisions on other, civil and political rights set out in the Convention. According to Melish, rather than recognise the autonomous rights of individuals to health, education, or adequate housing under the ACHR, the IACtHR has opted for a canopy approach. In doing so, it has subsumed these basic rights, all of which are necessary for the development of a dignified life, into a broadly understood concept of the 'right to life' and, more specifically, the 'right to harbour a project of life'.¹³⁹ In the celebrated 'Street Children' case, which centred on the abduction,

torture and murder of street children by policemen, the Court emphasised that the right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.¹⁴⁰ According to the IACtHR, one of the obligations that the state must undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person.¹⁴¹ Minimum living conditions identified by the court in various cases include those relating to food, access to clean water and medical services.¹⁴²

In addition, although the IACtHR cannot directly consider violations of the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights that are not based on trade union rights or the right to education,¹⁴³ the Court has repeatedly turned to that instrument and the CRC in order to determine the content and scope of Article 19 ACHR. This provision states that '[e]very minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state'. With regard to the protection of the socio-economic rights of the child, the IACtHR has declared that:

[t]hese provisions allow us to define the scope of the 'measures of protection' referred to in Article 19 of the American Convention, from different angles. Among them, we should emphasise those that refer to non-discrimination, special assistance for children deprived of their family environment, *the guarantee of survival and development of the child*, the right to an adequate standard of living and the social rehabilitation of all children who are abandoned and exploited. (emphasis added)¹⁴⁴

In its decision in *Juvenile Reeducation Institute v Paraguay*,¹⁴⁵ which focused on the conditions experienced by children in a detention centre, the Court reiterated the linkage between the right to life and other civil rights and the rights to health and education. In particular, it ruled that the obligation to provide children deprived of their liberty with special periodic healthcare and education programmes flowed from a proper interpretation of Article 4 ACHR, in combination with the pertinent provisions of the CRC and Article 13 of the San Salvador Protocol.¹⁴⁶

¹⁴⁰ 'Street Children' case, above n 6, para 144.

¹⁴¹ See, eg case of the *Juvenile Reeducation Institute*, above n 15, para 159.

¹⁴² See, eg *Yakye Axa Indigenous Community v Paraguay*, Judgment of 17 June 2005, Inter-Am Ct HR (Ser C) No 125 (2005).

¹⁴³ San Salvador Protocol, Art 19(c).

¹⁴⁴ 'Street Children' case, above n 6, para 196.

¹⁴⁵ Case of the *Juvenile Reeducation Institute*, above n 15.

¹⁴⁶ *Ibid* para 172.

¹³⁶ See, eg *Roper v Simmons*, 543 US 531 (2005); *Graham v Florida*, 560 US ____ (2010) (Slip Opinion).

¹³⁷ Human Rights Committee, General Comment No 17 on the Rights of the Child (art 24), UN Doc HRI/GFN/1/Rev.7 (1989) para 3.

¹³⁸ The interdependence, indivisibility and interrelationship of all human rights has been confirmed in, eg the Vienna Declaration and Programme of Action 1993, 12 July 1993, A/CONF.157/23 (Art 5) and the Proclamation of Teberan, 13 May 1968, A/CONF.32/41 (1968) 3 para 13. For a discussion of the concept of interdependence in the context of human rights, see C Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) *Osgoode Hall-Law Journal* 769, 779–90.

¹³⁹ T Melish, 'The Inter-American Court of Human Rights: Beyond Progressivity' in M Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, Cambridge University Press, 2008) 388.

Another reason to look beyond international and regional 'socio-economic rights treaties' is that a number of human rights, including the rights to life, equality and property and trade union rights, do not conform with any supposed clear-cut categories of socio-economic rights and civil and political rights. This demonstrates the artificiality of the distinction that is frequently made between civil and political rights, on the one hand, and socio-economic rights, on the other. For instance, although the right to equality has traditionally been viewed as a civil and political right, it may also be regarded as socio-economic in nature, as rights to equality and non-discrimination can be used either to defend or gain economic and social interests for individuals and groups of people.¹⁴⁷ This further underlines the point that the jurisprudence of treaty-monitoring bodies under the 'civil and political rights treaties' may also be relevant to a discussion of the interpretation and substantive content of socio-economic rights.

TURNING TO THE LEAST POWERFUL BRANCH: POINTS OF ENTRY AND THE SCOPE OF JUDICIAL ACTIVITY

This work makes the case that the courts can and should enforce the constitutional socio-economic rights of children where the elected branches of government have failed to do so. It is, therefore, necessary to consider the circumstances in which the courts may be called upon to give effect to such rights. Before doing so, however, two assumptions underlying this book's consideration of the court's intervention to secure children's rights must be highlighted.

The first assumption is that, in cases where the courts enforce children's socio-economic rights, the legislature or executive defends a particular legal or policy measure (or the way in which it is being applied) on the basis of an interpretation or approach that differs from that ultimately adopted by the court(s) in the case. It is thus clear that, in the scenarios under consideration in this work, the courts are acting contrary to executive or legislative expectations or preference.

Secondly, it is assumed that, in all of the scenarios addressed by the court, under the received conventions of legal interpretation and in the eyes of the reasonable observer, that body has the option to either uphold or invalidate a particular law or policy in the case in question. It is thus able to choose between the option which places it in a potentially conflictual relationship with the elected branches of government, or that which does not. That is not to suggest that the court's decision is motivated by the aim of entering such a relationship—it is simply that this will be the outcome of the court's decision. Reasonable people will often differ on whether or not the court

¹⁴⁷ S. Gutro, 'Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa' (1998) 4 *Buffalo Human Rights Law Review* 79, 94-96.

should uphold or invalidate a law or policy in light of what the constitution provides, as there may be more than one reasonable interpretation of a particular provision. Therefore, this work does not consider those extreme cases where it is clear to any reasonable person that the court does not have any real choice when it comes to deciding the matter before it. An example of this might be where a constitutional provision states that, 'all citizens over the age of 18 have the right to vote' and the legislature passes a law restricting the right to vote to male citizens only. On any reasonable reading of the text of the constitution, the court must hold that the law is unconstitutional and hence invalid (although it may have a broad discretion when it comes to deciding how that invalidity should be remedied).

These assumptions are important due to their implications for the respective stances of, and the relationship between, the courts and the elected branches of government in the context of litigation and adjudication involving the enforcement of children's socio-economic rights.

Let us turn to the points of entry of the courts. For simplicity's sake, it is useful to conceptualise the situations in which the courts will be asked to intervene to secure children's socio-economic rights in terms of incidences of:

- (1) governmental interference with the enjoyment of children's socio-economic rights; that is, to borrow the language of the ComECSR, where the government has failed to respect such rights;
- (2) governmental failure to prevent interference by third parties with the enjoyment of children's socio-economic rights; that is, where the government has failed to protect such rights;
- (3) government failure to take positive steps to facilitate, promote or provide children's socio-economic rights; that is, where the government has failed to satisfy its obligation to fulfil such rights.

These three incidences will result in the courts acting in numerous different ways in order to guarantee children's socio-economic rights.

That said, it is important to recognise that socio-economic rights violations are frequently complex and multifaceted. The reality is that the courts will often be required to address instances of socio-economic rights violations which involve more than one of the issues outlined above. For instance, interference by third parties such as paramilitaries with the enjoyment of children's socio-economic rights will frequently be accompanied by interference on the part of government forces.¹⁴⁸ Similarly, state evictions

¹⁴⁸ See, eg. Case 55/96 SERAC and CESR v. Nigeria Comm. No. 155/96 (ACHPR) (2002); 10 IHRR 282 (2003) in 15th Annual Activity Report of the ACHPR (2002). Here, the African Commission on Human and Peoples' Rights found, amongst other things, that the destruction and contamination of the Ogoni people's crops and housing by the government's and non-state actor petroleum companies violated the implied rights to housing/shelter and food under the African Charter on Human and Peoples' Rights. For an Inter-American example, see *Massacres of Ituango v Colombia*, Judgment of 1 July 2006, Inter-Am Ct HR (Ser C) 148 (2006), where, amongst other things, the IACtHR held the state expressly liable both for the direct collaboration of its agents in the acts constituting socio-economic

of slum-dwellers (and interference with the right to housing) may go hand-in-hand with state failure to fulfil the right to housing. Indeed, as Liebenberg highlights, 'framing a claim in terms of a negative or a positive duty is contingent on the stage at which a legal challenge is brought, and how the issues are framed in the pleadings'.¹⁴⁹ This must be borne in mind when considering the approaches of the courts discussed in this work.

But what of the scope of judicial activity entailed by instances (1)–(3)? The role that the court is called upon to play in situation (1) is relatively uncontroversial as it primarily entails a review of state action. In such a situation, the court will be requested to call a halt to the interference in question: it will not generally be required to delineate or prescribe positive measures to be taken by the state in order to ensure the vindication of the rights in question. Situation (2) may require the courts to outline or direct positive steps to be taken by government to put an end to the interference caused by third parties. However, these steps are aimed at preventing interference with enjoyment of a right. Thus, as with situation (1), the courts' actions can be viewed as being aimed at re-establishing the status quo. Such activity is likely to prove less controversial than that required by situation (3), which is aimed at altering the status quo and is very likely to entail an adjustment in prevailing distributions. The controversial nature of the courts dealing with situation (3) will be heightened where they set out steps that the state must take to fulfil its constitutional obligations in the form of a mandatory, rather than a declaratory, order or where courts grant structural interdicts.¹⁵⁰ This work thus clearly envisages situations in which the courts adopt what Tushnet and others have described as 'strong-form' judicial review, according to which judicial interpretations of a constitution are final and unreviewable by ordinary legislative majorities.¹⁵¹

A mandatory (or positive) order requires an affirmative act or course of conduct where there is a duty under the law to perform such. The granting of a mandatory order by a court in response to a violation of constitutional rights by the state will oblige the relevant state officials or agents to perform their constitutional duties in the way specified by the court. Orders of this nature may entail the court exercising supervisory jurisdiction (ie in

the case of structural interdicts). Declaratory orders outline what the state's constitutional obligations are and may also declare what is required of the government in order to satisfy them.¹⁵² With such an order, the court makes clear the normative *result* that must be achieved, but does not specify the *means* to achieve it.¹⁵³ While the government is bound to give effect to the obligations identified by the courts in declaratory orders in their law-and policy-making, where they fail to do so, the courts have no power to intervene to enforce the order in the absence of a plaintiff bringing another action seeking an injunction to prevent another act of disobedience. This is not the case with regard to mandatory orders, where the court retains jurisdiction over the matter if there is non-compliance with the order.¹⁵⁴ Where such orders are not complied with, the court may find the state (or the relevant government agencies or officials) in contempt of court. My focus on the courts granting mandatory orders is due to the fact that, in practice, mandatory orders exert more control and impose greater restrictions on the discretion of the elected branches than declaratory orders do. This will be discussed further in Chapter 4.

The close linkage between (1), (2) and (3) in particular instances means that the courts may have a certain degree of flexibility in terms of how they choose to consider or categorise the rights violation(s) and state conduct that comes before them. One example is the approach of the Argentine Supreme Court in *Campodónico de Beviacqua, Ana Carina v Ministerio de Salud y Banco de Drogas Neopláctas*.¹⁵⁵ This decision centred on the right to health of a child who had been born with a serious disability in his marrow, which reduced his immunological defences. The medicine necessary for the child's treatment was initially provided by the state. Later, however, the child's mother was informed that state delivery would be interrupted, with the state claiming that it had only ever provided the medicine on 'humanitarian' grounds (rather than on the basis of a legal duty). The mother of the child brought an *amparo* action,¹⁵⁶ seeking to prevent the interruption of delivery

¹⁵² For instance, in the South African *Grootboom* housing rights case, the Constitutional Court handed down a declaratory order setting out the duty of the state 'to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing'. Pillay points out that, although the order declared 'what was required by a constitutionally 'reasonable' programme, the declaratory nature of the order meant that it did not compel the state to take steps to ensure that its programme complied with the constitutional requirements (K Pillay, 'Implementing *Grootboom*' (2002) 3(1) *ESR Review* 16, 18). This decision is discussed further in Chapters 3, 4 and 6.

¹⁵³ C. Scott, 'Social Rights: Towards a Principled, Pragmatic Judicial Role' (1999) 1(4) *ESR Review* 7, 9.

¹⁵⁴ K Pillay, 'Implementation of *Grootboom*: Implications for the Enforcement of Socio-economic Rights' (2002) 6 *Law, Democracy and Development* 255, 275.

¹⁵⁵ *Campodónico de Beviacqua, Ana Carina v Ministerio de Salud y Banco de Drogas Neopláctas*, Supreme Court of Argentina, 24 October 2000.

¹⁵⁶ For more on the operation of *amparo* proceedings in a range of Latin American jurisdictions, see A Brewer-Carías, *Constitutional Protection of Human Rights in Latin America*:

on the basis that such state action would deprive her child of his rights to life and health guaranteed by the national constitution and under international human rights treaties.¹⁵⁷ This action was based on a threatened violation by the state of its duty to respect (that is, not to interfere with) the child's enjoyment of his right to health. However, the Supreme Court's judgment focussed extensively on the obligation of the state to take steps to fulfil the child's right to health by provision of treatment. The Court ultimately upheld the appellate court's decision to order the government to continue providing the medication. This decision demonstrates courts' ability to approach violations of children's socio-economic rights from a variety of angles where they are called upon to do so.

CONCLUSION

This chapter has addressed the three key foci of this work: children, socio-economic rights and the courts. Having defined the terminology used in the book, I outlined the particular position of children as socio-economic rights-holders, as well as some of the key debates surrounding the nature of such rights. In doing so, I explained why it is important to consider children's socio-economic rights and the courts' role in relation to enforcing such. Finally, I highlighted the points of entry and the scope of the judicial activity addressed in the book. The stage has been set for the first part of the book, which centres on the legitimacy of the courts giving effect to children's rights in terms of liberal democratic constitutional theory. I will now turn to consider the position of the child in democracy.

A *Comparative Study of Amparo Proceedings* (New York, Cambridge University Press, 2009). For a useful synopsis of the Colombian *tutela* action (which corresponds in terms of function to the *amparo* constitutional action), see R. Uppimay Yepes, 'Should Courts Enforce Social Rights? The Experience of the Colombia Constitutional Court' in F. Colomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen/Oxford, Intersentia, 2006), 360–61.

¹⁵⁷ Argentinean Constitution, s 42, discusses the right to protection of health in the context of the rights of consumers. However, the establishment of a constitutional right to health resulted from the judicial recognition of the constitutional priority accorded to international instruments setting out that right.

2

Children and Democracy

Even when the most basic needs of children for food, shelter and access to medicine emerge as the subjects of politics, they may easily be obscured by still larger or more absorbing concerns ... the interests of children seem peculiarly vulnerable to being regarded as insubstantial, obscure or unimportant in whatever becomes the final, schematic view. Perhaps this is because children lack a voice of their own in politics and their needs get too easily amalgamated with the political preferences of their proxies.¹

When politicians hold \$100-per-plate dinners, nine-year-olds do not buy tables.²

INTRODUCTION

CHILDREN ARE UNENFRANCHISED. They do not, and cannot, constitute a political constituency able to gain ground through political action.³ The executive and the legislature are not electorally accountable to them and are, therefore, not immediately dependent on their goodwill in order to ensure re-election. Children have no opportunity to exert direct influence on the policy-making process.⁴ As a result, their interests are unlikely to occupy a consistently large space on the agenda of elected law- and policy-makers.⁵ Their capacity to exercise indirect influence on the political system is also limited due to, amongst other factors, their inability to organise themselves into an effective pressure group, as

¹ J. Maslow Cohen, 'Competitive and Cooperative Dependencies: The Case for Children' (1995) 81 *Virginia Law Review* 2217, 2218.

² R. Mookin, *In the Interest of Children: Advocacy, Law Reform, and Public Policy* (New York, WH Freeman & Co., 1985) 39.

³ J. Sloth-Nielsen, 'Chicken Soup or Chainsaws: Some Implications of the Constitutionalisation of Children's Rights in South Africa' (1996) *Acta Juridica* 6, 7.

⁴ As I stated in Chapter 1, there are a few countries in which children may take part in municipal, local or other elections at a younger or older age than is required for participation in national elections. However, this is exceptional. In the vast majority of countries, children become enfranchised for the purpose of all elections at the same age. Therefore, the arguments made in this chapter will proceed on the basis that children become entitled to vote in elections at the same age before which they have no opportunity to participate directly in democratic decision-making procedures.

⁵ I say 'consistently' because there may, of course, be times when children do occupy a large space on the agenda of elected law- and policy-makers, for instance, where there has been a crisis in relation to child protection, education or juvenile justice.