REALISING THE ECONOMIC SOCIAL AND CULTURAL RIGHTS OF SINGLE-PARENT FAMILIES UTILISING THE UNITED NATIONS HUMAN RIGHTS LAW FRAMEWORK

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Abstract

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This thesis examines the potential of the UN human rights framework to provide a coherent alternative to norms of charity, actuarial accounting and private family law for addressing the marginalised socio-economic situation of single-parent families worldwide. ICESCR Article 10(1) – requiring the widest possible protection and assistance to be accorded to the family, particularly while responsible for dependent children – is the focus. Based on an evolutionary approach to treaty interpretation, it is found that Article 10(1) serves as a dye washing over the substantive provisions of ICESCR and thus extending their application beyond individuals to family group units. Theoretical and doctrinal analysis, including insights from vulnerability theory (such as the notion of derivative dependency), explain why the family group rightsholder in Article 10(1) must be conceptualised as the vulnerable-caring family understood pluralistically. The thesis shows single-parent families and their members are analogous categories protected by non-discrimination and equality guarantees. Additionally, it presents the marginalisation of single-parent families as a paradigmatic example of the consequences of failing to adequately consider and address the interplay of dependency and derivative dependency in relation to children's and women's rights. Capabilities approaches to poverty as a human rights violation are employed. A UK case concerning benefit caps is analysed to illustrate the lacuna in rights protection that ICESCR Article 10(1) addresses, before a thought experiment examines how a good faith policymaker might approach their role in a similar situation to the UK government's, had they understood their ICESCR Article 10(1) obligations. Finally, opportunities to progress the realisation of the single-parent families' rights under ICESCR Article 10(1) are considered. It is proposed that the ICESCR, CEDAW and CRC committees issue a joint General Comment/General Recommendation to guide states on their obligations to respect, protect and fulfil Article 10(1) rights without discrimination.

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Table of Abbreviations

BATNA	Best alternative to a negotiated solution
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW	Committee on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRC	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GDP	Gross Domestic Product
HRA	Human Rights Act
HRC	Human Rights Council
HRMI	Human Rights Measurement Initiative
IBOR	International Bill of Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ICJ	International Court of Justice
ILC	International Law Commission
KUMFA	Korean Unwed Mothers Families Association
LGBTQI+	Lesbian, gay, bisexual, transgender, queer and intersex plus
MWRF	Manifestly without reasonable foundation
NZ	New Zealand
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner on Human Rights
SA	South Africa
TINA	There is no alternative
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UKSC	United Kingdom Supreme Court
UN	United Nations

UNCHR	United Nations Commission on Human Rights
UNDRIP	United Nations Declaration of the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner on Human Rights
US	United States
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
VDPA	Vienna Declaration and Programme of Action

Glossary

advaitam	non-dualism
aiga	extended family, family group
aroha	affection, sympathy, charity, compassion, love, empathy
filius nullius	illegitimate child (lit. child of no-one)
funi	non-dualism
hapū	kinship group, clan, tribe, subtribe
hukou	household permit
in toto	in its totality, taken together
iwi	extended kinship group, tribe, nation, people, nationality, race
Kāore koe e tū mokemoke ai	A person never stands alone
manaakitanga	hospitality, kindness, generosity, support - the process of showing respect, generosity and care for others
pacta sunt servanda	agreements must be kept
nu'u	village
pepeha	tribal saying, figure of speech, motto, set saying known for its economy of words and metaphor, encapsulating Māori values and human characteristics
ren	'two-man-mindedness', benevolence
spuria	a designation historically applying to most illegitimate children under Roman law
tikanga	correct procedure, rule, code, customary law, the first common law of New Zealand
utu	pay, payment, cost, reciprocity, response
whakapapa	genealogy, lineage, layers of history
whānau	extended family, family group, in the modern context sometimes also used to mean a group based on common interests and values
whanaungatanga	relationship, kinship, sense of family connection. It also extends to others to whom one develops a close familial, friendship or reciprocal relationship
whāngai	to feed, nourish, bring up, foster, adopt, raise, nurture, rear. Foster child, adopted child based on customary practice

Table of Authorities

Cases

Botswana

Letsweletse Motshidiemang v A-G & Ors (LEGABIBO as amicus curiae) (2019) MAHGB-000591-16 (HC).....11

Canada

British Columbia (Public Service Employee Relations Commission) v BCGSEU [1999] 3 SCR 3.....187
Green v Weaver [1999] OJ no 5106 (QL)(OntSupCt) 113
Mahe v Alberta [1990]1 SCR 342 .....129, 387

India

Navtej Singh Johar & Ors v Union of India thr Secretary Ministry of Law and Justice (2019) INSC AIR 746,.....11

New Zealand

Ellis v R [2019] NZSC 83 .....16, 84
Ruka v Department of Social Welfare [1997] 1 NZLR 154 (CA) 23, 198, 361
Takamore v Clarke [2012] NZSC 116.....117

South Africa

Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CCSA) [20-4 and 38] 172, 173
President of the Republic of South Africa and Another v Hugo (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997) 23, 147, 148, 149
S v Makwanyane & Another 1995 (3) SA 391 (CC).....84

United Kingdom

AL (Serbia) v Secretary of State for the Home Department 187, 277
Beoku-Betts v Secretary of State for the Home Department [2008] UKHL 39.....134, 284
Humphreys v Her Majesty's Revenue and Customs Comrs [2012] UKSC 18.....280, 393
In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill [2015] UKSC 3 ..282
Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47.....285, 338
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R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions [2015] UKSC 16.....147, 189, 275, 279, 280, 282, 283, 284, 294
Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 283

United States of America

DeGraffenreid v General Motors Assembly Div, etc 413 F Supp 142 (ED Mo 1976) ..190, 191
Dobbs v Jackson Women's Health Organization US 19-1392 (2022).....106

Eisenstadt v Baird 405 US 438 (1972) 106
Griswold v Connecticut 381 US 479 (1965) 106
Lawrence v Texas (02-102) 539 US 558 (2003) 106
Pierce v Society of Sisters of the Holy Names of Jesus and Mary 268 US 510 (1925) .. 110
Roe v Wade 410 US 113 (1973) 106
Troxel v Granville 530 US 57 (2000) 105

European Commission and Court of Human Rights

Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (No 2) (1968) 1 EHRR 252 129
Neulinger v Switzerland (2010) 54 EHRR 1087 283
Thlimmenos v Greece Application no 34369/97 (ECtHR) 189, 275, 276, 302

International Court of Justice

Aegean Sea Continental Shelf (Greece v Turkey) [1978] ICJ Rep 3 46
Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece) [2011] ICJ Reports 644 44
Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion [1962] ICJ Rep 151 45
Competence of Assembly regarding admission to the United Nations, Advisory Opinion [1950] ICJ Rep 4 43
Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion (Second Phase) [1950] ICJ Rep 221 45
Kasikili/Sedudu Island (Botswana/Namibia) [1999] ICJ Rep 1045 44
Reparation for injuries suffered in the service of the United Nations, Advisory Opinion [1949] ICJ Rep 174 45
Rights of US Nationals in Morocco Case (France v United States) 1952 ICJ Rep, 176 ... 43

World Trade Organisation Appellate Body

US - Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R (1998) 17 43

UN treaty bodies

Balaguer Santacana (on behalf of Balaguer Montalvo) v Spain, Merits CCPR/C/51/D/417/1990, Communication No 417/1990 (1994) (HRC) 254
Ben Djazia and Bellili v Spain E/C12/61/D/5/2015 (CESCR) 239, 370
Díaz v Spain 134/2019 E/C12/73/D/134/2019 (CESCR) 370
JI v Finland CEDAW/C/69/D/103/2016 (2018) (CEDAW). 236, 372
Joslin and Ors v New Zealand 07/30/2002 CCPR/C/75/D/902/1999 (HRC) 370
Moreno Romero v Spain E/C12/69/D/48/2018 (CESCR) 370
Trujillo Calero v Ecuador E/C12/63/D/10/2015 (CESCR) 144, 340, 371, 419
Walters v Belgium E/C12/70/D/61/2018 (2021) (CESCR) 371

Legislation

New Zealand

Oranga Tamariki Act 1989 s 4(1) & s 5(1) 116
Social Security Act 2018 (NZ) s 8 ..... 23, 361
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South Africa

Constitution of the Republic of South Africa (Act 108 of 1996) s 26-29 172

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Human Rights Act 1998 278
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Welfare Reform Act (c 5) 2012 s 96(1). 270
Welfare Reform and Work Act (c 7) 2016. ..... 268, 270

Treaties and international instruments

African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev 5, 21 ILM 58 (adopted 27 June 1981, entered into force 21 October 1986) 75, 218

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS, vol 1249, 13 (adopted 1979, entered into force 3 September 1981) . 4, 15, 19, 52, 53, 58, 61, 105, 136, 137, 142, 143, 153, 158, 162, 163, 164, 195, 334, 365, 366, 401, 405, 410, 412
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Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, entered into force 22 December 2000) UNTS v2131 83 369

Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNTS 2515, 3 64

Convention on the Rights of the Child 1577 UNTS 3 (adopted 20 November 1989, entered into force 2 September 1990). 4, 19, 52, 53, 58, 61, 64, 109, 136, 137, 152, 155, 158, 163, 164, 365, 366, 381, 401, 402, 410, 412, 413
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Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014) A/HRC/RES/17/18 2011 369

European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (4 November 1950), ETS 5 .... 202, 209, 210, 222, 268, 269, 271, 282, 283, 287
—— Article 8 ..... 278, 279, 284, 300, 304, 305, 307, 334
Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (20 March 1952) ETS 009 270
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Indigenous Collaboration Arrangement between the Government of Aotearoa-New Zealand and the Government of Canada 2022 Aotearoa-New Zealand and Canada 12

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 13, 54, 60, 169, 170, 175, 218, 222, 234, 389
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Optional Protocol to the International Covenant on Civil and Political Rights (adopted 17 December 1966, entered into force 23 March 1976) 999 UNTS 171 170

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 ..... *throughout*
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Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution (adopted 10 December 2008, entered into force 5 May 2013) A/RES/63/117 2009 ..... 170, 338, 339, 340, 369

Statute of the International Court of Justice 1946 UN Article 38(1)(d) 193

United Nations Declaration on the Rights of Indigenous Peoples, GA A/RES/61/295 2007 UN 11, 128

Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III) 60, 169, 389
—— Preamble 122
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—— Article 16(3) 1, 91, 93, 98, 101, 127, 128, 229, 379, 393, 394
—— Article 23(3) 98, 420
—— Article 25(2) 98

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331
—— Article 26 ..... 217, 306, 349
—— Article 31 ..... 3, 13, 42, 43, 44, 47, 94, 128, 168, 217, 219, 234, 257, 351, 399, 428
—— Article 32 ..... 3, 13, 42, 44, 94, 128, 217, 219, 226, 229, 234, 257, 351, 399

—— Article 33 ..... 3, 42, 217, 257

UN documents

Australia, 'Committee on Economic, Social and Cultural Rights: Sixth periodic report submitted by Australia under articles 16 and 17 of the Covenant, due in 2022' (17 October 2023) E/C12/AUS/6 232

Belarus, 'Seventh periodic report submitted by Belarus under articles 16 and 17 of the Covenant, due in 2019' (04/02/2020) E/C12/BLR/7 232

CEDAW, 'General recommendation No 19: Violence against women' (1992) A/47/38 143
—— 'General Recommendation No 21: Equality in Marriage and Family Relations' (1994) A/49/38 ..... 143, 146
——'General Recommendation 29 on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)' (adopted 54th Session 2013) CEDAW/C/GC/29 2, 143, 372, 401
—— 'General recommendation No 35 (2017) on gender-based violence against women, updating general recommendation No 19 (1992)' (26 July 2017) CEDAW/C/GC/35 142

CEDAW and CRC, 'Joint general recommendation/general comment No 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices' (14 Novermber 2014) CEDAW/C/GC/31-CRC/C/GC/18 374

CESCR, 'Concluding observations on the fifth periodic report of France' (30/10/2023) E/C12/FRA/CO/5 231
—— 'Concluding observations on the fifth periodic report of Mongolia' (10/11/2022) E/C12/MNG/CO/5 ..... 231, 233, 351
—— 'Concluding observations on the fifth periodic report of Sri Lanka' (04/08/2017) E/C12/LKA/CO/5 ..... 184, 229, 231, 261
—— 'Concluding observations on the fourth periodic report of Chad' (30 October 2023) E/C12/TCD/CO/4 [35-6] 184, 231
—— 'Concluding observations on the fourth periodic report of Luxembourg' (15 November 2022) E/C12/LUX/CO/4 231
—— 'Concluding observations on the fourth periodic report of the Republic of Korea' (19/10/2024) E/C12/KOR/CO/4. ..... 184, 231
—— 'Concluding observations on the initial report of Qatar' (06/11/2023) E/C12/QAT/CO/1 231
—— 'Concluding observations on the initial report of South Africa' (29/11/2018) E/C12/ZAF/CO/1 231
—— 'Concluding observations on the seventh periodic report of Belarus' (24 March 2024) E/C12/BLR/CO/7 231
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—— 'Concluding observations on the initial report of Cabo Verde' (12/10/2018) E/C12/CPV/CO/1 ....229, 231
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—— 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland' (14/07/2016) E/C12/GBR/CO/6 184, 231, 292, 293, 338
—— 'General Comment No 1: Reporting by States Parties' (adopted 27 July 1981) E/1989/22....210, 215, 297, 332, 430
—— 'General Comment No 3: The Nature of State Parties' Obligations (Art 2, Para 1, of the Covenant)' (adopted 14 December 1990) E/1991/23.....54, 190, 201, 203, 204, 206, 207, 208, 214, 260, 295, 298, 307, 308, 332, 355, 413, 414
—— 'General Comment No 4: The Rights to Adequate Housing (Art 11(1) of the Covenant)' (adopted 13 December 1991) E/1992/23 ....176, 421
—— 'General Comment No 9: The domestic application of the Covenant' (adopted 3 December 1998) E/C12/1998/24 295
—— 'General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art 3 of the International Covenant on Economic, Social and Cultural Rights)' (adopted 11 August 2005) E/C12/2005/4 ...138, 140, 141, 186, 190, 249, 402, 409, 430
—— 'General Comment No 18: The Right to Work (Art 6 of the Covenant)' (6 February 2006) E/C12/GC/18....435
—— 'General Comment No 19: The right to social security (art 9)' (adopted 4 February 2008) E/C12/GC/19....183, 209, 210, 290, 293, 303, 308, 310, 337, 419
—— 'General Comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (adopted 2 July 2009) E/C12/GC/20....130, 335, 402
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—— 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' E/C12/2001/10.....179, 182, 352, 354

Chile, 'Fifth periodic report submitted by Chile under articles 16 and 17 of the Covenant, due in 2021' (27 April 2022) E/C12/CHL/5 .....232, 233

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and CRC, 'Joint general comment 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' (16 November 2017) CMW/C/GC/3-CRC/C/GC/22.....375

CRC, 'General comment No 7 (2005): Implementing Child Rights in Early Childhood' (adopted 20/09/2006) CRC/C/GC/7/Rev1.....318, 320
—— 'General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)' (29/05/2013) CRC /C/GC/14 285
—— 'Statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child' (11 October 2023).....106, 154, 246, 247

Doha International Conference for the Family and Jamal Nasser Al-Bader, 'The Doha Declaration' A/59/592 Annex to the letter dated 2 December 2004 from Qatar to the UN Secretary-General 104, 397

Finland, 'Seventh periodic report submitted by Finland under articles 16 and 17 of the Covenant, due in 2020' (23/04/2020) E/C12/FIN/7.....232

HRC, 'ICCPR General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (27 July 1990) HRI/GEN/Rev1 (1994) 91, 167, 252
—— 'Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona' (22 May 2014) A/HRC/26/28.....214, 367
—— 'The right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Report of the Special Rapporteur, Paul Hunt' (16 February 2004) E/CN4/2004/49.....214, 367
—— 'Res 12/21 A/HRC/RES12/21 Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind' (12 October 2009) A/HRC/RES12/21 368
—— 'Summary of the Human Rights Council Panel Discussion on the Protection of the Family: Report of the Office of the United Nations High Commissioner for Human Rights' (Dec 22 2014) A/HRC/28/40.....368

ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' A/68/10 46

Italy, 'Sixth periodic report submitted by Italy under articles 16 and 17 of the Covenant, due in 2021 E/C12/ITA/6' (26/08/2021) E/C12/ITA/6.....232

Mongolia, 'Fifth periodic report submitted by Mongolia under articles 16 and 17 of the Covenant, due in 2020' (21/03/2022) E/C12/MNG/5.....232, 233, 351

New Zealand, 'Fourth periodic report submitted by New Zealand under articles 16 and 17 of the Covenant, due in 2017' (06/10/2017) E/C12/NZL/4.....232

OHCHR, 'Protection against violence and discrimination based on sexual orientation and gender identity, Mandate of the UN Independent Expert, Work Programme 1 January 2021 – 31 December 2023; Version 12a, 1 November 2020, for consultation' (1 November 2020).....367

Pillay, AG 'Letter to States parties on economic, social and cultural rights in the context of the economic and financial crisis' (16 May 2012) CESCR/48th/SP/MAB/SW 2..205, 293, 296, 308, 317, 355

Sweden, 'Seventh periodic report submitted by Sweden under articles 16 and 17 of the Covenant, due in 2021' (10/01/2022) E/C12/SWE/7.....232

The World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (12 July 1993) A/CONF57/23 ....14, 18, 47, 49, 142, 174, 175, 176, 184, 237, 260, 353, 406

UN Department of Economic and Social Affairs Population Division, Household size and composition around the World 2017: data booklet ((ST/ESA/ SERA/405), United Nations 2017).....434

—— Patterns and trends in household size and composition: Evidence from a United Nations dataset (ST/ESA/SERA/433, UN 2019).....28, 29, 30, 402, 408, 413

—— Principles and Recommendations for Population and Housing Censuses, Revision 3 (ST/ESA/STAT/SERM/67/Rev3, UN 2017).....28, 29, 256, 348

UNGA, 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1 213

Travaux Préparatoires to the International Bill of Rights

Commission on the Status of Women, 'Draft Report of the Commission on the Status of Women to the Economic and Social Council' E/CN6/74 144

Inter-American Juridical Committee, 'Draft Declaration of the International Rights and Duties of Man' (8 January 1947) E/CN4/2 Article 10 390

UNCHR, 'Summary Record of the 14th Meeting' (4 February 1947) E/CN4/SR14.....128, 238, 386, 388

—— 'Draft Outline of International Bill of Rights (prepared by the Division of Human Rights) E/CN4/AC1/3 (4 June 1947)' 169
—— 'Draft International Declaration on Human Rights' (16 December 1947) E/CN4/77/Annex A 1, 397
—— 'Summary Record of the 58th Meeting' (3 June 1948) E/CN4/SR58 1, 100, 101, 240, 352, 392, 397

UNCHR (Drafting Committee), 'International Bill of Rights Documented Outline' (11 June 1947) E/CN4/AC1/3/Add1 ..... 91, 235, 389
—— 'Summary Record of the 13th Meeting' (20 June 1947) E/CN4/SR13 ..... 64, 95, 100, 116, 120, 128, 238, 386, 387, 389, 393
—— 'Summary Record of the 38th Meeting' (15 December 1947) E/CN4/AC1/SR/38 ... 1, 98, 99, 120, 128, 238, 348, 349, 386, 388, 389, 392
—— 'Lebanon: Amendment to Article 13 of the International Declaration on Human Rights' (2 June 1948) E/CN4/105 ..... 99, 392
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UNGA (3rd Committee), 'Summary Record of the 91st Meeting' (2 October 1948) A/C3/SR91 388
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—— 'Summary Record of the 124th Meeting' (6 November 1948) A/C3/SR124 . 116, 128, 238, 389
—— 'Summary Record of the 125th Meeting' (8 November 1948) A/C3/SR125 64
—— 'Summary Record of the 139th Meeting' (16 November 1948) A/C3/SR139 235
—— 'Summary Record of the 144th Meeting' (18 November 1948) A/C3/SR144 ..... 128, 348, 388, 392
—— 'Draft International Covenant on Human Rights, 731st Meeting' (15 January 1957) A/C3/SR731 100
—— 'Draft International Covenant on Human Rights, 732nd Meeting' (16 January 1957) A/C3/SR732 ..... 101, 349
—— 'Draft International Covenant on Human Rights, 735th Meeting' (18 January 1957) A/C3/SR735 ..... 101, 349
—— 'Report' (9 February 1957) A/3525 ..... 101, 349

International Commission of Jurists

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (26 January 1997) 54, 167, 201, 202, 203, 204, 207, 208, 209, 260, 283, 307
Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity (March 2007) 10, 11

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1 Introduction

At the origins of modern international human rights law, the drafters of the Universal Declaration on Human Rights (UDHR) made two key decisions for the rights of single-parent families: first, under Article 16(3) 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State';[1] and second, the concept of 'family' is not limited to the marital family.[2] These decisions are reflected in Article 10(1) of the International Convention on Economic, Social and Cultural Rights (ICESCR) which states:

> The widest possible protection and assistance should be accorded to the family which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.[3]

Nevertheless, there has been a dearth of comment on the need for states to fulfil their obligations under this provision. Elucidation of the content of the right has also been lacking. For single-parent families, this matters. Despite recognition of poverty as a human rights issue which women and children suffer from disproportionately, especially in the context of female-headed households,[4] the socio-economic and cultural marginalisation of single-parent families remains couched largely in terms of charity, morality and private law responsibilities (fathers' obligations to pay child support) rather

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[1] Universal Declaration of Human Rights (adopted 10 December 1948) 217 A (III).

[2] UNCHR (Drafting Committee), 'Summary Record of the 38th Meeting' (15 December 1947) E/CN4/AC1/SR/38; UNCHR, 'Draft International Declaration on Human Rights' (16 December 1947) E/CN4/77/Annex A; UNCHR, 'Summary Record of the 58th Meeting' (3 June 1948) E/CN4/SR58.

[3] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

[4] Thomas Pogge, 'The Role of International Law in Reducing Massive Poverty' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010).

than as a matter of international human rights. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) has acknowledged the impact of single-parenting on women's economic rights in its General Recommendation 29, but only in relation to the effects of dissolution of marriage not in relation to single-parent families generally.[5] In contrast, my research examines the potential of United Nations (UN) international human rights law mechanisms to provide an intellectually coherent alternative to child poverty and charity-based models to address the universally disadvantaged status of single-parent families, grounded in ICESCR Article 10(1). In doing so, I confront the meaning of family in international human rights law and the significance of Article 10(1) as a group right (rather than individual right).

1.1 Research question

The overarching question the thesis answers is:

> Does the UN human rights treaty system offer a valid and useful framework for the realisation of the economic, social and cultural rights of single-parent families?

1.2 The claim

My research breaks down the question into a six-part hypothesis or claim, namely that:

1. Single-parent families are families under international human rights law and, therefore, have rights under ICESCR Article 10(1) which provides that the family as a group unit is entitled to 'the widest possible protection and assistance', particularly while 'responsible for the care and education of dependent children'.

[5] CEDAW, 'General Recommendation 29 on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)' (adopted 54th Session 2013) CEDAW/C/GC/29.

2. The customary principles of treaty interpretation, as codified in Article 31 – 33 of the Vienna Convention on the Law of Treaties (VCLT),[6] must be applied to the interpretation of ICESCR Article 10(1). These principles require the provision be interpreted in good faith, in accordance with the ordinary meaning of the text in its context and in light of its object and purpose. On this basis, the best interpretation of Article 10(1) is as providing a dye which colours the interpretation of other substantive provisions of ICESCR by applying them to the family as a group unit, not merely as individuals. Article 10(1) thus enables international human rights law to address realities of human vulnerability which are not adequately protected as purely individual rights, including the dependency of children and derivative dependency of women as their usual primary caregivers.

3. States have positive duties to respect, protect and progressively fulfil economic, social and cultural rights to the maximum extent of their available resources. In addition, states have immediate obligations to address discrimination and inequality in the enjoyment of these rights.

4. Single-parent family status is protected by the non-discrimination guarantee in ICESCR Article 2(2) by analogy with the stated grounds. Single-parent families are universally disadvantaged in the realisation of their economic, social and cultural rights, and the on-going failure of states to address this constitutes unlawful discrimination under ICESCR.

[6] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

5. Moreover, attempting to address inequalities in women's and children's enjoyment of economic, social and cultural rights as purely individual rights matters and separate from each other suffers fatal limitations. In this regard, the marginalisation of single-parent families serves as a paradigmatic example of the consequences of failing to adequately consider and address the interplay of dependency and derivative dependency in relation to children and women. It thus illustrates the essential importance of requiring states to respect, protect and fulfil their Article 10(1) obligations on a basis of equality and non-discrimination as a key aspect of eliminating all forms of discrimination against women and realising the rights of the child.[7]

6. UN treaty bodies should require that states respect, protect and progressively fulfil the economic, social and cultural rights of single-parent families without discrimination; and guide states in how to meet this obligation and monitor progress. A Joint General Comment/General Recommendation issued by the Committee on Economic, Social and Cultural Rights (CESCR), CEDAW and the Committee on the Rights of the Child (CRC) would be a powerful step in this direction. Such action would provide a protective canopy under which norms of single-parent families' economic, social and cultural rights realisation may begin to germinate on the ground.

1.3 A note on my interest in the topic

My interest in the economic, social and cultural rights of single-parent families has both personal and professional origins. While I always saw myself as someone who would be

[7] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS, vol 1249, 13 (adopted 1979, entered into force 3 September 1981); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNTS 1577, 3.

a parent, I knew traditional heterosexual marriage was not for me. When embarking on becoming a parent, my country of residence (New Zealand) did not allow same-sex partners to marry, nor were same-sex partners able to be legally recognised as co-parents. Thus, my attention was drawn to models of single parenting.[8] Having been raised in a two-parent family, I was aware of the privileges this bestowed in comparison to my friends raised by single mothers. During tense moments in my parents' relationship, it was made clear that decisions to remain married were influenced by ideas of what was in the best interests of the children.

Later, I found myself working in a social policy system nested within the milieu of neoliberalism that had come to pervade Anglo democracies. Rhetoric of TINAism,[9] foreclosed consideration of root causes on many issues, including the increasing economic marginalisation of single-parent families, failure to advance women's economic positions, and increasing child poverty. When I was serving as a Principal Policy and Research Analyst drafting an issues paper on the economic wellbeing of single-parent families, a comment from a well-regarded welfare economist was passed on to me to the effect that policymakers must be careful not to make single parenthood appealing in order to avoid undermining the marital family. This idea served to make me question whether the marginalised status of single-parent families was only an unfortunate outcome of the market economy. The parallel to arguments against same-sex marriage on the grounds that it undermined opposite-sex marriage was clear. Just as it said something disturbing about the state of their opposite sex-marriages if people were

[8] Boyd and others' research on single-mothers-by-choice resonates with my experiences of desiring to prove oneself the 'correct' type of single-parent in by avoiding dependency: Susan B Boyd and others, *Autonomous motherhood? A socio-legal study of choice and constraint* (University of Toronto Press 2015).

[9] 'There is no alternative'- phrase associated with Thatcher's neoliberalism. Claire Berlinski, *There is No Alternative: Why Margaret Thatcher Matters* (Basic Books 2008).

only in them due to the unavailability of same-sex marriage, so suggesting it was necessary to perpetuate stigma towards and impoverishment of single-parent families in order to maintain the status of the marital family implied some fundamental issues about the functioning of marital families. I became curious about whether maintaining single-parent families' marginalisation might serve to curtail women's bargaining power within traditional heterosexual marriages by warning them that their 'best alternative to a negotiated solution' (BATNA)[10] could have dire socio-economic consequences, not just for themselves but also for their children.

That realisation made me curious about whether other normative frameworks offered credible alternatives. Specifically, what did the global normative framework of international human rights law have to say about the economic, social and cultural rights of those in single-parent families? Finding reference to the rights of families in each of the instruments of the International Bill of Rights (IBOR) but little scholarly, judicial or UN material on their application to the material disadvantage faced by millions of single-parent families, it seemed to me that there was a piece of research that needed to be done.

1.4 Approach

1.4.1 Critical and strategic focus on UN human rights law as normative

I view international human rights law as a cultural-political construct which offers strategic opportunities to tilt the internationally acceptable range of state actions (and non-actions) towards more just outcomes, particularly for the most marginalised, based on a globally agreed framework that carries the authoritative stamp of 'law'. While recognising that law is a non-autonomous aspect of the socio-political apparatus of

[10] Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating an agreement without giving in* (Random House 2012) 99-108.

human society,[11] its status as a non-arbitrary normative authority gives it particular significance in theories that attempt to navigate the divide between normative declarations of how the world *ought* to be and positivist recognition of how the world *is*.

Suppose barriers to the economic well-being of single-parent families were purely an accidental result of social policy under neoliberalism. In that case, social policy adjustments by governments, experts and officials who claimed to be concerned about women's rights and child poverty might have had the potential to ameliorate the situation. On the other hand, if low socio-economic status were linked to the stigmatisation of single-parent families by design, it might serve as a neoconservative means of reinforcing patriarchy as essential. Because neoliberalism does not acknowledge dependency and vulnerability as core to the being of humans, it runs into problems when confronted with their reality. Humans are essentially moral creatures, so when faced with others' suffering, we tend to feel bad. One way to remove that bad feeling is to convince ourselves that something about the other and their choices justifies their suffering. This assumption is the gift neoconservatism gives to libertarianism.

Critical Marxist feminists have drawn on the work of Engels, which posits that the agricultural revolution caused the development of patrilineal private property inheritance, which was an essential element in the development of complex large-scale societies and led eventually to the industrial revolution and the spread of capitalism globally. While many aspects of the literal accuracy of Engels' theory of the origins of the family have been debunked by subsequent developments in archaeology and anthropology, it continues to serve an explanatory function in highlighting the role of the marriage contract as not merely the epicentre of family law, but also as central to the maintenance

[11] Lynn Mather, 'Law and Society' (OUP 2013).

of the patriarchal capitalist social and economic system.[12] Rather than viewing marriage as a romantic affair, its materialist function is highlighted, with the marriage contract being viewed as the least-worst option for women rather than as a matter of optimal choice.[13] In patriarchal systems, it has been common for women to be unable to control some or all forms of property in their own right. Marxist feminists build on Engel's theory by arguing that, historically, men controlled women as the means of reproduction as well as controlling children as labour. This control is maintained by women's reproductive work being relegated outside the realm of economic exchange and rendered a private matter.[14] In a Marxist feminist analysis, romantic and fulfilling relational aspects of family obfuscate attempts to address unequal bargaining power within marriage and its role in maintaining women's economic, social and cultural inequality.[15]

Turning to critical race theory, the interest-convergence dilemma elucidated by Bell is particularly helpful in illuminating the challenge that power presents to attempts to address persistent social injustice.[16] Writing in the context of race relations in the US, Bell reasons that '[w]hites simply cannot envision the personal responsibility and the potential sacrifice' required because 'true equality for blacks will require the surrender of racism-granted privileges for whites'.[17] Similarly, one must be mindful of that fact that

[12] John Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld and Nicolson 1984) 3, 19.

[13] Fredrick Engels, *The Origin of the Family, Private Property, and the State* (Electric Book Co 2001) 60-63.

[14] Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (Quill, William Morrow 1970) 14; Engels (n 13) 67-9, 74-5.

[15] Firestone (n 14); Julie A Nelson, 'The Study of Choice or the Study of Provisioning? Gender and the Definition of Economics' in Marianne A Ferber and Julie A Nelson (eds), *Beyond Economic Man: Feminist Theory and Economics* (University of Chicago Press 1993).

[16] Derrick A Bell, '*Brown v Board of Education* and the Interest-Convergence Dilemma' (1980) 93 Harvard LRev 518

[17] ibid 522-23.

those who benefit most from patriarchies' devaluing of care-work may be unable to imagine the personal responsibility and the potential sacrifice required to dismantle structures that entrench the marginalisation and oppression of caregivers and those most dependent on care. In this regard, mere encouragement of men to take equal responsibility for child-rearing is unlikely to be any more effective than attempting to dismantle systemic racism simply by asking white people to be less racist.[18] The vulnerable embodied nature of human beings and the overwhelming degree to which women meet other humans' dependency needs through mothering and caregiving underlie age- and gender-based privileges that are typically taken for granted by men but which will not be readily surrendered.

On the other hand, Bell argues that understanding the nature of interest-convergence dilemmas also points to possible solutions.[19] Identifying arenas where the interests of power converge with the interests of justice allows possibilities of progress towards the realisation of the rights of oppressed people. The UN human rights treaty framework is one such location, notwithstanding frequent criticisms of the UN and its human rights apparatus, nor the fact that many rights are recognised more in their contravention than in their realisation. As Nedelsky observes, '"Rights" are a rhetorical tool in struggles for justice all around the world' despite being subject to 'a variety of compelling critiques'.[20] The consensus that the UN human rights law system is the global authoritative body of international human rights law and the extent to which this system obliges states to realise the rights enunciated within it on the basis of substantive non-

[18] A belief that men's psyches would benefit by engaging in caregiving does not negate the claim that relinquishing power typically engenders resistance.

[19] Bell (n 16) 532-3.

[20] Jennifer Nedelsky, *Law's Relations* (OUP 2011) 231.

discrimination and equality are significant. It is, therefore, worth considering that the application of this framework to inequalities caused by the privatisation of dependency within the typically extra-legal private sphere of the family may be of worth.

Focusing on the realisation of single-parent families' rights under ICESCR Article 10(1) provides an entry point for such an examination. Nedelsky urges engagement with the reality that the law structures relationships including 'those of power, responsibility, trust, and obligation'.[21] My focus on single-parent families allows us to consider the meaning of Article 10(1) in terms of such relations. Meanwhile, shifting the discourse around single-parent families' marginalisation away from private, community, and domestic levels removes it from locations of micro-interpersonal squabbles and domestic politics. It asks that the issue be addressed on the basis of principled reasoning stemming from the application of universally accepted rights.

Efforts to engage with the UN human rights apparatus to further rights realisation for other stigmatised and marginalised populations show the potential of such an approach. There is value in members of highly stigmatised or marginalised communities lifting their gaze from local struggles to engage with international human rights law in order to create normative shifts which may be leveraged for action towards rights realisation in diverse localities and regions. I am influenced by the lessons of both LGBTQI+ activism and the search for indigenous rights realisation as examples of how the structures of international human rights law can be harnessed to promote normative acceptance and reputational investment in the realisation of rights of stigmatised minorities. For example, the efforts of LGBTQI+ activists paved the way for the International Commission of Jurists (ICJ) and others to articulate in the Yogyakarta

[21] ibid 236.

Principles how international human rights law applies to sexual orientation and gender identity.[22] The Yogyakarta Principles have driven subsequent normative change at the international level and in regional and domestic settings, even without receiving approval by the UN General Assembly (UNGA).[23]

The engagement of indigenous peoples with the UN system has also shown the potential for marginalised peoples to utilise the framework of international human rights law in pursuit of rights realisation, even when participants are widely dispersed, with diverse backgrounds and aspirations. The drafting of the UN Declaration of the Rights of Indigenous Peoples (UNDRIP) brought together indigenous leaders, activists and scholars who found ways to use and expand dominant approaches to the interpretation and development of human rights norms to not only reflect indigenous ontologies and epistemologies in the UNDRIP text but also to transform drafting processes to accommodate their worldviews.[24] In turn, this increased domestic momentum for change. For example, despite initial opposition from the Anglo-dominated countries with significant indigenous minorities (namely NZ, Australia, Canada and the USA), these states subsequently signed UNDRIP and the rights it encapsulates are shaping domestic and multilateral policy and legal developments.[25] Such examples illustrate how

[22] ICJ, 'Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity' (2007).

[23] OHCHR, 'Activities: Independent Expert on sexual orientation and gender identity' (2022) <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/activities> accessed 24/04/2022; *Navtej Singh Johar & Ors v Union of India thr Secretary Ministry of Law and Justice* (2019) INSC AIR 746, *Letsweletse Motshidiemang v A-G & Ors (LEGABIBO as amicus curiae)* (2019) MAHGB-000591-16 (HC Botswana).

[24] UN Declaration on the Rights of Indigenous Peoples, GA A/RES/61/295 2007 UN; Claire Charters, 'The Sweet Spot Between Formalism and Fairness: Indigenous Peoples' Contribution to International Law' (2021) 115 AJIL Unbound 123.

[25] Claire Charters and others, *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (2019); Indigenous

engagement with the UN international human rights framework can offer an international normative canopy to facilitate rights realisation on the ground, including for categories of people whose voices have traditionally been excluded from UN rights discourses. They have succeeded by supporting rather than usurping local expressions of marginalised identities.

In contrast to writers such as Atrey, who focus primarily on jurisdictions with justiciable rights in searching for a principled approach to addressing the discrimination experienced by those whose lives are affected by multiple axes of oppression, I am not concerned with the regional or domestic juridical realisation of rights in a direct sense.[26] This is for several reasons. First, the Asia-Pacific geographic region I reside in contains both the world's most populous states and many of the smallest, and lacks a regional human rights system. Second, the domestic human rights infrastructure of most states in the region is poorly developed: outside of South Asia, ICESCR rights are not generally domestically justiciable. Third, my analysis is undertaken with the awareness that most marginalised single-parent families have no prospect of turning to the courts to adjudicate ICESCR rights.[27] Therefore, my interest skews towards examining the normative potential of international human rights law to affect political and policy decisions, including providing the conditions for marginalised people to effect change on the ground regardless of their access to the courts.

Positive economic, social and cultural human rights requirements are at times referred to as 'soft law' because of the absence, in most jurisdictions, of coercive

Collaboration Arrangement between the Government of Aotearoa-New Zealand and the Government of Canada 2022.

[26] Shreya Atrey, *Intersectional Discrimination* (OUP 2019).

[27] Tamara Relis, 'Human Rights and Southern Realities' (2011) 33 HRQ 509; Nedelsky (n 20) 231.

mechanisms for their enforcement. As such, there is a risk that they may be seen as 'purely political with no normative dimension'.[28] However, this would be incorrect. The IBOR (comprising the UDHR, the International Covenant on Civil and Political Rights (ICCPR)[29] and ICESCR) has been ratified by the vast bulk of UN member states. As such, it represents an overlapping consensus of principles that all states party recognise and agree to honour on a mutually reciprocal basis. Thus, it meets Rawls' requirements for a system of justice.[30] The normative strength of the UN international human rights law framework, recognised as a system of law, rests on this and gives it legitimacy beyond mere political aspirations.

1.4.2 The Vienna Convention on the Law of Treaties

The VCLT sets out the principles of treaty interpretation that ground my analysis. These principles provide that a treaty provision is to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'[31] and with recourse 'to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' as a supplementary means of interpretation.[32] For reasons I outline in subchapters 1.9 and 3.3, I take an evolutionary purposive approach to the interpretation of ICESCR Article 10(1) and other human rights treaty provisions.

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[28] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008)160.

[29] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[30] John Rawls and Erin I Kelly, *Justice as Fairness: A Restatement* (Harvard UP 2001) 32-4.

[31] VCLT Article 31(1).

[32] ibid Article 32.

1.4.3 Interdependent, indivisible, interrelated

In line with the Vienna Declaration and Programme of Action (VDPA), I see human rights as interdependent, indivisible and interrelated. They are not subject to a hierarchy of civil and political versus economic, social and cultural rights.[33] In my view, this includes a requirement to take group rights seriously alongside individual rights. The failure to realise single-parent families' economic, social and cultural rights represents a failure to understand the interdependence and interrelatedness of family members and the structures within which families exist. Nevertheless, to move beyond an atomistic rights analysis and acknowledge that everything is interconnected risks producing mere rhetorical mush unless we have tools for understanding the nature and effects of these interconnections. Therefore, my task includes elucidating the function of ICESCR Article 10(1) in relation to other economic, social and cultural rights using theoretical approaches of scholars grappling with interdependence, indivisibility and the interrelatedness of phenomenon.

Regarding the rights of single mothers as women, I supplement the non-discrimination and equalities approach taken by writers such as Fredman and Campbell[34] with the lessons of dependency theory and vulnerability theory that have been developed by the likes of Fineman and Herring[35] in order to illuminate the necessity of placing relationships, including mothering, at the centre of efforts to eliminate substantive

[33] The World Conference on Human Rights, 'Vienna Declaration and Programme of Action' (12 July 1993) A/Conf157/23 [5].

[34] Fredman (n 28); Meghan Campbell, *Women, Poverty, Equality: The Role of CEDAW* (Hart 2018); Meghan Campbell, 'Monitoring Women's Socio-Economic Equality Under ICESCR' (2018) Canadian Journal of Women and the Law.

[35] Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004); Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2011) 60 Emory LJ; Jonathan Herring, 'Making family law less sexy ... and more careful' in Robert Leckey (ed), *After Legal Equality* (Routledge 2014); Jonathan Herring, *Law and the Relational Self* (CUP 2020).

discrimination against women. I argue that the interdependence of mother-child dyads means that purely individual rights perspectives struggle to produce effective responses. By supplementing these with the group right in Article 10(1) allows concepts of universal vulnerability and dependency to be properly addressed, enabling women's relational autonomy to be recognised and upheld. Therefore, in addition to examining the economic, social and cultural rights of single mothers as an important women's rights goal in itself, I approach my investigation of the marginalisation of single-parent families as a paradigmatic example of how the autonomy myth and a failure to value caregiving perpetuate women's subjugation by not accommodating realities of dependency and derivative dependency. Thus, I argue that addressing the rights of single-parent families is essential to CEDAW's purpose of eliminating all forms of discrimination against women and that Article 10(1)'s group rights lens is a necessary complement to the individual rights perspective of CEDAW.

1.4.4 Pluralistic and universal

Although my analysis is primarily rooted in Western—particularly Anglo—human rights jurisprudence, I draw on other strands of scholarship to assist my understanding. These include insights from public policy, social science and political philosophy.

Many writers grounded in non-Western epistemologies, ontologies and moral philosophy have tackled questions of equality and non-discrimination; autonomy and the relationship between the group and the individual; and the nature of the family. In this regard, I look to indigenous, particularly Māori, jurisprudence and to Buddhist philosophy (specifically that of the Nichiren school) as sources of insight. For example, I refer, in subchapter 2.2.5, to Māori concepts of *whānau* and the Sāmoan concept of *aiga* to illustrate the plurality of conceptualisations that the term 'family' in ICESCR Article 10(1) must encompass in order to fulfil international human rights law's claim to

universal relevance. Māori jurisprudence shapes my insistence on the legitimacy of collective rights and adds to my appreciation of the need to centre relational autonomy, vulnerability, caring and interdependence in international human rights law. Here, I am influenced by the work of Jackson, Mikaere and Ruru, as well as the jurisprudence of the Waitangi Tribunal and the NZ Supreme Court.[36] The Buddhist concept of dependent origination provides an additional philosophical basis for asserting the legitimacy of relational approaches that centre interdependence and vulnerability and resisting the conceptualisation of humans as mere utility-maximising rational, autonomous beings.[37] Despite my pluralistic intent, limitations of my knowledge inevitably mean that many significant schools of jurisprudence are not reflected in this research.[38]

1.4.5 Intersectional

As Atrey observes, the notion of intersectionality has become an unmissable part of public discourse.[39] My approach is intersectional in the sense of understanding that single-axis approaches to discrimination neither reflect reality nor offer a realistic hope of tackling structural inequalities. Rather than having a merely additive effect, multiple axes of discrimination compound impacts on the most marginalised. In the case of single-parent families, the interdependence of members of the family group unit means that the whole family and all its members may be affected by discrimination against one member.

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[36] Moana Jackson, 'Whakapapa and the beginning of law', *'The Power in Our Truth', a Conference Inspired by the Work of Moana Jackson* (Te Wānanga o Raukawa 2023); Ani Mikaere, *Colonising Myths: Māori Realities – He Rukuruku Whakaaro* (Huia 2011); Jacinta Ruru, 'Kua tutū te puehu, kia mau: Māori aspirations and family law policy' in Mark Henaghan and others (eds), *Family Law in New Zealand* (15 edn, LexisNexis 2013); Waitangi Tribunal, *He Pāharakeke, he Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (WAI 2915, Waitangi Tribunal 2021) 14-6; *Ellis v R* [2019] NZSC 83.

[37] Daisaku Ikeda, 'Ethos of Symbiosis: a speech delivered to the Chinese Academy of Social Sciences, Beijing' (1992).

[38] Eg, Islamic jurisprudence.

[39] Atrey (n 26) 34.

For example, most single-parent families are female-headed, and thus affected by labour market discrimination against women. Similarly, generalised age discrimination faced by children, including an absence of political power, means single-parent families may lack the clout of, for example, a family consisting solely of an adult couple. For this reason, I consider the interplay of ICESCR Article 10(1), which protects the group rights of the family, with provisions of CEDAW and the UN Convention on the Rights of the Child (CRC),[40] and urge a joint approach from the three treaty bodies: CESCR, CEDAW and CRC.

Discrimination against one family member may add to the multiplicity of forces preventing single-parent families from realising their economic, social and cultural rights. For example, if one member of the family is reliant on a wheelchair for mobility and no accessible housing is available, the entire family may face homelessness, relocation to another area, or the physical labour of lifting their family member over the barriers that restrict that person's mobility. Single-parent families may also be primary objects of intersectional discrimination, for example, where family members share a marginalised racial or religious identity. Thus, I argue that 'intersectional overtones'[41] must be given due weight in UN treaty bodies' and states' efforts to realise single-parent families' economic, social and cultural rights.

Conversely, the impact of single-parent family status must become one of the lenses through which UN and state actors, advocates and scholars approach human rights analysis and decision-making on economic, social and cultural policies. To say that the UN treaty bodies ought to offer guidance on the realisation of single-parent families'

[40] Eg CEDAW Articles 3, 5, 7, 8, 11, 13 and 14 (read in light of Articles 1, 2, and 4); CRC Articles 6, 24, 26, 27, 31, and 32 (read in light of Articles 2, 3, and 4).

[41] Atrey (n 26) 34.

economic, social and cultural rights is not to say that this issue is more important than every other possible human rights issue on which guidance and action is needed. It is not an 'Oppression Olympics',[42] but rather a matter of shining light on an area of rights violation that affects significant numbers globally yet has been underexamined and underacknowledged in the literature and practice.

Nevertheless, my thesis does not seek to add to scholarship on intersectionality as a concept used in judicial decision-making. To do justice to that topic would require additional detailed analysis, which I do not have room for here. Furthermore, as explained, I aim to elucidate the role of UN treaty bodies in guiding states on their human rights obligations towards single-parent families, rather than pursuing a juridical approach. The intricacies of single-axis approaches to discrimination law are less entrenched in these forums than in judicial decision-making. The approach set out in the VDPA that sees all human rights as interdependent, indivisible and interrelated lends authority to less atomistic analysis. The restriction of UN treaty bodies to monitoring, guidance and recommendation-making provides greater freedom to engage with overlapping concepts and interconnections than that enjoyed by courts which must produce binding judgements on damages or decide whether to strike down legislative provisions.

1.5 Contribution to scholarship

The concept of 'family' has been under-theorised in relation to UN human rights treaties and economic, social and cultural rights. My thesis addresses this lacuna in five ways. First, it breaks new ground by addressing the concept of the family as a group

[42] Elizabeth Martinez and Angela Y Davis, 'A discussion with Angela Y Davis and Elizabeth Martínez' (Centre for Cultural Studies, University of California Santa Cruz, (1993) <https://culturalstudies.ucsc.edu/inscriptions/volume-7/angela-y-davis-elizabeth-martinez/> accessed 2/12/2021.

rightsholder in international human rights law. Despite being the archetypal form of human group, scholarship on group rights rarely touches on the rights of the family as a group unit.[43] This thesis explains why the failure to grapple with the family as a group unit has negative consequences for the realisation of rights for real people at the grassroots level, including many of the most vulnerable. Second, my thesis provides content to the term 'family' in international human rights law based on theoretical and doctrinal analysis. Here, I rebut both unduly restrictive and contractual notions of the family.[44] Third, a case for UN human rights mechanisms to take the economic, social and group rights of single-parent families seriously is mounted, thus bringing scholarly attention to a previously neglected area. In this context, I rely on CESCR General Comments and the literature on substantive discrimination.[45] Fourth, my thesis applies Fineman's notion of derivative dependency to the realisation of rights in UN human rights treaties, drawing a previously undeveloped link between the work of family law theorists on vulnerability theory and the rights protected by the UN treaty system.[46] This application allows the interdependence of group and individual rights to be explored. It draws attention to the need for attention to be paid to the interplay of ICESCR Article 10(1) with CEDAW and CRC, based on the argument that the failure to protect the economic, social and cultural rights of the family group unit renders the dream of

[43] Exceptions include Olajide O Akani, 'Group Rights and Conflicts in Africa: A Critical Reflection on Ife-Modakeke, Nigeria' (2009) 16 IJ Minority and Group Rights 31 & Carol C Gould, 'Group rights and Social Ontology' in Peter Jones (ed), *Group Rights* (Ashgate 2009) 142.

[44] Robert John Araujo, 'Natural Law and the Rights of the Family' (2010) 1 IJ Jurisprudence of the Family 197; Mary Somerville, 'Children's Human Rights to Natural Biological Origins and Family Structure' (2010) 1 IJ Jurisprudence of the Family 35; James G Dwyer, *The Relationship Rights of Children* (CUP 2006); Elisabeth Landes and Richard A Posner, 'The Economics of the Baby Shortage' (1978) 7 J Legal Stud 323.

[45] Eg Sandra Fredman, *Discrimination law* (2nd edn, OUP 2011); Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart 2009).

[46] Fineman, *Autonomy* (n 35) 31-54.

women's and children's rights fulfilment unachievable in a world characterised by human vulnerability, dependency and derivative dependency. Finally, I add to scholarship around UN treaty bodies by offering practical proposals for UN human rights mechanisms to require states to respect, protect and fulfil the economic, social and cultural group rights of single-parent families. In particular, I propose a joint General Comment/General Recommendation on states' obligations in relation to the economic, social and cultural rights of single-parent families be issued by CESCR, CEDAW and CRC.

1.6 Audience

Beyond the examiners, my thesis is directed at several audiences. First, the members and secretariats of UN treaty bodies, particularly CESCR, CEDAW and CRC. I contend that these committees have a role to play in guiding states' understanding of their obligations to realise the economic, social and cultural rights of single-parent families. Therefore, my arguments need to be persuasive to them. Second, scholars concerned with economic, social and cultural rights may be encouraged to think about ICESCR Article 10(1) afresh while academics within disciplines such as family law, social science, public policy, and feminist and critical legal theory may also find the arguments of interest. Third, civil society plays a crucial role in advancing human rights realisation through developing and championing new thinking and holding governments to account. My arguments are unlikely to gain traction with treaty bodies unless they are also persuasive to civil society activists and organisations. Fourth, remembering that single-parent families come in all forms, it is hoped that some members of such families will engage with the arguments and endorse their relevance to their lived experiences localities. Finally, it is hoped that policy and lawmakers within states party to the relevant treaties will gain an increased understanding of their obligations towards single-parent families and how to promote,

protect and fulfil these. State obligations exist regardless of whether a treaty body has issued guidance on them. It is acknowledged that the myriad obligations on states party to international human rights treaties creates situations in which some receive less domestic attention than others. Awareness of the arguments advanced in this thesis would assist state executives and legislatures in understanding that domestic decisions affecting the socioeconomic and cultural position of single-parent families have international human rights implications. Regional and national human rights institutions could encourage this awareness and monitor progress even in the absence of UN treaty body guidance. Judicial decision-makers are not a primary audience for this thesis. Nevertheless, some may find the arguments advanced here assist in the interpretation of cases before them in limited circumstances.

1.7 Nomenclature

I use the phrase 'single-parent family' to refer to a family containing dependent children and headed by one adult who is de facto responsible for fulfilling parenting functions in relation to one or more children under the age of eighteen. As I investigate in subchapter 2.3, 'family' is a contested and value-laden concept with unclear boundaries. There are debates about how best to describe the type of families I am concerned with. Accuracy, destigmatisation and simplicity compete as criteria for assessment. Other possible terms include lone-parent families, sole-parent families and solo-parent families. The term 'families led by one person'[47] is clear and avoids stigma but suffers from longwindedness.

In subchapter 2.3, I conclude that the proper conception of the family for the purposes of ICESCR Article 10(1) is the vulnerable-caring family. Within such a family,

[47] Birthright, 'Birthright' <http://www.birthright.org.nz/> accessed 23 May 2017.

parenting roles can be undertaken by someone who does not have the formal or biological status of a parent. Thus, families led solely by a grandparent, aunt or other adult come under my meaning of 'single-parent family', as do single-parent nuclear families nested within larger extended families.

The existence of shared-care arrangements raises different issues for the definition of a single-parent family. Shared care is increasingly common in states such as Australia, New Zealand and the UK. There is limited research on how this development affects the economic and caring situations of the separated parents or their families.[48] It is, however, important to note that my conception of the family as a functional, vulnerable-caring group allows for the possibility that a child may be a member of more than one family. From the perspective of economic, social and cultural realities, a child who is the subject of shared care may be seen as located within their mother's and father's families.[49] This view reflects the reality that often each parent is making everyday family decisions about their family as a unit that excludes (though inevitably has regard to) the other parent's family. The alternative, which is to view the child as part of a family that includes both parents, leads to a range of difficulties, including the continued use of the epithet 'broken' and the freezing of separated parents – who do not have a shared desire to remain a family, may have been in an abusive relationship, or may have never had more than a sexual liaison – as a family in relation to each other.

Other family situations also challenge my definition. What of the family in which one parent migrates for work? Clearly, there are many nuances: is the migrating parent gone for months, years, or decades? Do they regularly return? Do they take active

[48] Jan Pryor, *Stepfamilies: A Global Perspective on Research, Policy, and Practice* (Routledge 2014).

[49] Assuming opposite-sex parents.

responsibility for the care and education of the children despite the distance? Do they form a new family that takes their attention at the expense of the one left behind? The formation of a new intimate relationship by a single parent also challenges the definition of a single-parent family. Some jurisdictions are quick to assume that once a single parent enters into a new intimate relationship, their family no longer needs social welfare support.[50] Imprisonment adds another dimension, both in situations where one parent is imprisoned leaving the other to parent on their own, and in situations where the only legal parent is in prison, as in the South African case of *President of the Republic of South Africa and Another v Hugo*.[51] Moreover, it is possible that an abusive man may be held not to be family of his legal children or their mother despite years of cohabitation if the relationship has been overwhelmingly coercive and he entirely failed to contribute to the family through nurture or material provisioning.[52] These are hard issues for governments and courts. However, for the purposes of this thesis, the concept of a functional vulnerable-caring family provides sufficient definition to allow the argument that single-parent families are a uniquely discriminated against family type in terms of ICESCR Article 10(1).

Furthermore, families are not static. Over time, dependent children become adults. A single parent may enter into a new romantic relationship. From a vulnerable-caring perspective, this does not necessarily equate to the morphing of the family into a two-parent one. Nevertheless, it is possible that in some situations, it may be accurate to consider that the single-parent family has been replaced by a two-parent one. None of this

[50] Social Security Act 2018 (NZ) ss8, 29, 30.

[51] *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997).

[52] *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 (CA).

renders the term 'single-parent family' less useful. As Lord Wilson observes, the fact that a status can change does not obviate the relevance of that status.[53]

Based on the vulnerable-caring conception, I use verbs related to family to reflect functions undertaken rather than status. Thus, I use the term 'parenting' to mean the array of functions, tasks and responsibilities undertaken typically by parents to care for and educate children. When someone other than a parent is undertaking these functions in place of a parent, they are, in my usage, 'parenting'. More specifically, 'mothering' refers to labour typically undertaken by mothers. The array of tasks, functions and responsibilities connoted by the term is extensive. Moreover, the term suggests that these functions are undertaken with 'care and protection'.[54] In taking this approach, I am influenced by but diverge slightly from Fineman, who rejects the word 'parenthood' in favour of 'motherhood' in her analysis to draw attention to motherhood as 'a constructed social and cultural role', which contains powerful coercive normative expectations.[55] She argues, '[t]o say we need someone to take care of a child is not the same as saying we want someone to mother that child'.[56] Her approach resonates with the usage of 'motherhood' in IBOR. While in practice, states' implementation of provisions protecting motherhood has focused on the post-partum and breastfeeding mother, it is also possible to interpret such provisions as encompassing the attached-nurturing-caregiving-

[53] *R (on the application of DA and others) (Appellants) v Secretary of State for Work and Pensions (Respondent) R (on the application of DS and others) (Appellants) v Secretary of State for Work and Pensions (Respondent)* [2019] UKSC 21 [38-39].

[54] Judy Pearsall (ed), *The Concise Oxford English Dictionary* (10th edn, revised OUP 2002).

[55] Fineman, *Autonomy* (n 35) 146.

[56] Ibid 146-7.

provisioning-protecting-raising work that is universally associated with mothering. In a functional definition of family, the mothering-child dyad is central.

In contrast to 'mothering', common usage often limits the term 'fathering' to a man's involvement in procreation. However, the *Concise Oxford English Dictionary* also defines 'fathering' as 'to treat with fatherly protective care'.[57] To be 'fatherly' is to be 'protective and affectionate' in contradistinction to being 'motherly' which is to be 'caring, protective and kind'.[58] In academic disciplines such as sociology and psychology, 'fathering' is often used in the wider sense of parenting carried out by fathers, for example, in discussing male parenting styles. The distinctions are subtle, but it is clear that even in the wider meaning of 'fathering', it is not a direct parallel to 'mothering'. Nor are 'fathering' and 'parenting' equivalent.[59]

Given the focus of ICESCR Article 10(1) on 'care and education', I have not had the same need to use the term 'fathering' in this thesis. Given the high overlap between 'single parent' and 'single mother', I use the female 'she' or the gender-neutral 'they' in talking about the single parent generally. In contrast, I use 'he/him' to denote a single father. In terms of gestation, birthing and breast-feeding, I acknowledge that transmen and non-binary people can undertake the physical labour of reproduction. Others are writing about the experiences, rights and identities of trans-parents and their children.[60]

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[57] Pearsall (ed) (n 54).

[58] ibid.

[59] Fineman, *Autonomy* (n 35) 147.

[60] Eg, N Eugene Walls and others, 'Transfeminine Spectrum Parenting: Evidence from the National Transgender Discrimination Survey' (2019) 43 Social Work Research 133; Susie Bower-Brown, 'Beyond Mum and Dad: Gendered Assumptions about Parenting and the Experiences of Trans and/or Non-Binary Parents in the UK' (2022) 18 LGBTQ+ Family: An Interdisciplinary Journal 223.

Unfortunately, for ease of readability and to avoid clouding my central argument, I have found it necessary to maintain the fiction of the gender binary in this thesis.

Taking an international approach to the topic requires facing the implications of different terms for the world's regions. While all are problematic, I prefer terms such as high-, middle- and low-income to indicate different levels of resources different states have access to. However, income is not the only organising principle by which states may be grouped. Sometimes, the terms 'Global South' and 'Global North' better express the intended idea. Other quasi-geographic terms are used when their historical resonance is relevant, for example, in discussion of 'Western liberalism', or 'Anglo' states which are historically rooted in English norms, language and institutions, including the common law.

1.8 Rationale for focus on single-parent families

1.8.1 Single-parent families as a universally marginalised category

Single-parent families are universally marginalised in terms of substantive equality across all four dimensions of discrimination, namely, distribution, recognition, transformation and participation,[61] yet little has been written about this from an economic, social and cultural rights perspective. Rather, their marginalisation has been accepted to be a matter of individual deficit (whether moral or functional) or personal misfortune. Solutions have been limited to charitable provision, deficit-based welfare provision, or private family law remediation. None of these have proved satisfactory in terms of human dignity, practical outcomes or analytical robustness. My thesis addresses this gap by taking single-parent families seriously as holders of ICESCR Article 10(1) rights that create commensurate obligations on states.

[61] Fredman, *Discrimination* (n 45) 25. See subchapter 3.4.

Given that single-parent families are typically (though not always) made up of a woman and her children, it is unsurprising that the unequal economic, social and cultural status of both women and children is reflected in these family units. Economic, social and cultural inequality and discrimination towards both women and children have proved stubbornly difficult to rectify. The failure to account for the care needs of children and the parallel caregiving responsibilities taken on by women (referred to by Fineman as dependency and derivative dependency, respectively) contributes to this.[62] In the case of single-mother families, the absence of an adult male removes the possibility of sharing in the economic privileges associated with that status.

In the area of economic, social and cultural rights, the number of people affected matters. A serious violation of one person's rights is concerning. Nevertheless, when making a decision about where to direct scarce resources, the number of people affected is relevant. Programmatic rights realisation occurs at a population level.

Moreover, claims of discrimination and inequality in the enjoyment of rights require the identification of a category of people who are discriminated against. Criticisms have been levelled at the identification of additional analogous grounds for protection from discrimination because it is feared that the recognition of endless new categories may rob the whole project of anti-discrimination of meaning. Intersectional theory's call for recognition of the multiplicative effects of intersecting axes of discrimination has received similar criticism.[63] Therefore, to justify a call for UN treaty bodies to hold states accountable for violations of single-parent families' economic, social and cultural rights as a matter of urgency, it is important to show not just that

[62] Fineman, *Autonomy* (n 35) 45.

[63] Kathy Davis, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful' (2008) 9 Feminist Theory 67, 75.

single-parent families as a class suffer Article 10(1) rights violations, but also that the numbers affected and their distribution are sufficiently significant to justify a global response.

Statistical definitions of single-parent family status have, until recently, been poorly developed. For example, 'unmarried mothers' and 'households with female heads' have both been used as proxies to estimate numbers of single-parent families, reflecting cultural assumptions about families and households. It is encouraging to see moves by the UN Population Division to address this in the third revision of its *Principles and Recommendations for Population and Housing Censuses*.[64] Its dataset now covers a variety of useful data indicators related to single-parent households allowing exploration of trends across countries in all UN regions.[65] Nevertheless, data concerning the economic, social and cultural status of single-parent families remains limited, and comparability across states continues to be constrained by differing interpretations of key concepts and variability in reporting. For example, household statistics from China are notably absent from the dataset, resulting in no data on the estimated 19.4 million plus single-parent families in that country.[66]

Furthermore, state censuses and surveys which are the usual sources of data on household composition, typically describe each member of the household by reference to

[64] UN Department of Economic and Social Affairs Population Division, *Principles and Recommendations for Population and Housing Censuses, Revision 3* (ST/ESA/STAT/SERM/67/Rev3, UN 2017) [4.133].

[65] UN Department of Economic and Social Affairs Population Division, *Patterns and trends in household size and composition: Evidence from a United Nations dataset* (ST/ESA/SERA/433, UN 2019) 2, 31-32.

[66] Vivian Wang, 'For China's Single Mothers, a Road to Recognition Paved with False Starts' *The New York Times* (31/05/2021) <https://www.nytimes.com/2021/05/31/world/asia/china-mothers-children-birth.html> accessed 17/2/2022.

a single reference person who is recorded as the 'household head'.[67] According to the UN Population Division,

> The most common assumption that can distort the facts is that no woman can be the head of any household that also contains an adult male. Enumerators and even respondents may simply take such an assumption for granted.[68]

Nevertheless, female-headed households account for at least half of all households in nine states: Russia, Bermuda, Belarus, Puerto Rico, Poland, Estonia, NZ, Lithuania and Latvia.[69]

Single-parent nuclear family households account for more than 15 per cent of all households in eight states or territories: Bolivia, Jamaica, Latvia, Mayotte, Nepal, Puerto Rico, Sint Maarten (Dutch Part) and South Sudan.[70] The vast majority of are headed by women. As the UN Population Division observes:

> Often, the female heads of households with children present are single mothers and, in many contexts, these households are more vulnerable to poverty than two-parent households.[71]

The highest proportions of single-father nuclear family households are in Lesotho and Trinidad and Tobago, where they account for 3.4 percent and 3.1 percent of all households, respectively.[72] The UN definition of single-parent households excludes households in which an adult other than the parent is caring for and responsible for children. Skip-generation households, in which a grandparent resides with their grandchild or grandchildren, but no parent of those children is present, account for

[67] ST/ESA/SERA/433 (n 65) 12.

[68] ST/ESA/STAT/SERM/67/Rev3 (n 64) [4.133].

[69] ST/ESA/SERA/433 (n 65) 12-13.

[70] ibid 18-19.

[71] ibid 12.

[72] ibid 18-19.

between 5 and 9 percent of all households in Malawi, Zimbabwe, Zambia, Uganda, Mozambique, Eswatini; Sao Tome and Principe, Zambia, Tanzania, Rwanda and Liberia.[73] The correlation between such households and contexts of high adult mortality (such as the AIDS crisis or situations of armed conflict) or the outmigration of working-age adults suggests that skip-generation households are likely to be particularly at risk of rights violations. Where skip-generation households are led by a single adult, they are included in my definition of single-parent families. They should be included in measures to protect the economic, social and cultural rights of single-parent families.

Single-parent families may also be nested within extended family household configurations, in which all members are related to each other, but at least one member is outside the nuclear family unit. Extended family households comprise over fifty percent of households in Guinea, Gambia, Sierra Leone and Senegal.[74] The UN Population Division data does not offer insight into the number of children who move between two single-parent family situations, such as may occur when shared parenting is court ordered: a situation that is increasingly frequent in Anglo jurisdictions.

1.8.2 Illustrations of marginalised status of single-parent families globally

The claim in this thesis includes the premises that single-parent families are universally disadvantaged in the realisation of their economic, social and cultural rights; and that there has been an on-going failure of states to address this. Under Fredman's theory of discrimination, when a category of people against whom discrimination is prohibited is manifestly unequal in its enjoyment of an economic, social or cultural right, this

[73] ibid 29.

[74] ibid 19.

constitutes *prima facie* evidence of discrimination.[75] I elaborate on this point in later chapters and provide, in Chapter 4, an analysis of the UK case of *R (DA)*[76] as an illustration of single-parent families' rights violations by a state in the absence of recognition of the obligation to implement ICESCR Article 10(1) on a basis of non-discrimination.

To set the scene, however, it is helpful to consider examples of single-parent families and their members' inequality in various states. These examples do not prove universal discrimination against single-parent families empirically. That is too big a task. As discussed, the very marginalisation of single-parent families in local, domestic, regional and global policy frameworks means that robust comparable data do not exist. However, illustrative examples drawn from available statistics, research and journalistic reporting offer *prima facie* indications of the extent to which single-parent families' economic, social and cultural rights are routinely violated. Here, I present these using the framing device of Fredman's four dimensions of discrimination, namely maldistribution, misrecognition, transformation (as expressed by its absence, structurally entrenched marginalisation) and non-participation.[77]

1.8.2.1 Maldistribution

Single-parent families experience material poverty and persistent severe economic inequality in all states for which data is available. Single jurisdiction and comparative studies consistently show single-parent families to be the poorest in their communities, with significantly disproportionate numbers suffering persistent poverty across high,

[75] Fredman, *Discrimination* (n 45) 15.

[76] *R (DA)* (n 53).

[77] Fredman, *Discrimination*, (n 45) 25-33.

middle and low-income states.[78] *Prima facie* evidence of distributive discrimination in the enjoyment of economic, social and cultural rights also appears in other domains. For example, research in a range of states has found single parenthood, and single motherhood in particular, to be associated with low health outcomes, including higher risks of cardiovascular diseases, diabetes, depression and anxiety, as well as general mortality and morbidity.[79]

1.8.2.1.1 The example of the USA

Forty-one percent of US single-mother families and 22 percent of single-father families live below the official poverty line, compared to 9 percent of two-parent families. Two-thirds of single-mother families are 'food insecure', and three quarters of homeless families are headed by single-mothers.[80] Low rates of health cover, stingy income support, a lack of leave entitlements, long waiting times for early childhood education and low rates of child support receipt all serve to marginalise US single-parent families economically.[81]

While paid work has often been touted as a route out of poverty, the US experience suggests that such a view is overly simplistic: over 33.5 percent of US

[78] Timothy Casey and Laurie Maldonado, *Worst Off - Single-Parent Families in the United States: A Cross-National Comparison of Single Parenthood in the U.S. and 16 other High-Income Countries* (Legal Momentum 2012); Yekaterina Chzhen and Jonathan Bradshaw, 'Lone parents, poverty and policy in the European Union' (2012) 22 JEurSP; Clifford O Odimegwu, Nyasha Mutanda and Chidimma M. Mbanefo, 'Correlates of Single Motherhood in Four Sub-Saharan African Countries' (2017) 48 J Comparative Family Studies 313; OECD, 'Doing Better for Families' (OECD, (2011) <https://www.oecd-ilibrary.org/social-issues-migration-health/doing-better-for-families_9789264098732-en> accessed 3/11/21; OECD, 'OECD Family Database' (OECD, <https://www.oecd.org/els/family/database.htm> accessed 3/11/21. Otrude N Moyo and Saliwe M Kawewe, 'Lone Motherhood in Zimbabwe: The Socioeconomic Conditions of Lone Parents and Their Children' (2009) 24 Social Work in Public Health 161.

[79] E Rousou and others, 'Single mothers' self-assessment of health: a systematic exploration of the literature' (2013) 60 International Nursing Review 425 1; Odimegwu, Mutanda and Mbanefo (n 78); E Krassoi Peach and J Cording, *Multiple disadvantage among sole parents in New Zealand* (Social Policy and Evaluation Research Unit 2018); Moyo and Kawewe (n 78).

[80] Casey and Maldonado (n 78) 27.

[81] ibid 1.

families with single mothers in paid work are in poverty.[82] Data over a thirty-year period shows that single mothers in paid employment are almost three times more likely to be low-waged than members of the employed population as a whole.[83] US single mothers are paid so much less than men with comparable qualifications that it is estimated that poverty rates among those families containing an employed single mother would be halved if such women were paid the same as men with comparable qualifications.[84] Unemployed single mothers, meanwhile, suffer marginalisation in receipt of unemployment income. Whereas 44 percent of all unemployed people receive unemployment insurance payments in the US, this figure drops to 24 percent of unemployed single mothers. The payments received by eligible single mothers are also disproportionately low due to the low-wage work to which such women are often confined.[85]

The economic marginalisation experienced by single-parent families in the US, despite engaging in paid employment, is mirrored in countries such as Japan, where the poverty rate of single-parent families in paid work is 56 percent.[86]

1.8.2.2 Misrecognition

The misrecognition of single-parent families has long and complex historical roots that continue to fuel stigmatisation of single-parent families and their members today.

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[82] Alana Semuels, 'Japan Is No Place for Single Mothers' *The Atlantic* (7 September 2017) <https://www.theatlantic.com/business/archive/2017/09/japan-is-no-place-for-single-mothers/538743/> accessed 7/9/2017.

[83] Casey and Maldonado (n 78) 9.

[84] ibid 9.

[85] ibid 21.

[86] Semuels (n 82).

1.8.2.2.1 Historic roots—the example of Europe

While much has changed in Europe and in other parts of the world whose polities draw heavily on European worldviews, the stickiness of ideas that benefit those with greater power means that it is helpful to consider how single-parent families and their members have been (mis)recognised in Europe in the past, including legal antecedents such as the concept of illegitimacy which continues to colour attitudes despite no longer being a legal categorisation in most contexts.

Historically, European views of single-parent families and their members fixated on how such families came into being. Unmarried motherhood and children of such mothers were the most stigmatised. In classical antiquity, pregnant, unmarried women were commonly killed.[87] The legal status of 'illegitimacy' was traditionally placed on children born to unmarried mothers in much of Europe and always involved disadvantage. Under Roman (that is, continental European) law, most illegitimate children were designated *spuria*. They were entirely dependent on their mothers, who also had very limited rights. Early orphanages would not accept such children, making options for their survival dire. As a result, it was common for such children to be left to die via exposure to the elements.[88]

Similarly, English cannon and common law designated children born to unmarried mothers *filius nullius*, meaning 'child of no-one'.[89] As in continental Europe, these children were often killed through exposure to the elements, a fate that appears to have become frequent during the turmoil of the industrial revolution. Under the English Poor Laws, municipalities responsible for making charitable provisions for the poor

[87] Jenny Teichman, *Illegitimacy: A Philosophical Examination* (Basil Blackwell 1982) 53.

[88] ibid 33-34.

[89] ibid 60.

inflicted punishments such as imprisonment and hard labour on unmarried mothers. One type of punishment was to require such women to wear badges advertising their status in a deliberate act of legalised stigmatisation. [90]

In contrast to unmarried mothers and their children, traditional European societies might regard single-parent families that came about through the dissolution or de facto ending of a marriage somewhat less harshly. Nevertheless, stigmatisation was severe. In contrast, widows and their children often enjoyed a less stigmatised status. The death of one parent was a common event. For example, a third of children in eighteenth-century European villages might be affected.[91] Such families might face material hardship and decreased social, political and cultural power, but they escaped the weight of social, religious and legal judgment inflicted on other single-parent families.[92] In the case of war widows and their children, they might even be lauded for their sacrifice.

1.8.2.2.2 The example of Sri Lanka—consequences of stigma for never-married mothers and their children

A study of unmarried pregnant women and single mothers in Sri Lanka revealed an array of negative consequences of a highly condemnatory environment.[93] Relatively high levels of education and autonomy experienced by women and girls in Sri Lanka (compared to South Asia as a whole) are not sufficient to offset the stigma arising from a traditional expectation that maintaining virginity until marriage is necessary to uphold one's family's reputation.[94] The overwhelming impact of stigma, described as 'shame-fear',

[90] Teichman (n 87) 63.

[91] Guy Brunet, 'Orphans' *Encyclopedia of Children and Childhood in History and Society* <http://www.faqs.org/childhood/Me-Pa/Orphans.html#google_vignette> accessed 5/2/2014.

[92] Therefore, many single-parent families sought to 'pass' as widowed.

[93] Malin Jordal, Kumudu Wijewardena and Pia Olsson, 'Unmarried women's ways of facing single motherhood in Sri Lanka – a qualitative interview study' (2013) 13 BMC Women's Health.

[94] ibid 1-2.

robbed never-married single mothers of strategic agency. Despite striving for familial and social acceptance as well as social and financial survival, these single mothers 'had limited possibilities for shaping social processes, but rather tried to "grab on to possibilities arising in the shadow of the strategic others"'.[95]

When informing others of their pregnancy, the women attempted to reduce the risk of rejection and condemnation by expressing self-blame and guilt. This held true for the 29 percent of the sample who had become pregnant as a result of rape, as well as those who said their pregnancy was a result of consensual sex. To attempt to rehabilitate their relationships with their families-of-origin, relatives and employers, the women strove to demonstrate obedience and compliance.[96] The women also expressed high levels of self-blame for having transgressed social norms, as well as claims of victimhood (stating they were taken advantage of by unscrupulous men). In taking on 'an obedient and fearful attitude in order to restore a damaged reputation', Jordal et al suggest that women are not creating their own space in a strategic sense but rather using 'tactical agency or "bending the norms of others" (in this context, gendered norms and patriarchal power structures)'[97] to attempt to restore damaged reputations. Nevertheless, despite such efforts, gendered norms and structural barriers left these women little space to live safe and satisfying lives together with their children8 due to their dependency on the 'choices of powerful others'.[98] Specifically, 'hierarchical families, patriarchal gender structures, powerful employers and limited work opportunities, restricted the women's choices and

[95] ibid 8 citation omitted.

[96] ibid 5-6.

[97] ibid 8-9 citation omitted.

[98] ibid 9.

limited their ability to pursue their own personal interests'.[99] Women felt obliged to conform to ideals of social norms, the wellbeing of their families-of-origin, and patriarchal structures within their society to avoid social and familial exclusion and to ensure their and their children's survival.

The impacts of these women's stigmatising environment were many and included suicidality, an unsurprising result given the association between 'accusations of premarital sexual relations' and Sri Lanka's high female suicide rate.[100] Coerced separation of the nascent single-parent family was common, including pressure from family, employers and faith-based charitable agencies. At the extreme, coercion extended to threats of murder.[101] Women expressed a wish to keep their child but did not perceive it as their right. Support from others or the means to leave their home environment was required for a woman to contemplate parenting their child. Out-migration was often seen as necessary because raising the child away from her home area enabled the dignity of the woman's family-of-origin to be preserved, including siblings' future marriage options.[102] The stigma of 'illegitimacy' was a key concern for women thinking about their child's future. Some women sought to make the biological father acknowledge paternity through court proceedings. In these cases, obtaining financial support was said to be 'of minor importance' compared to obtaining a father's name on the child's birth certificate.[103]

[99] ibid 9.

[100] ibid 10.

[101] ibid 6.

[102] ibid 7.

[103] ibid 7.

In the case of Sri Lanka, single-parent families are sexually, economically and socially vulnerable. Gender norms, limited work opportunities and protections, and a lack of social security create dependency on support from family and employers, which can easily be abused. For women and girls who become single mothers as a result of premarital sex, societal condemnation makes ensuring the survival and wellbeing of themself and their child as a family unit an almost inconceivable goal.[104]

1.8.2.3 Structurally entrenched inequality—the transformative dimension

The transformative dimension of equality refers to the systemic or structural aspects of equality and, in a sense, ties together the other dimensions. The hegemonic stigmatisation of women and children who exist outside of a male-headed household based on marriage, as well as the visible lessons that can be drawn from their marginalised economic status, serve a necessary role in inducing women to tolerate the inequalities of married relationships. Rights violations suffered by single-parent families serve as a warning to married mothers that if they cannot maintain their intimate partner relationship, they will suffer, and will also inflict suffering on their children.

The extent to which single-parent families have continued to experience economic, social and cultural marginalisation despite the immense economic, social and cultural structural changes that have been a feature of most states and societies over the last fifty years indicates the need for a conscious commitment to transformative equality. Similar imperatives drive the stigmatisation of spinsterhood and childless women, although the economic consequences of stigmatisation are generally fewer in those instances. My argument is not based on an assumption that women are defined by childbearing or mothering. Rather, it acknowledges first, the fact that most women do

[104] ibid 1-2.

reproduce; second, the impression that for a substantial proportion of women, child-bearing and raising children is part of that which they have 'reason to value';[105] and third, the reality that human societies only survive if they reproduce physically and socially.

1.8.2.3.1 The example of New Zealand

A report on the wellbeing of single-parent families in New Zealand explains that: 'Historically, people's experience in income, health, loneliness, and housing quality had a strong relationship with overall life satisfaction, and sole parents fared poorly across a number of these areas'.[106] Roughly a quarter of NZ sole parents rate their families' wellbeing as low, compared with 10 percent of partnered parents. Nearly twice as many single parents as partnered parents rate their personal life satisfaction as low. Single parents in NZ are also three times as likely as other adults to experience major problems with heating their houses in winter and with dampness or mould. More than four times as many single-parent families in NZ lack sufficient money for everyday needs compared to partnered parents, and a majority of single parents have insufficient or barely sufficient money to meet everyday needs.[107] However, despite the inclusion of child poverty reduction targets in domestic law and espoused commitment to gender equality, NZ has not incorporated analysis of impacts on single-parent families as a regular part of policymaking processes.

1.8.2.4 (Non)participation

The participative dimension of discrimination refers to exclusion from social interaction, politics, culture, recreation and the like. While time and material poverty are significant

[105] Amartya Sen, *Development as Freedom* (2 edn, OUP 2001) 74.

[106] Stats NZ, 'Wellbeing outcomes worse for sole parents' <https://www.stats.govt.nz/news/wellbeing-outcomes-worse-for-sole-parents> accessed 14 September 2020.

[107] Ibid.

factors in marginalising single-parent families from full participation in society, misrecognition through stigma and discrimination also contribute. The combined impact of these factors has a compounding effect. For example, the study that found NZ single parents experienced much lower levels of wellbeing than the general population also found they were nearly twice as likely to report having experienced discrimination in the last year, were less likely to feel safe walking alone in their neighbourhood after dark and reported low levels of trust at a higher rate than others.[108] Moreover, it appears that the possibility of participation by single-parent families in the civic and political sphere is so unlikely that it is not even included in the matters measured. Even prominent organisations advocating on issues affecting single-parent families, such as Gingerbread (UK), and Birthright (NZ) describe themselves as supporting single-parent families, not as representing single-parent families' voices.

1.8.2.4.1 South Korea as an illustration of participative marginalisation

The idea that births to unmarried women is a social or ethical problem is widely accepted in South Korea and stigma against families headed by unmarried single mothers results in widespread participative marginalisation.[109] According to the Korean Women's Development Institute, 'The moment a woman decides to carry on with the pregnancy and keep her child, regardless of what her education level or occupational competency may be, social prejudice pushes her into a most strenuous situation'.[110] The dominant societal narrative is that unmarried single-parent families ought to be disestablished

[108] Ibid.

[109] Mijeong Lee and others, *How to Improve Government Welfare Services for Low-Income Unwed Mothers in Korea* (Korean Women's Development Institute, 2010), iv; Ann Babe, 'The stigma of being a single mother in South Korea' Al Jazeera <https://www.aljazeera.com/features/2018/3/1/the-stigma-of-being-a-single-mother-in-south-korea> accessed 17/2/2022; Rachel So, 'Poverty among single mothers in South Korea' (*The Borgen Project*, 2022) <https://borgenproject.org/single-mothers-in-south-korea/> accessed 18 May 2022.

[110] Lee and others (n 109) *ii.*

through adoption as soon as they come into existence. Ninety percent of South Korean babies adopted internationally in 2019 were children born into unmarried single-parent families, in what the Korean Unwed Mothers Families Association (KUMFA) describes as 'a tragic indication of the difficulties that unwed mothers in Korea face.'[111] Unmarried women also face widespread pressure to have abortions, resulting in potentially wanted families not being formed

Ostracism of single-parent families from the wider family unit is common and results in being outcast from much of social and cultural life:

> Relatives gathering for holidays often don't want unmarried mothers attending because it reminds them that there's a black sheep in the family. It's … a sign that they didn't raise the woman well.[112]

As a result, single-parent families may find themselves isolated during cultural festivities.[113] Moreover, background checks of official documents that record that a child was born to an unmarried mother can lead to single mothers being unfairly excluded from labour force participation and their children being denied educational opportunities and social acceptance from their peers at school and in the community.[114] Such participative marginalisation feeds into other aspects of inequality, including persistent poverty and the continuance of stigmatisation. Furthermore, transformative equality is stymied by the exclusion of single-parent families from decision-making on their behalf.

[111] KUMFA, 'About KUMFA' <https://kumfa.or.kr/#> accessed 28/07/2022; KUMFA, 'The Reality of Unwed Mothers in South Korea' <https://kumfa.or.kr/realityofkumfa/> accessed 28/7/2022.

[112] Babe (n 109).

[113] ibid.

[114] KUMFA, 'Unwed Mothers' (n 111); So (n 109).

1.8.3 Subchapter conclusion

Evidence from low, middle and high-income states, including states with all types of political and economic systems and with all kinds of cultural and religious backgrounds, reveals that single-parent families are generally marginalised in economic, social and cultural terms. Available data offers clear *prima facie* evidence of discrimination across the four dimensions of (re)distribution, (mis)recognition, transformation and (non)participation. While there continue to be limitations in the collection of demographic data related to single-parent families, the UN Population Division's household dataset makes it clear that many millions of families are affected. Thus, a strong rationale exists for focusing scholarly attention on the question of the realisation of the economic, social and cultural rights of single-parent families as a particularly marginalised category. Moreover, all single-parent families (as I define them) contain children, and more than percent contain women. Given that it is acknowledged that women and children suffer disproportionate levels of economic, social and cultural rights violations, including both relative and absolute poverty, and that this has been stubbornly difficult to change, I believe it is productive to focus on the single-parent family as the paradigmatic unit in which these two categories are typically interdependent, and which typically does not have access to economic, social and cultural privileges that might accrue from the presence of an adult male.

1.9 Interpreting human rights treaties

1.9.1 General principles of treaty interpretation

Treaties, like all legal documents, are open to interpretation.[115] The general principles of law relating to the interpretation of treaties are codified in Articles 31 to 33 of the Vienna

[115] Martin Dixon, *Textbook on International Law* (7th edn, OUP 2013) 73.

Convention on the Law of Treaties (VCLT).[116] As a result, these provisions provide the authoritative guide to the interpretation of ICESCR, despite post-dating it. VCLT Article 31 sets out the fundamental rules of interpretation. Under Article 31(1), a treaty must 'be interpreted in good faith in accordance with the ordinary meaning given to the terms in their context and in the light of its object and purpose'. This statement reflects the position of the International Court of Justice (ICJ) in the *Competence of the General Assembly for the Admission of a State to the United Nations* case, that 'the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context which they occur'.[117]

The elements of Article 31(1) guide determination of the common will of the parties, meaning that the principle of contemporaneity applies. In other words, 'a treaty should be interpreted by reference to the circumstances prevailing when the treaty was concluded.'[118] A treaty's preamble becomes important as part of the context,[119] providing 'the principal and natural source'[120] of guidance on a treaty's object and purpose. Nevertheless, lack of care and attention in the drafting of preambles can limit their usefulness. Because the preamble does not constitute a provision of a treaty, it can be drafted with deliberate ambiguity to mollify political concerns within or between state

[116] Malcolm N Shaw, *International Law* (8th edn, CUP 2017) 73.

[117] *Competence of Assembly regarding admission to the United Nations, Advisory Opinion* (1950) ICJ Rep 4, 8.

[118] Shaw (n 116) 708.

[119] VCLT Article 31(2); *Rights of US Nationals in Morocco Case (France v United States)* 1952 ICJ Rep, 176, 196.

[120] *US - Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/AB/R (1998) 17.

parties. For these reasons, additional interpretative tools should be used alongside reference to a preamble.

Under VCLT Article 32, 'supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' may be resorted to:

> to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

ICJ case law demonstrates that 'the wording of Art. 32 is flexible enough to allow resort to preparatory material in all but the most clear-cut cases'.[121] However, contemporaneity is not the only consideration in treaty interpretation: developments such as 'the present-day state of scientific knowledge'[122] and subsequent state practice[123] may also be taken into account.

As Dixon observes, 'the Vienna Convention gives a great deal of latitude to the body or court charged with interpretation of a treaty'.[124] The resulting dispute between schools of treaty interpretation that insist on contemporaneous approaches (treaty texts ought to be interpreted strictly in accordance with the situation and meanings of terms at the time a treaty was entered into) and those that approach treaties as living documents has been lengthy.[125]

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[121] Dixon (n 115) 77; see *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)* [2011] ICJ Reports 644.

[122] *Kasikili/Sedudu Island* (n 126)1060.

[123] VCLT Article 31(3); Shaw (n 116) 708.

[124] Dixon (n 115) 77.

[125] ibid 77.

1.9.2 Theories of treaty interpretation

Shaw describes the three dominant theoretical approaches to treaty interpretation as objective, subjective and teleological (or purposive). The objective approach 'centres on the actual text of the agreement and emphasises the analysis of the word used'.[126] It is literalist in its emphasis on fidelity to the words used in a text. The subjective approach 'looks to the intention of the parties adopting the agreement as the solution to ambiguous provisions'.[127] The teleological or purposive approach 'adopts a wider perspective than the other two and emphasises the object and purpose of the treaty as the most important backcloth against which the meaning of any particular treaty provision should be measured'.[128] The VCLT adopts aspects of all three doctrines.[129]

Dixon adds a fourth approach, namely the principle of effectiveness, which he states 'is closely aligned to the teleological approach and means that the treaty should be interpreted in order to ensure maximum effectiveness in achieving the object and purpose of the treaty'.[130] While ICJ cases support this principle,[131] the jurisprudence of the ICJ also makes it clear that the principle of effectiveness cannot be used to override the plain meaning of the text of a treaty provision.[132]

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[126] Shaw (n 116) 707.

[127] ibid 707.

[128] ibid 707.

[129] ibid 707, footnote 147.

[130] Dixon (n 115) 74.

[131] *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion* [1962] ICJ Rep 151; *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion* [1949] ICJ Rep 174.

[132] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion (Second Phase)* [1950] ICJ Rep 221.

It is possible to resolve this conundrum by adopting the view that the determination of the parties' intention is the anchor point for interpretation. Instead of seeing evolutionary and contemporaneous aspects of interpretation as in conflict, they may be reconciled by focusing on the way in which evolution ensures the intentions of the parties are allowed ongoing relevance in changing times.[133] The International Law Commission has found that treaties are 'embodiments of the common will of their parties'[134] and that, therefore, 'interpretation must seek to identify the intention of the parties.'[135] Thus, the intentions of the drafters at the time of drafting remain important. The circumstances of the drafting process assist us to understand the underlying problem that a treaty seeks to address and how a particular provision fits within that. Such information assists with the construction of a persuasive interpretation of its provisions.[136]

The ICJ has held that generic terms are those 'whose content the parties expected would change over time.'[137]As Campbell's analysis of ICJ cases shows, '[t]he more enduring, legislative or institutional in nature the treaty, the more likely the presumption of an evolutionary interpretation will apply'.[138] Human rights treaties, particularly those in IBOR, fall into this category, and are subject to a 'dynamic approach to interpretation'.[139] ICESCR makes frequent use of such generic, open-textured terms (for

[133] Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014).

[134] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties' A/68/10, 23.

[135] ibid 18.

[136] Campbell, *Women* (n 34) 27.

[137] *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3 77.

[138] Campbell, *Women* (n 34) 62. See also Bjorge, (n 133) 188-94.

[139] Shaw (n 116) 710.

example, 'family'[140]). Without straying beyond the text's parameters nor overturning the treaty's demonstrable intent and purpose, an evolutionary approach is permissible and necessary to maintain ICESCR's relevance and integrity.

There has also been increasing recognition of the need for a comparative approach to interpreting human rights treaties, an approach mandated by VCLT Article 31(3).[141] The VDPA's call for human rights to be treated as indivisible and interconnected provides an antidote to the fragmentation and siloing of separate human rights mechanisms that may occur as part of bureaucratic and analytic legal processes.[142] Comparative interpretation allows the normative environment surrounding a treaty to be given appropriate weight.

1.9.3 Subchapter conclusion

Understanding applicable rules and techniques of treaty interpretation is necessary to allow one to interpret the provisions of international human rights treaties correctly. For this thesis, the question is, does a correct interpretation of UN treaties provide for economic, social and cultural rights of single-parent families? My argument is that it does. This subchapter has contributed to that argument by showing that the interpretation of a treaty provision must accord with the ordinary meaning of the text in its context, and in light of its objects and purpose, and that in relation to human rights treaties in particular, a dynamic or evolutionary approach is warranted.

International human rights provisions are open-textured, and the evolution of their interpretation reflects the intentions of state parties to agree to provisions that will be

[140] See Chapter 2.

[141] Campbell, *Women* (n 34) 62-3.

[142] A/CONF57/23 (n 33) [5].

long-standing and widely applicable across societies. Thus, my thesis is not that new rights are needed. Rather, rights that already exist under international human rights law need to be given effect. For this to be true, I must show that international human rights instruments, correctly interpreted, do provide economic and social rights for families in general and single-parent families in particular. ICESCR Article 10(1) provides the basis for this argument. I will argue that its content becomes most meaningful when interpreted as a dye that washes over other substantive provisions of ICESCR, requiring them to be read as articulating obligations on the state in relation to families, not merely individuals. To show that states owe particular obligations to single-parent families requires demonstrating not only that such families are 'families' in terms of the intentions of the parties to ICESCR, but also that they form a protected category for the purpose of the non-discrimination and equality provisions of ICESCR. It is also necessary to demonstrate that the rights protected in ICESCR are not merely aspirational but rather confer obligations on states. The principles of treaty interpretation set out in this subchapter underpin the entirety of that analysis.

1.10 Chapter outline

In Chapter 1, I introduced my research question and claim. I explained my interest in the topic and my positionality in relation to it. Next, I discussed the theoretical and legal principles underpinning my approach, specifically the rationale for adopting a critical and strategic focus on UN human rights law as normative rather than focusing on analysis of judicial doctrine or attempting for inform future judicial reasoning. I placed the normative role of the UN in the context of Bell's notion of interest convergence[143] to illuminate the significance of UN bodies' pronouncements as legitimising the claims of marginalised

[143] Bell (n 16).

and stigmatised populations and shifting states' calculus of the costs of violating their rights. I pointed to actions towards realising the rights of LBGTQI people and indigenous peoples as evidence for the utility of this approach. After that, I explained my approach to interpretation, which is grounded in the VCLT. I went on to say that I treat human rights as interdependent, indivisible and interrelated in accordance with the VDPA,[144] and as necessarily both pluralistic and universal. Concerning this latter point, I explained that while my worldview is shaped to the greatest extent by Western thought and philosophy, I also refer to Buddhist scholarship and indigenous (particularly Māori) jurisprudence to provide a counterpoint to hegemonic Western liberalism. These philosophical traditions are particularly apposite as lenses through which to consider the nature of the individual and the group, interdependence and the meaning of family. I also explained that while my approach is intersectional in the social science sense, it does not seek to engage with the legal doctrinal questions of intersectionality as it applies to discrimination law in domestic or regional courts.

Turning to the contribution of my thesis to scholarship, I explained that it addresses a lacuna in international human rights law's theorisation of family in relation to economic, social and cultural rights in five ways. The first is by examining the family as a holder of group rights. Second, by providing content to the term 'family' in international human rights law. Third, through demanding that the social, economic and cultural rights of single-parent families be taken seriously by UN human rights bodies. Fourth, by drawing a link between the work of vulnerability theorists in family law and rights protected by the UN treaty system. Fifth, by offering practical proposals for UN human rights mechanisms to require states to fulfil their obligations in relation to the realisation

[144] A/CONF57/23 (n 33) [5].

of single-parent families' economic, social and cultural rights. Next, I outlined the audiences to whom my arguments are directed: UN treaty body members and staff; family and human rights scholars; economic, social and cultural rights activists; government advisors; and those single parents who are nurturing nascent single-parent families' rights movement at domestic, regional or international levels. I also admitted the possibility that members of the judiciary might find something of relevance, despite not being the primary audience. Thereafter, several tricky questions of nomenclature were addressed.

My rationale for focusing on single-parent families occupied subchapter 1.8. I explained that single-parent families are a universally marginalised category and summarised demographic data supporting this claim. I went on to provide illustrative examples of the substantive discrimination and inequality experienced by single-parent families in selected states across the globe. I considered: maldistribution in relation to single-parent families in the USA; the misrecognition of single-parent families in terms of the historical case of Europe and in contemporary Sri Lanka; structural inequality (the transformative dimension) in the context of NZ; and, non-participation as illustrated by the situation of single-parent families in South Korea. Finally, in this chapter, I addressed issues of treaty interpretation, including general principles and reasons for favouring an evolutionary approach.

In Chapter 2, I turn to the subject of the right in ICESCR Article 10(1). I begin by examining the liberal notion of the rightsholder as the autonomous man capable of exercising agency. I ask whether this is the correct way to delineate those who may be said to hold rights under the UN international human rights framework. Here, I consider the interplay of rights, autonomy and dependency. I turn to the work of vulnerability theorists and relational autonomists writing in the Western liberal tradition to explain why

notions of humans as solely an autonomous free agents lack grounding in reality as well as explanatory rigour, and fail to protect humans at our most vulnerable or respond to what is most important to us. A further counterpoint to the autonomous individual notion of self is provided by reference to conceptions of self and interdependence in selected East Asian and indigenous worldviews. The reader is reminded of the international human rights project's claims to universality and the contribution of Confucian scholar Pengchun Chang, who, in his role as Vice-chair of the Commission on Human Rights guided the drafters of the UDHR on the need to move beyond parochial assumptions about the self.[145] Based on this exploration, I round out subchapter 2.2 with my claim that the family group unit is correctly understood to be the subject of Article 10(1), based on the ordinary meaning of its terms in their context and in light of the provision's object and purpose, and informed by the preparatory work of the treaty and the circumstances of its conclusion, as well as by subsequent advances in knowledge and the evolution of social norms.

Having determined the importance of recognising the family as a rightsholder under Article 10(1), I turn in subchapter 2.3 to the question of what a family is. Here, I posit four potential models of the family as the subject of Article 10(1). These are the conservative-marital family, the liberal-contractarian family, a pluralistic notion of the family as illustrated by Māori and Sāmoan conceptions of family, and the caring-vulnerable family. Through an analysis of the object and purpose of Article 10(1) and the drafters' intentions, I determine that only the vulnerable-caring model, interpreted widely

[145] Pinghua Sun, 'Pengchun Chang's Contributions to the Drafting of the UDHR' (2016) 5 Journal of Civil & Legal Sciences.

to encompass plural notions of family, accords with a correct interpretation of the provision.

Thereafter, I briefly confront issues raised by the designation in Article 10(1) of the family as a 'group unit'. The legitimacy of group rights has been questioned by scholars and practitioners on grounds ranging from their alleged incoherence to their perceived position as a threat to gender equality. However, given the text of Article 10(1), and in light of the purpose of the provision, I conclude that we cannot abandon the group rights aspect of the provision. It is the family as a group consisting of interdependent individuals in relationship that has rights. This social ontological concept of group rights, to use Gould's term, offers the best means for conceptualising the definition and place of the family's group rights under Article 10(1).[146] I note that accepting the legitimacy of the family as a holder of human rights under Article 10(1) does not require that individual rights be diminished. I explain that further discussion of the group rights debate and Article 10(1) is provided as supplementary material.

Finally, in subchapters 2.5-2.6, I turn to the question of protected categories under the non-discrimination and equality provisions of ICESCR, CEDAW and CRC. Accepting that single-parent families are families for the purposes of international human rights law does not in itself demonstrate that they are entitled to protection over and above that to be accorded to all families who are responsible for dependent children. In subchapter 1.8.2, I had provided examples of *prima facie* discrimination towards and inequality of single-parent families. Now I examine whether single-parent families constitute outgroups protected by non-discrimination and equality provisions. I determine that they do. Having concluded that single-parent families as family group units are

[146] Gould (n 43) 142-5.

legitimate rightsholders under ICESCR Article 10(1) and that they constitute an outgroup protected by the non-discrimination guarantee contained in ICESCR Article 2(2), I consider whether the status of being an individual within a single-parent family is also analogous for the purposes of non-discrimination and equality guarantees. I look first at single parenthood as a protected category in its own right before considering the specific situation of single mothers under CEDAW and briefly considering whether single fatherhood could also constitute an analogous ground. I finish by examining the status of children in single-parent families as a protected category under ICESCR and CRC

In Chapter 3, I shift the focus to the obligations with which states party to ICESCR must comply. I begin by considering the status of economic, social and cultural rights, describing critiques of the concept and outlining responses to them. In particular, I stress that the justiciability of these rights is not determinative of their status as 'real law'. While certain jurisdictions increasingly recognise economic, social and cultural rights as directly justiciable, their normative quality is at least as important and is the aspect of their power with which this thesis is concerned. Next, I turn to the evolution of an interconnected interpretive framework for economic, social and cultural rights based on the recognition that human rights are universal, indivisible, interdependent and interrelated. To deal with this complexity, I introduce the notion of 'wicked problems' from the fields of planning and design.[147] I examine the contribution of capabilities approaches to UN treaty bodies' evolving understanding of poverty as a matter of rights. Thereafter, in subchapter 3.4 I turn to states' obligations in relation to non-discrimination and equality. I investigate the meanings of formal equality, direct and indirect discrimination, and substantive equality. Fredman's four dimensions introduced in are

[147] Horst W J Rittel and Melvin M Webber, 'Dilemmas in a General Theory of Planning' (1973) 4 Policy Sciences 155.

considered in more detail here.[148] Subchapter 3.5 outlines additional aspects of states' ICESCR obligations with particular reference to CESCR's General Comment 3 and the Maastricht Guidelines.[149] Here I consider obligations to respect, protect and fulfil; the margin of appreciation; issues of timing and resource availability; the status of retrogressive measures; and measurement of compliance.

Having dealt with states' obligations under ICESCR in broad terms, in subchapter 3.6 I focus on states' specific obligations under Article 10(1) to families in general, and single-parent families in particular. Here, I consider the analysis of Article 10(1) advanced by Kinley, Saul and Mowbray.[150] I contrast this with analyses suggested by capabilities approaches, insights from vulnerability theory and UN treaty bodies' evolving articulation of poverty as a violation of human rights. I refer to the *Travaux Préparatoires* to the UDHR and ICESCR to reveal the drafters' intent in including the family's rights to protection, assistance and support. I also review CESCR's observations on Article 10(1) and single-parent families. This subchapter examines the meaning of the phrase 'widest possible protection and assistance', the application of a capabilities approach to the provision, parental responsibility and gender-based poverty, justifiable limits to the right, non-discrimination, and planning and monitoring obligations. I explain why I conclude that by basing their analysis on ICCPR provisions related to the family, Kinley, Saul and Mowbray miss the essential purpose of economic, social and cultural rights, therefore arriving at a skewed and limited interpretation of Article 10(1). I

[148] Fredman, *Discrimination* (n 45) 25-33.

[149] CESCR, 'General Comment No 3: The Nature of State Parties' Obligations (Art 2, Para 1, of the Covenant)' (adopted 14 December 1990) E/1991/23; ICJ, 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (January 22-26 1997).

[150] Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014) 721-853.

conclude that the metaphor of a dye that washes over the other rights recognised in ICESCR and thus imposes obligations on the state to promote, protect and progressively fulfil these in relation to the family (particularly while it is responsible for the care and education of dependent children) is a stronger and more satisfactory interpretation of the content of the provision. Read in conjunction with the non-discrimination guarantee in ICESCR Article 2(2), I conclude that states have immediate obligations to address the disparities single-parent families face in their enjoyment of economic, social and cultural rights.

Chapter 4 delves into the practical application of ICESCR Article 10(1) as it pertains to single-parent families. The chapter begins with a case study illustrating the impacts of failing to be aware of or give effect to single-parent families' rights under Article 10(1) in states' policymaking, lawmaking and judicial decision-making. I use as my starting point the case of *R (DA)* which concerned claims that the UK's household benefit cap was distributively discriminatory under the European and domestic UK law.[151] I analyse the reasoning of the judges, the majority of whom held that although the cap pushed members of a protected class into poverty, the government's acts were not unlawful because the policy was not manifestly without reasonable foundation (MWRF).

This sets the scene for a thought experiment in subchapter 4.3 which imagines how a policymaker who sought to ensure the state's obligations under Article 10(1) were complied with in good faith would assess whether a benefits cap policy should be implemented. Centring Article 10(1) rights of the family as a group unit draws attention to the needs of dependent children for care and nurture and to the caring labour of parents in meeting these needs (even in contexts of accessible, available, acceptable, quality

[151] *R (DA)* (n 53).

childcare). The effects of a policy such as the UK benefit cap are considered in terms of the four dimensions of discrimination. This allows me to draw out the types of considerations required to give effect to single-parent families' rights under Article 10(1) on a basis of non-discrimination. Simple modelling reveals that a benefit cap like the one in *R(DA)* provides two-parent families with up to166 hours per week during which children could experience the security of a hands-on parent available to care for and nurture them without triggering the cap. In contrast, children in single-parent families have a maximum of 70.5 hours per week during which they can benefit from similar parental care before the cap is triggered, a clearly discriminatory outcome.

Chapter 5 concludes the thesis by summarising arguments set out in previous chapters. Returning to my six-part claim, subchapter 5.2 argues that integrating an understanding of the autonomy myth, dependency and derivative dependency gives substance to the 'having, loving, being' capabilities approach to economic, social and cultural rights interpretation. States must provide the widest possible protection and assistance to families under ICESCR Article 10(1) and single-parent families, as a particularly marginalised type of family, must be at the centre of these efforts. Thus, the summary shows the validity of the first five sub-claims of my thesis.

Subchapter 5.3 examines how we can move from the theoretical to action towards the realisation of these rights—the subject of the sixth point of my claim. I propose a theory of change based on action at the UN level to create a protective canopy under which the realisation of economic, social and cultural rights of single-parent families across the globe can begin to germinate. I survey the range of mechanisms and tools available within the UN international human rights apparatus, including Special Procedures of the Human Rights Council (HRC), individual communications to treaty

bodies, and treaty bodies' General Comments/General Recommendations, and as well as briefly considering the possibilities of advancing a claim based on single-parent families' rights under ICESCR Article 10(1) via domestic or regional litigation. Based on an analysis of the structures and functions of relevant UN human rights mechanisms and the opportunities for academics and civil society (including grassroots movements) to influence these, I conclude that, of the possible approaches, a Joint General Comment/General Recommendation from CESCR, CEDAW and CRC offers the greatest practical potential. I note that this does not dismiss the possibility of other strategies being advanced towards realisation of these rights. Nor does the possibility that one or more of the treaty bodies might not join such a General Comment/General Recommendation render the enterprise void.

In subchapter 5.4, I consider the requirements for the content of a Joint General Comment/General Recommendation on progressive promoting, protecting and fulfilling single-parent families' economic, social and cultural rights. First, I explain why the General Comment/General Recommendation should focus on single-parent families directly, rather than adopting a more general focus on the economic, social and cultural rights of families under Article 10 (1) with specific mention of particularly marginalised families, including those with a single parent. Here, I stress the importance of centring the single-parent family, thus avoiding an approach that paints such families as deficient or 'other'. Thereafter, I briefly set out matters to be addressed in the Joint General Comment/General Recommendation. A draft outline on a Joint General Comment/General Recommendation is provided as Supplementary Material. Noting that this outline is predominantly informed by ICESCR Article 10(1), as this has formed the centre of my research, I observe that in advocating for, negotiating and drafting a Joint General Comment/General Recommendation, attention must be paid to elucidating

relevant CEDAW and CRC provisions in equal depth. Guidance must interleave the individual rights of members of single-parent families as women and children with the rights of families as group units. It must be intersectional and stress the need for appropriately disaggregated data to inform the development of robust indicators. The participative dimension of rights realisation requires that single-parent families themselves must be included at the centre of developments. I suggest that the concept of a wicked problem is useful to draw attention to the complex, multi-faceted nature of violations of the economic, social and cultural rights of single-parent families and their members, while not resiling from tackling this complexity. Reference is made to connections between violations of these rights and violations of the civil, political and cultural rights of single-parent families and their members.

I conclude with the observation that adopting such guidance jointly by CESCR, CEDAW and CRC would send a powerful signal to states about the need for them to comply with their ICESCR Article 10(1) obligations to single-parent families and the reputational risks of failing to do so, while also assisting them in undertaking this task. Significantly, it would bolster the mandate, legitimacy and confidence of nascent single-parent families' movements worldwide and direct established human rights NGOs and scholars to pay attention to the marginalised situation of single-parent families as a human rights matter.

2 The subject of the right in ICESCR Article 10(1)

2.1 Chapter introduction

Unlike most articles in IBOR, which have the individual as their subject, ICESCR Article 10(1) speaks of the family as the unit entitled to the widest possible protection and assistance. What is the family, and why does international human rights law acknowledge it as a rightsholder? Some clues are offered in the provision's text, which includes the phrase 'particularly … while it is responsible for the care and education of dependent children'. It could be that the care and education of dependent children is viewed as a socially worthwhile function, so society should support the family in this regard, although this utilitarian argument sits uneasily within a fundamental human rights framework. There could also be something 'natural and fundamental' about the care and education of dependent children which occurs in families. This argument is distinct from the natural law arguments which reify the two-parent heterosexual marital family. Unlike intimate-partner relationships which take a vast array of forms and are not essential to human existence, the dependency of a child on one or more parents or caregivers is essential in the sense that it has always existed among humans across time and culture. There are no humans who have not been dependent infants at the start of their lives. Attempts to relocate responsibility for child dependents away from a family-like structure (for example, through non-familial collectivisation) have not proved sustainable for meeting humans' intergenerational relationship aspirations. If this is the reason for providing rights for the family, it is supported by modern neuroscience, which suggests that early attachment to a small number of caregivers is important for human development.[152]

[152] Dante Cicchetti, 'Socioemotional, Personality and Biological Development: Illustrations from a Mulitlevel Developmental Psychopathology Perspective on Child Maltreatment' (2016) The Annual Review of Psychology ; Charles H Zeanah and others, 'Sensitive Periods' (2011) 76 Monographs of the

However, in denoting the family as the subject of ICESCR Article 10(1) and parallel provisions in UDHR and ICCPR, the drafters created several challenges for a rights analysis. First, the idea of 'family' connotes notions of dependence and interdependency, which sit oddly with the commonly held belief that rights must be founded in individual autonomy. Second, 'family' is an emotionally loaded yet difficult-to-define term with wide socio-cultural variation in its meaning. Third, the text of Article 10(1) uses the term 'group unit' to refer to the family as a rightsholder, yet the validity and usefulness of group rights troubles some theorists. Fourth, how do the non-discrimination and equality provisions found in ICESCR Articles 2(2) and 3 apply to families as group units? Finally, how can the relationship between the rights-holding family group and individual family members be understood in the context of economic, social and cultural rights (including non-discrimination, equality and population rights)?

In this Chapter, I examine these challenges. I begin in subchapter 2.2, by interrogating the idea of autonomy in light of human dependency. Next, in subchapter 2.3, I look more deeply into the meaning of family. I outline four possible conceptions of the family: the conservative-marital family, the libertarian-contractual family, the plurality of family forms and the caring-vulnerable family. I assess which best accords with the plain meaning of the text of Article 10(1), as interpreted with reference to the provisions' objects and purpose and the drafters' intentions. In subchapter 2.4, I briefly discuss the characteristics and validity of group rights, noting that Article 10(1) describes its subject as a 'group unit', I consider the drafters' intentions in employing the phrase, and how it can best be interpreted. Subchapter 2.5 examines the application of ICESCR

Society for Research in Child Development 147; D.J Siegel, 'Toward an interpersonal neurobiology of the developing mind: Attachment relationships, "mindsight," and neural integration' (2001) 22 Infant Mental Health Journal 67.

Articles 2(2) and 3 to families as rightsholders. For my purposes, it is particularly important to ascertain whether single-parent families are a protected category on analogous grounds to those categories listed in Article 2(2). Finally, in subchapter 2.6, I consider individual members of single-parent families as rights-holders under CEDAW and CRC as well as CESCR. After addressing these challenges, I set out conclusions about the nature of the family group unit as the rightsholder under Article 10(1) and the place of single-parent families as a category entitled to protection from discrimination and inequality. Thereafter, in Chapter 3, I turn to investigate the obligations Article 10(1): imposes on states.

2.2 Rights, autonomy and dependency

2.2.1 The autonomous man and his critics

> The law tends to reflect the values that are suitable for an individualised understanding of self, autonomy, privacy and bodily integrity. The law undervalue[s] or ignores relational values: trust, mutuality and interdependence.[153]

The notion of autonomy has been foundational to the Western liberal conception of rights. Eighteenth-century liberal political theory conceptualised the individual rights-holder as 'separate from, but potentially in competition with, other rights holders [who are] … autonomous human beings, protected in their individuality from encroachment by other individuals on their rights.'[154] In this notion, 'Autonomy is synonymous with a concept of self-governance, and is characterized by self-sufficiency and independence, individual qualities that are seen as prerequisites for individual freedom of will and

[153] Herring, *Relational Self* (n 35) 23.

[154] Fineman, *Autonomy* (n 35) 19.

action.'[155] However, the seemingly natural Western liberal idea of the fully independent autonomous individual is a caricature.[156]

Western liberal theories of rights developed in a context where adult able-bodied white males were the only beings widely accepted as fully legitimate human subjects at law.[157] In early liberal writings on the rights of man, the family was generally subsumed within the identity of the patriarch as family head, and the concept of family privacy provided a veil behind which the law would not look. Broadly speaking, privacy rights are understood to be protections of one's autonomy over that which is most personal to one's life, including one's body, correspondence, sexual relations and, crucially, one's family. The designation of these areas as private 'acts as a principle of restraint and abstention.'[158] Within this structure, the rational, self-interested man from the public sphere is assumed to be transformed by his family into a benevolent patriarch upon whom the caregiving woman and dependent children may rely.

Subsequent liberation campaigns have extended the framework of liberalism beyond its eighteenth-century origins as basic freedoms for more population groups have been won. For example, liberal feminism has fought for the 'autonomy of individuals *within* the family'[159] by insisting that the interests of individual family members be considered separately and protected against other individuals in the family in relation to

[155] ibid 19-20.

[156] Herring, (n 35) 7.

[157] Cynthia Willett, Ellen Anderson and Diana Meyers, 'Feminist Persepctives on the Self' *Stanford Encyclopedia of Philosophy* (Spring, 2020) <https://plato.stanford.edu/archives/spr2020/entries/feminism-self/> accessed 13/07/2020.

[158] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) Yale JL Feminism 5.

[159] Fineman, *Autonomy* (n 35) 21.

family violence and child abuse. Thus, 'the individual who is encroaching on the welfare or safety of another family member can [now] find his autonomy compromised by the state's intervention on behalf of the person in danger.'[160] In these instances, the family is no longer perceived as a private sphere, autonomous from the state, but is rather subject to its rules.

Nevertheless, understandings of rights remained cobbled by the invisibility of those upon whose shoulders the adult white cis male non-disabled rational liberal subject's autonomy rests. This shifting multi-faceted quality is common to all mythology and hints that what initially seemed to be a simple, logical category may be a construct that serves to obscure as much as enlighten. Differences between the ideas of autonomy and privacy as applied to the individual and assumptions of family autonomy and privacy are generally not made explicit, thus obfuscating understandings of dependency and care and their relationship to inequality, which remain under-theorised in general theories of rights.[161]

For proponents of will theories of rights, such as Kant, Kelsen and Hart, the capacity for autonomous agency is a prerequisite of being a right-holder and 'the function of a right is to give its holder control over another's duty.'[162] This approach continues to attract strong adherence despite its exclusion of the most vulnerable, including infants, the unconscious and the severely communicatively disabled. Other theories of rights, such as interest theories advanced by Bentham, Raz and Kramer, as well as demand and

[160] ibid 21.

[161] ibid 149.

[162] Leif Wenar, 'Rights' *Stanford Encyclopedia of Philosophy* (2023) < https://plato.stanford.edu/archives/spr2023/entries/rights/> accessed 11/05/2023.

hybrid theories, do not require the autonomous agency of rightsholders.[163] These theories are a better fit for describing the function and meaning of 'rights' as the term is meant in the UN human rights framework. For example, the *Travaux Préparatoires* of the UDHR demonstrate that the founders of the UN human rights framework did not limit the notion of rights to those inherent in humans who had capacity for autonomous agency.[164] The subsequent development and wide ratification of population-specific human rights treaties, such as CRC and the Convention on the Rights of People with Disabilities,[165] further demonstrate the international community's rejection of a requirement that rightsholders display autonomous will.

Nevertheless, the ideal of individual autonomy remains central to modern liberal theories of justice advanced by writers as disparate as Rawls, a social contractarian who follows Locke in considering that the consent of the majority allows state intervention such as taxation and property redistribution, and Nozick in whose libertarian analysis any state interference with the individuals' ownership of himself, his labour or his property is an illegitimate abuse of state power.[166] In these constructions, the family remains peripheral to both worthwhile human endeavours (especially economically productive endeavours[167]) and theories of justice. This obscures proper analysis of how notions of autonomy combine with ideas of privacy and the family in particular ways to generate

[163] Ibid.

[164] UNCHR (Drafting Committee), 'Summary Record of the 13th Meeting' (20 June 1947) E/CN4/SR13; UNGA (3rd Committee), 'Summary Record of the 125th Meeting' (8 November 1948) A/C3/SR125.

[165] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) UNTS 2515, 3.

[166] John Rawls, *A Theory of Justice* (Revised edn, Harvard UP 1999); Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 2013); Fineman, *Autonomy* 212-5 (n 35).

[167] Marilyn Waring, *Three masquerades: essays on equality, work and hu(man) rights* (Auckland UP: Bridget Williams Books 1996).

negative consequences for gender equality, the acknowledgement of the vulnerable aspects of the human condition, and the valuing of those who are most dependent on care and their carers throughout society. For example, Fineman observes that the metaphor of the social contract as it has been revived in modern theories of justice as 'a framework for thinking about legitimacy and political obligation'[168] continues to rely on the fiction that autonomous individual members of a society implicitly consent to its structures through their participation in that society and that, therefore, the society must be fair and chosen.[169]

Under this formulation, care work is assumed to be voluntarily chosen, in the same way that neoliberalism would hold that any other 'preference' is chosen. This fiction then construes the state as no more responsible for addressing the consequences of taking on caring roles than it is for assisting a person who experiences a temporary 'brain freeze' after choosing to eat ice cream. However, this is not a contract in which those who take on caring roles receive consideration in return, such as the fair redistribution of property and power.[170] If people with little or no capacity and their carers appear in such theories, it is only as afterthoughts, not as fully acknowledged human beings. This is the result, for example, of Rawl's belated acknowledgement of the unequal burden of caretaking in his later theorising of the social contract. It becomes a tack-on to his theory of justice, to be addressed through 'special provisions'.[171] Accepting such a notion would be to accept a two-tier understanding of human rights, not a universal one.

[168] Fineman, *Autonomy* 210-1 (n 35).

[169] ibid xxi.

[170] ibid 23.

[171] ibid 215-7.

The centrality of this ideal of autonomy is not only a Western liberal philosophical preference: it is central to modern liberal constructions of the role of the state in relation to its people, particularly in liberal Anglo societies. Self-reliance is a central pillar of social policy under neoliberalism[172] emphasising the family as 'ideally responsible for its own members' dependency'.[173] Individual autonomy is conflated with the 'autonomous family' that is perceived as a self-sufficient, natural institution that provides for its members independently of the state and operates in a separate, private sphere.[174] Ideals of autonomy coupled with neoliberal institutional arrangements that posit the market as 'an absolute good' and state action as 'presumptively bad' have reinforced 'the conceptual separation of the family from other societal institutions and the assignment to it of primary responsibility for the dependency of those deemed not autonomous and independent.'[175] Modern neoliberal mythology requires that we see this arrangement as freely chosen and respectful of the two adults as equals (it is less clear how the child's autonomy rights can be given effect to in this model, although child rights theorist Dwyer makes a valiant attempt to do so[176]). Generally, parents are presumed to exercise autonomy rights in the interests of their children. In US law, parental rights have been recognised by the Supreme Court and are fiercely defended by interest groups.[177] In this conception, children are viewed as part of the private domain and, 'like any other

[172] G Esping-Anderson, *The Three Worlds of Welfare Capitalism* (Princeton UP 1990).

[173] Fineman, *Autonomy* (n 35) 37 citations omitted.

[174] ibid 21.

[175] ibid xiii.

[176] Dwyer (n 44); subchatper 2.3.3.

[177] Fineman, *Autonomy* (n 35) xv.

item of consumption, a matter of individual preference and individual responsibility.'[178] Such a view privatises responsibility for the care and education of dependent children, and this is extended as an approach to human dependency in general, which transfers 'previously public concerns … to the magic realm of private solution.'[179] Resort to the collective resources of the state is considered a moral hazard 'deserving of condemnation and stigma.'[180] Those families that fail to provide adequately for their members are rendered less autonomous and, therefore, less deserving of privacy. By accepting assistance, a family can be moved 'from the private to the public sphere, where it may be regulated and disciplined.'[181]

In fact, the ideal of the autonomous, self-sufficient individual has become so pervasive that, '[e]ven the targets of the imposition of independence are convinced of its appropriateness'.[182] Thus, for example, many single mothers in receipt of welfare benefits 'mimic the rhetoric that condemns them as pathologically dependent' and show acceptance of 'the assertion that independence and self-sufficiency are inextricably tied to paid work.'[183] Middle-class single-mothers-by-choice show an internalisation of such messages in a different way. Their narratives seek to distance themselves from the stigma of irresponsible dependence that attaches to single-parent families generally by

[178] ibid xiv.

[179] ibid xv.

[180] ibid 37.

[181] ibid 37, citation omitted.

[182] ibid 22.

[183] ibid 22.

emphasising measures they have taken to be economically independent and avoid reliance on the state.[184]

However, as Fineman emphasises, even an autonomous-minded professional person in a high-income state society is dependent on a range of structural accommodations such as the availability of ATMs, extended banking hours, yard and lawn services, fast food delivery and paid childcare as they go about their life. Yet, these are only accessible to those with sufficient economic, social and cultural resources.[185] Others are considered to be deficient under a standard that requires economic self-sufficiency as 'a necessary precondition for the conferral or recognition of any other type of independence or autonomy by the system.'[186] This system holds that '[o]nly if we are economically self-reliant can we be considered independent.'[187] Thus, 'independence and self-sufficiency "buy" for us the right to self-governance and "control" over will and actions. They earn our autonomy.'[188] Although, as Fineman explains,

> Far from being pathological, avoidable, and the results of individual failings, a state of dependency is a natural part of the human conditions and is developmental in nature. … [D]evelopmental dependency should … be regarded as both universal and "inevitable," and for these reasons, certainly not deserving of generalized stigma. All of us were dependent as children, and many of us will be dependent as we age, become ill, or suffer disabilities.[189]

[184] Jane D Bock, 'Doing the Right Thing? Single Mothers by Choice and the Struggle for Legitimacy' (2000) 14 Gender & Society 62.

[185] Fineman, *Autonomy* (n 35) 30.

[186] ibid 22.

[187] ibid 22.

[188] ibid 22.

[189] ibid 34-5, citation omitted.

The reality, as Herring points out, is 'that as humans we are interdependent. No one can be truly independent.'[190]

In light of these shortcomings, it is unsurprising that the traditional liberal notion of the autonomous self has been challenged from many sides, including by feminist, child studies, disability, indigenous, decolonial and Confucian theorists. Such critiques are necessary because an idea of humanity that rings true to the small proportion of humanity it most closely describes but appears alien to many others is unlikely to sustain a valid universal theory of justice. To define the human self as a free, rational and unencumbered being is to suggest that those who do not meet those criteria are not real people.[191] Non-real people do not have human rights, yet it is almost axiomatic that those who suffer the greatest economic, social and cultural rights violations do not live up to the autonomous actor ideal. If autonomy is taken as the marker of our humanity, then those without the capacity for autonomy (such as babies and some people with severe mental disabilities) lack humanity and thus lose their entitlement to justice from a philosophical point of view.[192] Moreover, people (including many within indigenous communities) for whom the privileging of the individual over the collective is an anathema must relinquish their essential (collective) sense of self to be recognised as human.

Some ethics of care, disability, child studies and indigenous law theorists reject rights talk because they view current human rights frameworks as irreparably linked to liberalism's valorisation of autonomy.[193] Other theorists, such as Fineman, have sought to

[190] Herring, *Relational Self* (n 35) 22.

[191] Willett, Anderson and Meyers (n 157).

[192] Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard UP 2006) 33.

[193] Ani Mikaere, 'Seeing human rights through Māori eyes' (2007) 8 NZ Yearbook of NZ Jurisprudence; Mary Ellen Turpel, 'Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural

demote the centrality of autonomy as a founding principle of rights or to reconceptualise autonomy to encompass humans' central social and relational nature, as is the case with Nedelsky and Herring.[194]

2.2.2 Theorising dependency, vulnerability, the self and interdependence

As well as critiquing classic liberal and neoliberal notions of autonomy, theorists have searched for alternative frameworks that centre dependency, vulnerability and relationships. Many Western theorists draw on the Aristotelean recognition that humans are essentially social beings, and that a fully human life can only be achieved in a community with others to buttress the legitimacy of their alternative theories of rights and justice.[195] These include vulnerability theorists and relational autonomists, both of whom insist that caring and the family must be brought to the centre of legal theory and jurisprudence, not hidden behind a cloak of privacy.[196] Thinkers from East Asian, indigenous and other traditions also articulate compelling conceptions of human existence and justice that are not centred on the autonomous individual.

2.2.3 Vulnerability theory

> [E]ven the least vulnerable human being is still fundamentally, and inescapably, vulnerable in the negative sense, since none of us can meet her basic needs and satisfy her core desires without the co-operation of others; and even the most capable adult is vulnerable to hurt and harm, both physical and emotional.[197]

Differences' (1989) 6 Canadian Human Rights Yearbook 3; Karen Wells, *Childhood in a Global Perspective* (3 edn, Polity 2021) 219; Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (Routledge 1999).

[194] Fineman, *Autonomy* (n 35); Nedelsky (n 20); Herring, *Relational Self* (n 35).

[195] Jonathan Herring, 'Relational autonomy and family law' (Springer, 2014) 16-18.

[196] Fineman, *Autonomy* (n 35) 208-09.

[197] Mary Neal, '"Not Gods but Animals": Human dignity and vulnerable subjecthood' (2012) 33 Liverpool Law Review 177, 185.

Vulnerability theory holds that the embodied nature of humans renders us all vulnerable as a 'universal constant'.[198] The theory challenges 'the dominant conception of the universal legal subject as an autonomous, independent and fully-functioning adult', calling instead for systems of law and justice to centre the vulnerable subject whose existence is 'shaped by an inherent and constant state of vulnerability across the life-course'.[199] This understanding of vulnerability is not to be confused with the idea in public policy and related disciplines of certain segments of the population being particularly 'vulnerable' to adverse outcomes or events, for example due to their greater than average exposure to 'risk factors'. Vulnerability, as understood by vulnerability theorists, is not a comparative term nor intended as an identity label for discriminated against categories. Moreover, despite being concerned with how societies acknowledge and address dependency, vulnerability is not simply another term for dependency on care.[200]

In *The Autonomy Myth: A Theory of Dependency*, Fineman articulates a theory of dependency which is worth reviewing in depth. She describes her task as one of the most important for those concerned about society's most vulnerable, especially poor mothers and children. It arises from a concern that 'our particular way of thinking about the desirability and attainability of autonomy for individuals and families has seriously limited the ways in which we think about equality.'[201] In my view, this reification of

[198] Martha Albertson Fineman, 'What Vulnerability Theory Is and Is Not' 2021) <https://scholarblogs.emory.edu/vulnerability/2021/02/01/is-and-is-not/#:~:text=Prospects%20of%20Applying%20Vulnerability%20Theory&text=Vulnerability%20theory%20recognizes%20that%20the,sexuality%2C%20disability%2C%20and%20class.> accessed 1 February 2021

[199] ibid.

[200] ibid.

[201] Fineman, *Autonomy* (n 35) xiii.

individualistic notions of autonomy is precisely what ICESCR Article 10(1) serves to correct by articulating a right of the family to the economic, social and cultural protection and support owed to it as a consequence of the role it performs in undertaking dependency. I rely on the concept of derivative dependency and other ideas expressed in *The Autonomy Myth* to inform my articulation of what is required for single-parent families' realisation of their Article 10(1) rights in light of the particularly acute repercussions the privatisation of dependency has on them.

In *The Autonomy Myth,* Fineman argues that the foundational myth of autonomy combines with other mythologised concepts to produce 'real and negative social consequences.'[202] Most significant for my purposes are the notions of dependency and derivative dependency. Dependency is an integral part of the human condition and is everyone's first experience of life. The realisation of an individual's rights to life and freedom relies, in the first instance, on the care, nurturing and sustenance provided to them as an infant by at least one more capable human being. Legal obligations of parental responsibility generally govern the requirement to ensure care is forthcoming.[203] The actual caring and nurturing labour can be described as 'mothering'. Modern neurobiology backs up the hunch that it is important that care is provided by one or more capable humans who are securely bonded (attached) to the infant.[204] Thus, the most essential universal human rights, including the right to life, rely on a bond which is found in the family and is very hard to replicate elsewhere. Despite a reliance on these bonds and the labour of mothering being the universal reality, our conceptions of equality are based on

[202] ibid 25.

[203] John Eekelaar, 'Forward' in Rebecca Probert, Stephen Gilmore and Jonathan Herring (eds), *Responsible Parents and Parental Responsibility* (Hart Publishing 2009) v.

[204] Siegel (n 152); Zeanah and others (n 152); Cicchetti (n 152).

the autonomy rights of atomised individuals. As such, Fineman explains, they are fundamentally inadequate to define relationships of such existential significance as those created by the natural dependency of infants and children and the mothering response this typically engenders.[205] She, therefore, asks, 'What are we feminists to do with motherhood, as both as a practice and an ideological structure?'[206]

Because universal and inevitable dependency is the experience of every human, Fineman argues that it is 'of collective concern, requiring collective response.'[207] Yet paradoxically, 'the essential and society-preserving work' demanded by the inevitably of dependency is 'channeled by society in such a way that only *some* of its members bear the burdens of this work.'[208] Further, 'undertaking dependency—caring for an inevitable dependent—generates a different form of dependency in the caretaker.'[209] Fineman labels this type of dependency 'derivative dependency' which she defines as arising 'when a person assumes (or is assigned) responsibility for the care of an inevitably dependent person.'[210]

In Fineman's analysis, there are two parts to derivative dependency. Derivative dependents, Fineman explains, have 'as a result of the dependency work they are doing, … a need for monetary or material resources, … institutional support and

[205] Fineman, *Autonomy* (n 35) 169. This is not to essentialise mothering as something experienced by all women and only women.

[206] ibid 169.

[207] ibid 263. Italics in original.

[208] ibid 263.

[209] ibid 34.

[210] ibid 35-36.

accommodation, and … structural arrangements that facilitate their caretaking.'[211] Moreover, dependency work is demanding: as Fineman explains, '[t]he norms of sacrifice and selflessness are clear—and costly.'[212] Undertaking it represents an opportunity cost, in that the carer cannot spend the time and energy they use caring in other ways, such as on income or wealth generation. Therefore, 'those who care for others are themselves dependent on resources in order to undertake that care.'[213] Nevertheless, crucially, '[d]erivative dependency is not a universal experience.'[214] Not everyone performs caretaking roles. 'In fact', Fineman stresses, 'many people in our society totally escape the burdens and costs that arise from assuming the role of caretaker, and perhaps are even freed for other pursuits by the caretaking labor of others.'[215]

Fineman pinpoints the conflation of the myth of the autonomous individual with the mythologised private family as the ideological girding that enables dependency to be rendered a private matter and relegated to the responsibility of individual families. In the traditional patriarchal family, the patriarch assumes responsibility for both the biologically dependent person and the derivatively dependent person. In return, he holds the power within the household. The survival and flourishing of both types of dependents rests on his will, a fact which constrains the bargaining power of other family members. Thus, Fineman argues that political ideology (mis)uses the private family to avoid fair accounting for the burdens of dependency both within the family and across society more generally. By invoking autonomy, she writes, 'we create and perpetuate cultural and

[211] ibid 35.

[212] ibid 35.

[213] ibid 35-36.

[214] ibid 35.

[215] ibid 35.

political practices that stigmatize and punish those among us labelled dependent. Dependency is thus cast as a societal problem in need of drastic measures to remedy.'[216] Under neoliberalism, dependency has come to be understood as synonymous with reliance on government welfare assistance.

Yet, even beyond infancy and childhood, human beings are naturally dependent throughout the life course. Disability, high health needs and other contingencies make some people's dependency more apparent than others. Many individuals experience heightened levels of dependency at the end of life. Moreover, patterns of care and expectations in response to adult dependency vary greatly between states, societies and communities. For example, the recognition of adult familial interdependency in the African Charter on Human and People's Rights stands in contrast to other international and regional human rights instruments.[217] Meanwhile, neoliberal Anglo states have attempted to instil in their populations a greater sense of family responsibility for meeting the needs of adult dependents than was the case in their earlier incarnations as welfare states. However, so far, this has tended to be expressed as a social or moral expectation, not a legal duty.

Fineman's analysis is insightful in pointing to the importance of the family as a support for the 'public' government sphere and the 'private' commercial sphere (which is, nevertheless, conceptualised as less private than the family). She argues that understanding dependency as both universal and inevitable creates an obligation on society to support those of its members who engage in care work as a matter of fairness and requires 'the reallocation of responsibility for dependency across societal institutions,

[216] ibid 32.

[217] African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev 5, 21 ILM 58 (adopted 27 June 1981, entered into force 21 October 1986).

away from primary reliance on the family.'[218] The idea of universal dependency encapsulates 'the notion that subsidy is also universal—we all live subsidized lives', even though 'not all subsidies are labeled as such.'[219] For example, the state subsidises private business and caretakers within families subsidise society in general, as well as its institutions. In other words, '[f]ar from being independent, the state and the market institutions that it protects and fosters are dependent on the caretaking labor that reproduces society and populates its institutions.'[220] Fineman argues that a 'social debt' is owed in return and must be paid 'according to principles of equality that demand that those receiving social benefits also share the costs when they are able'.[221] Thus, her analysis inverts neoliberal economists' concern about moral hazard by demonstrating that it is 'our market institutions' which are '"free-riders" appropriating the labor of the caretaker for their own purposes'.[222] Building on the feminist insight that the public/private split is a false dichotomy as most things are *both*, she observes that, 'the family frees the market to act without consideration or accommodation for dependency.'[223] Although state and business sectors benefit from and rely on work within the family to provide citizens and labour, relegating derivative dependency to a private matter of family responsibility allows it to be invisiblised in political and economic theory, sidelined in legal frameworks and absent from national accounts. The power of

[218] Fineman, *Autonomy* (n 35) xvii.

[219] ibid xvii.

[220] ibid xvii.

[221] ibid xvii.

[222] ibid xvii.

[223] ibid 37.

the autonomy myth lies in its ability to obscure the reality that seeming autonomy is the product of caretaking in the family.[224]

Fineman argues for 'a new understanding of autonomy'[225] to overturn the autonomy myth and establish instead 'an intergenerational and cross-institutional notion of collective responsibility for dependency.'[226] She insists that the family be made visible as a background condition fulfilling necessary societal functions. The family deserves structural support to do so, just as markets are structured and supported by the state and civic society through multiple means, including laws, incentives and background conditions.[227] Such a collective responsibility does not deny the importance of families as relational units within which affective, developmental and physical care is provided. Rather, Fineman's theory 'develops a claim of "right" or entitlement to support and accommodation from the state and its institutions on the part of caretakers—those who care for dependents.'[228] She leaves open questions of whether care work might be paid. More important is that under this approach the labour of those who care for dependents is to be 'treated as equally productive' and 'measured by its societal value, not by … market indicators.'[229] This will enable 'us to appropriately and fairly assign responsibility for dependency in a way that promotes substantive equality.'[230]

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[224] ibid 233.

[225] ibid xxii.

[226] ibid xiii.

[227] ibid 229-30.

[228] ibid xv.

[229] ibid xv.

[230] ibid xxii.

To achieve this, Fineman urges us to envisage what might be optimal both legally and in terms of policy for society to distribute responsibility for dependency across its institutions. This should form the basis of a rethinking of the metaphor of the social contract.[231] In contrast to the tacked-on nature of attention paid to dependency and derivative dependency in liberal theories of justice such as Rawls', Fineman argues:

> If family were a central part of a justice analysis, and family roles were also assessed behind the "veil of ignorance," the structural position of the family in society and the attendant appropriation of domestic labor by the state and the market would become apparent.[232]

The result would be a revelation of injustice that occurs from the ordering of social institutions.

The situation of the single-parent family exemplifies Fineman's point: where the family contains only biologically dependent people (children) and a lone derivatively dependent person (the single parent), there is no intermediary to mitigate the appropriation of domestic labour by the state and market. The family may struggle to meet its members' needs as a result.[233] The solution is not to valorise the marital family; within which dependency and the unequal gender relations this embeds are rendered invisible. That approach is not only analytically unhelpful, it also demeans and stigmatises single-parent families as deficient.

2.2.4 Relational autonomy

The scepticism towards autonomy implied by Fineman's description of it as a 'myth' has been criticised by some relational autonomists who believe that, despite its historical

[231] ibid 208-9, 234-7.

[232] ibid 217.

[233] This is not to suggest all single-parent families are isolated from support. Families may be embedded in wider extended family groups or close-knit communities.

limitations, the concept of autonomy can be rehabilitated via a more nuanced understanding.[234] Relational autonomists attempt to reinterpret the concept of autonomy as morally defensible by arguing that it is the self which 'emerges out of our relationships with each other' and is 'constituted by and through our relationships'[235] that must be taken seriously. In their view, the law must recognise 'the substance, support and reward of caring relationships as a central goal' and understand that 'we cannot consider the rights and interests of individuals separately from each other'.[236] Thus, Lawless' statement that '[a]s social beings, our agency emerges from our relationships with the other members of our communities'[237] echoes and draws legitimacy from the Aristotelean notions of humans as social animals. As Lawless explains, our relationships 'necessarily limit our options and render us subject to others' choices'.[238] However, such 'limitations and vulnerabilities do not threaten our agency but give it determinate form.'[239] Thus, rather than being based on 'free will and self sufficiency', relational autonomy posits an ideal of true autonomy being found within relationships in which 'our decisions are made with and supported by others' and 'our goals are mixed up with the decisions of others.'[240] In this thesis, I understand relational autonomy as relating to the rights of individuals as family members. In contrast, vulnerability theory is key to understanding

[234] Eg Nina A Kohn, 'Vulnerablity Theory and the Role of Government' (2014) 24 Yale JL and Feminism 1, 1; Catriona Mackenzie, 'Feminist innovation in philosophy: Relational autonomy and social justice' (2019) 72 Women's Studies International Forum 144, 147.

[235] Herring, *Relational Self* (n 35) 11.

[236] ibid 197.

[237] John Lawless, 'Agency in Social Context' (2017) 94 Res Philosophica 471, 472.

[238] ibid 472.

[239] ibid 472.

[240] Herring, *Relational Self* (n 35) 18.

economic, social and cultural rights of families as group units. ICESCR Article 10(1) is expressed as a group right, and for this reason, vulnerability theory plays the starring role in my analysis. However, relational autonomy influences my consideration of the rights individual members of single-parent families.

2.2.5 Conceptions of self and interdependence in East Asian and Indigenous worldviews

The preceding sections on autonomy, vulnerability and relationships have focused on the work of selected theorists writing in the Anglo-American liberal philosophical tradition (a stance they readily acknowledge). That is also the broad discourse within which I was raised, studied and am most articulate. It is the tradition within which this thesis is written. However, to give substance to the essential conceit of international human rights law, which holds that it is of universal relevance and application, it is necessary to begin at least to move away from privileging Western worldviews as the presumptive pinnacle of philosophising, and as a bare minimum, to acknowledge the existence of other traditions. While it is beyond the scope of this thesis or my abilities to articulate non-Western conceptions of self, autonomy and interdependence in-depth, it is important to observe, as the anthropologist Geertz does, that the centrality of individual autonomy is 'a rather peculiar idea within the context of the world's cultures.'[241]

Within the development of the UN human rights system, there have been voices highlighting other intellectual traditions that address the ordering of society and interpersonal relationships and contain theories of justice, power and morality. In particular, Chang, the Confucian philosopher and China's representative who served as

[241] Clifford Geertz, '"From the Native's Point of View": On the Nature of Anthropological Understanding' (1974) 28 Bulletin of the American Academy of Arts and Sciences 31.

Vice-Chair of the UDHR Drafting Committee worked with skill and perseverance to move the Drafting Committee's thinking beyond a narrow Western lens.

Chang's influence on the development of IBOR and the international human rights law framework has had increasing recognition. He famously recommended that UN Human Rights Division Director Humphrey take six months off to study Confucian and Asian philosophy.[242] His embodiment and articulation of Confucian principles enabled the Drafting Committee to move beyond a seemingly endless debate about whether the UDHR should reference 'the Creator' (a point of particular significance concerning the article on the family) by recalling:

> that the population of his country comprised a large segment of humanity. That population had ideas and traditions different from those of the Christian West. Those ideals included good manners, decorum, propriety and consideration for others. Yet although Chinese culture attached the greatest importance to manners as a part of ethics, the Chinese representative would refrain from proposing that mention of them should be made in the declaration.[243]

The Drafting Committee accepted Chang's reasoning that deleting reference to a Creator 'would obviate any theological question, which could not and should not be raised in a declaration designed to be universally applicable'.[244]

Beyond individual textual contributions, Chang's influence on IBOR' structure and his ability to break ideological impasses between other members, often by referencing pithy accessible Chinese proverbs, was significant. Thus, Humphrey, who wrote that Chang's 'intellectual stature'[245] towered over the rest of the committee, observed: 'He was a master of the art of compromise and, under cover of a quotation

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[242] John P Humphrey, *Human Rights & the United Nations: A Great Adventure* (Dobbs Ferry 1984) 29.

[243] UNGA (3rd Committee), ' Summary Record of the 98th meeting' (9 October 1948) A/C3/SR98..

[244] ibid..

[245] JP Humphrey, AJ Hobbins and L Piatti, *On the Edge of Greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights* (McGill University Libraries 1994) 88.

from Confucius, would often provide the formula which made it possible for the Commission to escape from some impasse'.[246] It is helpful to bear this in mind when considering the applicability of the IBOR to states and societies not rooted in Western liberal norms and when seeking to give its provisions their fullest accurate expression.

Autonomy is not a central principle of the Confucian intellectual framework. Chang's earlier scholarly work, *China at a Crossroads,* explained that in Confucius's teachings, 'the man of virtue is the man who can extend his sympathy and understanding to others; the man who is conscious not only of himself but of others; the virtuous man is, every moment, really more than himself'.[247] In other words, the Confucian ideal was not of an autonomous person but a relational, dependent one. Chang's proposal that the Confucian notion of *ren* (benevolence) be reflected in the UDHR should be seen in this light. His translation of the word *ren* into English as 'two-man-mindedness' harked back to the word's etymological origins[248] thereby emphasising that the new system of international human rights must not be trapped within Western liberal conceptions of rights based only on individual autonomy.

Recent efforts of Western philosophers to justify claims concerning the vulnerability that arises from human's embodied nature, relational interdependencies or structures supporting intergenerational care may seem unnecessarily convoluted or redundant to philosophers approaching such questions from within any of the multitude of philosophical traditions founded on relational and collective notions of self. Debates about the (non)existence and nature of the self stretch at least as far back as 500 BC,

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[246] Humphrey (n 242) 23.

[247] Sun (n 145) 46, citing Pengchun Chang, *China at a Crossroads* (Evans Brothers Ltd 1936).

[248] UNCHR (Drafting Committee), 'Summary Record of the 80th meeting' (17 June 1947) E/CN4/AC1/SR80; Sun (n 145).

when Siddhārtha Gautama taught the concept of 'dependent origination' as a central component of what became known as Buddhism.[249] It is true that the idea that there is no self presents practical problems for institutions and systems of thought operating in dualist Western liberal traditions. For example, if there is no self, who is a legal person? Even more simply, who is writing this thesis? Buddhism, however, developed the idea of *advaitam* or *funi,* meaning non-dualism, which allows for the possibility of 'neither self nor other' to understand this essential paradox.[250] Such Buddhist concepts overlap with the Confucian ideas Chang brought to the UDHR drafting process.

Many indigenous world views also reveal the notion that there is no self outside of relationships. Thus, for example, the adolescent narrator in Samoan writer Sia Figiel's novel *Where We Once Belonged* states '"I" do not exist. I am not. My self belongs not to me because "I", is always "we", is a part of the 'aiga [family] … a part of the nu'u (village), a part of Samoa.'[251] Renowned Māori jurist Moana Jackson writes, 'We have a pepeha [saying] "Kāore koe e tū mokemoke ai"—a person never stands alone—and the beginnings of our law gave meaning to everything that whakapapa [genealogy, layering of history] implied for the past and the future.'[252] Such collective ontologies have practical implications. For example, Milroy observes, '[i]n pre-colonial Maori society a

[249] Ikeda (n 37); Mahieu Boisvert, *The Five Aggregates: Understanding Theravada Psychology and Soteriology* (Wilfrid Laurier UP 1995).

[250] ____, 'Meaning of the Sanskrit Word: advaitam' (2020) Sanskrit Dictionary, http://sanskritdictionary.org/advaitam accesseD 5/10/2020; ——, <jlearn.net, 'Funi' Online Japanese Dictionary and Study Portal https://jlearn.net/dictionary/%E4%B8%8D%E4%BA%8C-%E3%81%B5%E3%81%AB#:~:text=Kana,term%20advaitam%20(non%2Dduality)> accessed 5/10/2020.

[251] Sia Figiel, *Where We Once Belonged* (Pasifika Press 1996) 135.

[252] Jackson (n 36).

man's house was not his castle', and the community was able to intervene in issues such as intimate partner violence 'in a very straightforward way.'[253]

The privileging of the ideal of autonomy in rights discourse is a result of the hegemonic effect of Western liberalism, brought about under the conditions of colonialism and neocolonialism.[254] Nevertheless, despite the strong homogenising power of global liberalism and neoliberalism, countertrends are in motion. These include academics', legislatures' and courts' increasing articulation of legal concepts that speak to ontological values of interconnectedness, interdependence and communalism as foundational.[255] In New Zealand, for example, Māori jurisprudence has loosened the grip of Western notions of autonomy in family law, and notions of *whānau* (the collective extended family) are now commonplace in legislation, policy and case law.[256] More recently, *tikanga* (customary Māori law) has been recognised by the NZ Supreme Court as 'the first law of the land' and an extant part of the common law applicable to both Māori and non-Māori inhabitants.[257] While the impacts of this have not yet played out fully, Māori philosophers and jurists, the Waitangi Tribunal and the NZ Supreme Court have consistently asserted principles akin to collective interdependence, relationships and relational autonomy as sitting at the heart of *tikanga*.[258] Thus, Mikaere writes:

> Tikanga Māori embodies the practical expression of a philosophical base that is unique to us. The principles that underpin tikanga are timeless, reminding us that

[253] S Milroy, 'Domestic Violence: Legal Representation of Maori Women' (1994) 12.

[254] Wells (n 193) 221.

[255] *S v Makwanyane & Another 1995 (3) SA 391 (CC)* (Mahomed J) [263]; Ndjodi Ndeunyema, *Re-invigorating ubuntu through water: A human right to water under the Namibian Constitution* (Pretoria ULP 2021); Waitangi Tribunal, *The Muriwhenua Land Report* (GP Publications 1997); Mikaere *Colonising* (n 37) 254-5.

[256] Ruru (n 36).

[257] *Ellis* (n 36).

[258] Mikaere *Colonising* (n 36) 179-204.

> relationships are of paramount importance: relationships between humans and the spiritual realm, relationships between humans and all other living things, relationships between the generations now living, and between ourselves and past and future generations as well.[259]

Mikaere identifies underlying principles on which tikanga is based, including *whakapapa, whanaungatanga, manaakitanga, aroha* and *utu*.[260] While these defy neat translations into simple English phrases, they encompass critical notions of interdependence, vulnerability and relationships. Mikaere explains, 'While the practice of tikanga has adapted over time to meet new contexts and needs, it has nevertheless remained true to those foundational concepts, which some have called "conceptual regulators".'[261]

2.2.6 Article 10(1) read in light of theories of dependency and vulnerability

> The ideal autonomous person is not the lone businessman striding off to work protected by his suit and briefcase, but the mother changing the nappy.[262]

It is no accident that family relations are the central metaphor used by vulnerability theorists and relational autonomists to describe the ideal human. Furthermore, it is unsurprising that the archetypes employed by vulnerability theorists and relational autonomists are the mother and infant/child: it is in the act of 'mothering' that care and nurturing occurs, not in 'fathering' or in some gender-neutral 'parenting'. That is not to say that non-females cannot do mothering, nor does there have to be a biological or legal relationship with the recipient for it to occur.

[259] ibid 266.

[260] Broadly, genealogy or lineage, relationships, care, respect and reciprocity.

[261] Mikaere *Colonising* (n 36) 254-55, citations omitted.

[262] Herring, *Relational Self* (n 35) 18.

As Herring observes, caring relationships are integral and have primacy in human lives:

> From our earliest days, we are in caring relationships which are crucial to our physical health, emotional well-being and psychological identity. Caring is hardly some kind of luxury hobby or activity ancillary to other more important activities. It is central to our humanity. Feeding, bathing, changing, comforting, transporting and nurturing are core moral acts.[263]

However, Herring adds, '[s]adly, this is not how law seems to see things.'[264] Does international human rights law have the potential to pay better attention to relational caring? My argument is that it does. There is a need for understandings of international law as well as domestic law to become more in tune with the realities that 'identities become merged in caring relationships'.[265] The argument that 'the "vulnerable subject" must replace the autonomous and independent subject asserted in the liberal tradition'[266] is as valid for international protections of economic, social and cultural rights as it is in domestic jurisdictions. Alternatives are needed to dominant legal language's reinforcement of 'separation rather than combination.'[267] An examination of the *Travaux Préparatoires* relating to Article 10(1) and its parallels provision in the UDHR reveals that the drafters were striving to do this through their inclusion.

I contend that Fineman's theory of dependency and its claim of a right or entitlement 'to support and accommodation from the state and its institutions on the part of caretakers'[268] aligns with the intentions the drafters of IBOR had in establishing the

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[263] ibid 46.

[264] ibid 46.

[265] Jonathan Herring, 'The Disability Critique of Care' (2014) 2 Elder Law Review 9.

[266] Fineman, 'Anchoring Equality' (n 158) 2.

[267] Herring, 'Disability Critique' (n 265) 9.

[268] Fineman, *Autonomy* (n 35) xv.

family as a rightsholder, despite the somewhat inchoate ways in which this was expressed in the drafters' deliberations. In this analysis, ICESCR Article 10(1) conveys the intent that the state should be responsive to human vulnerability by ensuring that the vulnerable-caring group unit known as the family is protected and assisted, particularly in relation to its universally archetypal function of mothering/being mothered (expressed in the text as 'nurturing and educating dependent children'). Giving effect to Article 10(1) based on this framing would respond to the actual economic, social and cultural realities of the most oppressed, who are predominantly women and children.

Such understandings of humans as vulnerable, interdependent and relational do not dismiss the importance of autonomy. For example, Fineman explains that vulnerability theory understands that autonomy relies on individuals having access to 'the basic resources that enable them to act in ways that are consistent with the tasks and expectations imposed upon them by the society in which they live.'[269] She writes, '[t]he expectation that one should achieve this form of autonomy—autonomy supported by a societal commitment for the provision of basic social needs—should be every person's birthright.'[270] This sense of autonomy concedes 'that there is an inherent dependence on society on the part of all individuals.'[271] It recognises that the concept of autonomy is only meaningful if individual choices are not impossibly constrained by inequalities. Therefore, Fineman continues, '[t]he goal of autonomy must be supported through an understanding of collective responsibility for basic needs.'[272] Such an understanding of autonomy and dependency resonates with the capabilities approaches' conceptualisation

[269] ibid 29.

[270] ibid 29-30.

[271] ibid 30.

[272] ibid 30.

of the significance of rights as stemming from the opportunities they afford people to express their capabilities.[273] The provision in ICESCR Article 10(1) for families to be accorded 'the widest possible protection and assistance' can be best understood in this context.

It is a fact that the universal human experience of life is not autonomy but rather babyhood, which is a state of complete dependency. While some of us do not live beyond that stage, all of us begin there. To make the realisation of human rights truly universal, we must build from that shared experience. It is important to ensure that the philosophical supports relied on to give content to human rights treaty provisions acknowledge this in order to be fit-for-purpose. Philosophical groundings that do not include such recognition will only be able to consider humans' common vulnerability and dependency as externalities to be addressed through exceptions to normal rules or as inconvenient deficits to be moralised or ignored. Conceptions of justice, rights and societal organisation built on that base result in unequal bargaining positions, relative powerlessness and frequent impoverishment for caregivers and those who depend most directly on care. Rhetoric of the family as a private sanctuary in which worldly rational considerations are displaced—whether by romantic or maternal love, cultural resonance, or religious injunctions—serves to camouflage these realities. However, overlooking or stigmatising dependency and derivative dependency leads to an array of failures for rights realisation, of which the marginalisation of single-parent families is one.

In families with only one adult, it is not possible to share the burdens of derivative dependency, nor, in female-headed single-parent families, for the family to benefit from the greater labour market privileges accruing to male work. Responses from society and

[273] See subchapter 3.3.

the state to the struggles this generates generally revolve around stigmatising assumptions of moral culpability or personal inadequacy and are frequently accompanied by punitive control and a loss of privacy. This reaction serves to uphold the myth of autonomy by obfuscating the realities of dependency and derivative dependency. Rather than a structural failure to support dependency and caregiving being viewed as causing poverty and adverse outcomes for single-parent families, their marginalisation is attributed to moral failures—specifically of the mother, but also passed on to her children. Meanwhile, the dependency of children and derivative dependency of those responsible for mothering in heteronormative two-parent families remains hidden from serious policy, political or legal consideration, shrouded in the lingering veil of privacy. Thus, in a sense, single-parent families are collateral damage of a failure to ensure appropriate supports and recompense for the government and private business sectors' reliance on unpaid caring work to maintain and reproduce societal functioning.

We must recognise that caretakers need resources to perform care work. Throughout the world, such work is disproportionately undertaken by women who are rendered derivatively dependent as a result. No matter how much one loves those one cares for, our embodied forms render humans dependent on physical provisions, rest and time. Regardless of its intrinsic value within human experience, care requires temporal and material resources to support it and allow those who provide and receive it to live well. As Fineman observes, as long as the primary source of resources to support care is the family, it will be hard to undo gender inequality.[274]

An international human rights law approach grounded in ICESCR Article 10(1) allows us to overcome the invisibilisation of dependency as a private matter to be dealt

[274] Fineman, *Autonomy* (n 35) xvii.

with within the family. As a branch of public law, human rights law is concerned about relations between people and the state. It contains tools for overcoming the separation of the family and the public sphere found in private family law. This, however, requires UN treaty bodies to insist that states take the provision seriously. By giving it its full meaning and applying an equalities and non-discrimination approach to its implementation the lacuna concerning dependency can be addressed. Relationships are not to be traded off against the realisation of individual human rights. To quote Fineman again, '[d]ependency must not be structured as in competition and incompatible with the ideal of equality—it is merely one of the human and societal circumstances that must addressed as part of achieving equality.'[275] This requires a reallocation of power and resources. Combining a recognition of universal vulnerability and relational notions of self with the ideas of having, loving and being found in capabilities theory offers a promising way to understand Article 10(1) rights. Given the existential significance of the nurture of dependent infants and children to humanity, it is unsurprising that the founders of IBOR recognised the family (as the group unit within which care typically occurs) as a holder of human rights. What is alarming is the lack of attention paid to this right in the subsequent decades. This blindness has wide-ranging consequences. However, before I examine the interpretation of the right and the consequences of its non-realisation in detail, it is necessary to address interrogate what is meant by 'family' in the context of Article 10(1). It is to this I now turn.

[275] ibid xvii.

2.3 What is family?

2.3.1 Subchapter introduction: the meaning of ‘family’ and why it matters

In this subchapter, I turn to the identity of the family. It is important that we know what families are for two reasons: first, to answer criticisms that the concept of family is too ill-defined for UDHR Article 16(3) and ICESCR Article 10(1) to be implemented meaningfully, and second, to be clear on whether single-parent families are families in a true sense. On one level, the answer to the second question is self-evident: ‘single parent’ is simply a descriptive phrase qualifying such families as a subgroup of the larger set of ‘families’. However, this assumption has been contested with ramifications for single-parent families' economic, social and cultural rights. CECSR has not issued guidance on how to interpret the term ’family’ in the context of ICESCR Article 10. In the absence of this, one might turn to the HRC’s comments on the parallel provision in ICCPR Article 23. The findings here are mixed. The HRC’s General Comment 19, which deals with ICCPR Article 23, offers a hint of clarity while also sowing additional ambiguities. There, the HRC states that:

> In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should … indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.[276]

In this statement, the HRC recognises that single-parent families are families but immediately undermines this by allowing states to indicate the extent to which they and their societies recognise and protect such families. Perhaps the HRC’s intention is that once states provide this information, it will be better able to assess the extent to which each is meeting its ICCPR Article 23 obligations to single-parent families. However,

[276] HRC, 'ICCPR General Comment No 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (27 July 1990) HRI/GEN/Rev1 (1994) [2].

ambiguity arises from the location of this statement at the end of a paragraph discussing the concept of family in relativist terms. The paragraph in which this request is found begins by noting 'that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is, therefore, not possible to give the concept a standard definition.'[277] The HRC also emphasises that 'when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23.'[278] This opens up the possibility that the HRC would allow a state to choose not to recognise a particular type of family as 'family' and thereby escape its Article 23 obligations to such families. Applying such a relativist approach to ICESCR Article 10(1) would, however, be contrary to the anti-discrimination tenets of ICESCR and the meaning of Article 10(1) as based on the plain meaning of the text read in light of its object and purpose, having regard to the intentions of the drafters, which, as I will demonstrate in the course of this sub-chapter included protection of the most vulnerable families.

The HRC deals with the difficulties of defining family by offering a non-prescriptive list of 'minimal requirements for the existence of a family … such as life together, economic ties, a regular and intense relationship, etc.'[279] Thus, for example, 'flatmates, friends sharing a residence, or tenants in a boarding house' would not generally qualify as family in ICCPR terms.[280] The fact that the HRC does not apply an explicit equality and non-discrimination lens to its discussion of family types in its

[277] ibid [2].

[278] ibid [2].

[279] Saul, Kinley and Mowbray (n 150) 731.

[280] ibid 732.

General Comment 19 may be partly explained by its time. Since 1990, when General Comment 19 was published, human rights bodies' understanding of non-discrimination and equality has developed considerably. The HRC's own subsequent practice demonstrates that states are not permitted 'unbounded relativity' in their conceptions of family.[281] Overall, the HRC's approach does not offer much guidance for determining what 'family' means in ICESCR Article 10(1).

Stepping back to consider theoretical approaches, Nedelsky argues that it is necessary to clearly identify the relevant values and then clarify the kinds of relationships that would be structured by competing forms of a right to determine which will actually foster those values.[282] I adopt this approach to examine competing conceptualisations of the family. Here, I seek to determine which conceptualisation gives the correct meaning of the term in Article 10(1) based on the values underpinning the object and purpose of the provision in terms of the text, as elucidated by the intentions of the drafters and in light of subsequent developments in international human rights law, societal contexts and scientific knowledge.

Any assumption that a straightforward, universally applicable definition of the family could be easily agreed upon dissolves on scrutiny. This subchapter, therefore, examines common conceptualisations of the family to ascertain the content of the term under international human rights law. I examine four broad models, which I categorise as conservative-marital, libertarian-contractual, pluralistic (including traditional extended-collectives) and caring-vulnerable. I test these models against the ordinary meaning of the word family as used in Article 16(3) of the UDHR and Article 10(1) of ICESCR in its

[281] ibid 729.

[282] Nedelsky (n 20) 236-37.

context, and in light of the 'object and purpose' of IBOR.[283] In addition, I refer to the *Travaux Préparatoires* to the UDHR and ICESCR as a supplementary means of interpretation.[284] Models of the family that are inconsistent with the object and purpose of international human rights law because of irreconcilable conflicts with fundamental principles of non-discrimination and universalism cannot be accepted, especially where the *Travaux Préparatoires* indicate that they are contrary to the intentions of the drafters.

2.3.2 The conservative-marital family

The conservative-marital family takes the idea that a heterosexual family consisting of a married father and mother and their genetic biological children is god-given or natural. It has traditionally been the model of the family understood in Western legal systems, remains highly influential in domestic family law and policies, and enjoys the support of a number of family law theorists as well as politicians and lobbyists. The idea of the conservative-marital family is often associated with religious belief.[285] For example, in his article 'Natural Law and the Rights of the Family', Araujo sets out arguments for defining the family as only the marital family based on natural law and Catholic Church doctrines.[286] However, the idea that religious bodies should determine the nature of family is not limited to the Catholic Church. Despite the many variations between and even within religious groups, family law has come under the purveyance of religious courts in jurisdictions ranging from historical England to modern Nigeria, India, Malaysia and Iran. Moreover, juridical-religious beliefs have strongly influenced modern socio-

[283] VCLT Article 31.

[284] ibid Article 32.

[285] Brenda Almond, *Fragmenting Family* (OUP 2006) 12-15; Araujo (n 44).

[286] Araujo (n 44).

legal conceptions of family in many states. The influence of these conceptions can be observed in the debates of the UDHR drafting committee, which, despite ultimately rejecting status-based definitions, was swayed to include a reference to the family partly by its importance to Christian NGO submitters.[287]

In the conservative-marital model, the family is a cradle of traditional values, offering protection from external forces of modernity. Status-based roles, in which family members are defined in legal relationship to one another as husband, wife or child, offer structure and certainty. With marriage at the centre, husband-breadwinner and wife-homemaker roles are based on fixed duties to each other, their children and society (although these duties are not necessarily legally enforceable). In Anglo thought, the notion of domestic sphere as sanctuary is historically significant and relies on a middle-class ideal of womanhood as passively subordinate to the male breadwinner. Women are idealised as angels in the house, under whose gentle influence archetypal self-interested rational public men are assumed to transform into benevolent private patriarchs wisely providing for their dependents.[288] The caretaking role is viewed as both the highest female vocation and, in the model's traditional form, not something to be sullied by monetisation. Although the conservative-marital family is viewed as natural, it is simultaneously thought to be at risk and in need of protection from other family forms, which are pretend, incomplete, deficient, broken and/or degenerate. Thus, writers such as Somerville argue that children have a right to be raised by both their bio-genetic mother and father wherever possible and that for the state to support same-sex marriage or single-parenthood by choice would wrongfully interfere with these norms.[289] The core of the

[287] E/CN4/SR13 (n 164).

[288] Coventry Patmore, *The Angel in the House* (John W Parker 1854-1856).

[289] Somerville (n 44).

family under the conservative-marital model arises from religious and legal status, which is placed on top of presumed bio-genetic relationships without regard to functional relationships.

The centrality of the family in the conservative social structure means that conservative thinkers argue that the state has a role in supporting the correct family form through legislative recognition, official discourse and institutional structures.[290] There may be economic support for families that fall within the correct norm through cash transfers, tax relief, housing and other measures.[291] Attitudes to non-marital family forms may vary depending on the families' origins. Thus, a single-parent family arising from the death of a parent may be viewed sympathetically (especially if that parent died in military service) and may be eligible for higher rates of social security benefits; abandoned wives (and husbands) raising children alone may also be looked on with some sympathy. In contrast, young, never-married single mothers often are viewed unfavourably. The state may actively stigmatise and delegitimise them through language, policies, legislation and institutional structures which emphasise their deviance and attempt to dis-incentivise others from forming such families.[292] In extremes, state action may involve criminalisation of certain family or relationship forms (for example, homosexual relationships). Removing children from a single-parent and adopting them into an 'intact' family may be preferred by proponents of the conservative-family model

[290] Almond (n 285); Sara McLanahan, 'Strengthening Fragile Families' (2010) Policy Brief: The Future of Children; Boyd and others (n 8) 31-32.

[291] Roger Scruton, *The Meaning of Conservatism* (3rd edn, Palgrave Macmillan 2001) 129-132; Almond (n 285) 146-154; Boyd and others (n 8) 31-32.

[292] Boyd and others (n 8) 208; Alison Diduck, *Law's Families* (LexisNexis UK 2003) 206.

to leaving them in what are considered broken, deviant, or failing single-parent families.[293] There is no room in such models for single-parents-by-choice.

Although the conservative-marital model is associated with conservative thinking, its influence is wider than conservative politics and the religious right. In the years following World War 2, the marital family was at the centre of efforts by Western governments to enhance security and stability through the creation of strong welfare states which extended the middle-class ideal of the nuclear family to workers and protected it from unexpected hardships as part of the social contract. In this conception, the male breadwinner is entitled to a family wage, while the homemaker provides care for the children and a sanctuary from the harshness of working life. The privatisation of dependency within the marital family is assumed to be natural. Such a model generally assumes that work outside the home should not interfere with a mother's homemaking and childrearing duties nor do more than supplement the breadwinner's wage. Under this model, there is, therefore, no need for extensive childcare services or flexible working conditions. In welfare states that pursued this model, the state would step in with a generous safety-net if external forces impinged on the ideal of the breadwinner and homemaker. The influence of this conception is apparent in provisions in IBOR regarding workers' rights to a wage sufficient to support a family, supplemented by other means of social protection for those for whom adequate waged work is not available, and the right to an adequate standard of living for oneself and one's family, including basic necessities, social security, and the continuous improvement of living conditions, as well as the

[293] Sonia Harris-Short, 'Making and Breaking Family Life: Adoption, the State, and Human Rights' (2008) 35 JLS 28.

family's entitlement to the support of society and the state, and motherhood and childhood's entitlement to specific support.[294]

Nevertheless, analysis of the *Travaux Préparatoires* of the UDHR reveals that the drafters of Article 16(3) rejected proposals to define the family as deriving from marriage precisely because it was too restrictive, anti-universal and discriminatory. Debate on the matter was heated and, at times, circular. For example, Pavlov, the USSR delegate, claimed that 'there was no purpose in laying down that the family was based on marriage because it could hardly be based upon anything else.'[295] When Malik of Lebanon retorted that, 'There could be family without the solemn ceremony of marriage,'[296] Pavlov 'noted a contradiction in this because a marriage was possible even if it was not solemnized, and he thought that the family, that is to say, the children, should be protected in all cases.'[297] In other words, not all who spoke of 'marriage' envisaged that only legally or religiously solemnised relationships would be covered by that status.

Conflicting provisions were also found in the national constitutions which informed the drafting of the outline of IBOR. While the family appeared as an important concept in many influential Latin American Constitutions, only some, such as the Cuban and Nicaraguan constitutions proclaimed it to be based on marriage, and there was ambiguity about what this meant. The Panamanian Constitution, for example, provided for de facto relationships of ten or more years duration to have the effect of civil

[294] UDHR Articles 16(3), 23(3), 25(2); ICESCR) Articles 7(a)(ii), 10.

[295] E/CN4/AC1/SR/38 (n 2).

[296] ibid.

[297] ibid.

matrimony. The Nicaraguan, Panamanian and Bolivian Constitutions made express provision for the equality of illegitimate children. [298]

Article 15A of the draft declaration of 16 December 1947 commenced, 'The family deriving from marriage is the natural and fundamental unit of society.' Later, Malik proposed an amendment stressing the marital family's natural essence, as follows:

> The family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the creator with inalienable rights antecedent to all positive law and as such shall be protected by the State and society.[299]

When this was rejected, Malik was not prepared to let the matter rest, insisting a record be made of his desire that his text 'be further considered in the future.'[300] Nevertheless, contrary views were strongly expressed. Eastern bloc states, for example, disagreed with Malik's theist natural law, arguing that equality between the sexes, safeguards for mothers and the protection of children were the true heart of the article on the family, They argued that Western cultural and religious prejudices in favour of marriage could not be allowed to jeopardise those women and children whose economic and cultural powerlessness meant their rights were most in need of protection.[301] Moreover, the Commission on the Status of Women made extensive submissions insisting that the 'moral and material' interests of women be protected in situations of divorce.[302] The Egyptian delegation was only prepared to support the text if it omitted the words 'deriving from marriage' as it was adamant that 'protection should not be withheld from

[298] UNCHR (Drafting Committee), 'International Bill of Rights Documented Outline' (11 June 1947) E/CN4/AC1/3/Add1.

[299] UNCHR (Drafting Committee), 'Lebanon: Amendment to Article 13 of the International Declaration on Human Rights' (2 June 1948) E/CN4/105.

[300] E/CN4/AC1/SR/38 (n 2).

[301] ibid; E/CN4/SR58 (n 2).

[302] E/CN4/SR58 (n 2).

families not deriving from marriage', a point with which Larrian, of Chile agreed.[303] There was dissension between the Saudi Arabian and Pakistani delegates as to the extent to which Islamic law provided sufficient protection for women in marriage without recourse to an international bill of rights.[304] Meanwhile, the UK delegation 'felt it was better to keep a declaration of the equal rights of men and women as to marriage, without giving any definition of marriage and the family' and stated it 'would vote against any amendment designed to provide a definition of those concepts.' This approach prevailed, and the final text of the article drops any causal connection between marriage and the family.

The issue arose again in the drafting of ICESCR. The first draft restricted the protected family to those 'based on marriage'.[305] Macchia (Italy) argued for this approach on the basis that only marriage enabled parents to protect children.[306] However, others disagreed out of concern that family units not based on marriage would be excluded. The rights of single-parent families and their members were at the forefront of such concerns. For example, Rössel (Sweden) stated:

> In its present context moreover, the passage seemed to imply that the family must be based on marriage; but unmarried mothers with children and divorced or widowed persons with children should also be recognized as family units.[307]

Souter (NZ) favoured a wording of the article that would ensure 'much needed assistance could be given to women who had to bring up children without the help of a husband.'[308]

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[303] ibid.

[304] E/CN4/SR13' (n 164).

[305] UNGA (3rd Committee), 'Report' (9 February 1957) A/3525.

[306] UNGA (3rd Committee), 'Draft International Covenant on Human Rights, 731st Meeting' (15 January 1957) A/C3/SR731.

[307] UNGA (3rd Committee), 'Draft International Covenant on Human Rights, 735th Meeting' (18 January 1957) A/C3/SR735.

[308] ibid.

Bratanov (Bulgaria) congratulated ICESCR's Working Party on drafting a text that 'took in that part of the Bulgarian amendment … which had been intended to protect illegitimate children with at least one parent'.[309]

Even among those who apparently accepted that marriage deserved a special mention, some argued that this in no way suggested that families not based on marriage had fewer rights. For example, Agiurre (Mexico) argued:

> Some delegations had said that paragraph 2 seemed to apply solely to children of families based on marriage. She could not share that view; it was merely the drafting of the paragraph which was at fault. Moreover, it should not be forgotten that under article 2, paragraph 2, each State undertook to guarantee the exercise of the rights without distinction of any kind, including distinction of birth; there could thus be no question of any discrimination against children born out of wedlock.[310]

Similarly, Eustathiades argued that Greece:

> [C]onsidered the phrase "It is based on marriage" unnecessary, since it expressed a concept which was universally admitted. Furthermore, its inclusion might be interpreted to mean that the measures of protection contemplated in article 10 would not apply to families which were not founded on marriage. Such an interpretation would be contrary to the Charter of the United Nations and to the Universal Declaration of Human Rights.[311]

In the end, the text was written to align with ICCPR Article 23, which was itself in alignment with UDHR Article 16(3) in its refusal to restrict the concept of the family in international human rights law to those based on marriage.

Nevertheless, some conservative commentators have followed Malik in seeking to relitigate the point in the subsequent decades. Often, proponents of the conservative-marital model of family express fears that increasing rates of single-parenthood threaten

[309] ibid.

[310] UNGA (3rd Committee), 'Draft International Covenant on Human Rights, 732nd Meeting' (16 January 1957) A/C3/SR732.

[311] ibid.

the stability of society. Of particular note are the 1990s communitarian and civil societarian movements in the USA and elsewhere, which advanced secular arguments for policies favouring the two-parent marital family.[312] These theorists and advocates shift policy arguments in favour of a conservative-marital definition of family from the moral and religious to the social and psychological, and deploy social science studies purportedly to demonstrate that children from single-parent families fare poorly in social and economic outcomes, reinforcing the notion that single-parent families are a deficient family form. In this context, juvenile crime, drug and alcohol crises, declining education achievements, teen pregnancy and suicide are all attributed to single-parent families.[313] For example, Galston, a former adviser to President Clinton, makes a 'frankly normative' argument for the conservative-marital family, asserting, 'I don't think we can escape the conclusion that children need structure and oftentimes the divorced household is a chaotic scene', and quoting Zinmeister's statement that, '"There is a mountain of scientific evidence showing that when families disintegrate, children often end up with intellectual, physical, and emotional scars that persist for life."'[314]

Communitarians and civil societarians advocate for highly conditional delivery of any state support to single-parent families, based on the dual notion that members of such families are less able to make rational decisions about their own interests and that a punitive approach is necessary to disincentivise others from having single-parent families. The desirability of caring for children is to be tempered by the perceived perils

[312] Martha Alberston Fineman, 'The Family in Civil Society' (2000) 75 Chicago-Kent LRev 531.

[313] Fineman, *Autonomy* (n 35) 71-85; Christian Action Research & Education, 'Marriage and Family' (Christian Action Research & Education, <https://www.care.org.uk/our-causes/marriage-and-family/marriage> accessed 03/06/2017; McLanahan (n 301).

[314] William Galston, 'A Liberal-Democratic Case for the Two Parent Family' (1990-91) 1 The Responsible Community 14.

of encouraging future feckless conduct by providing overly generous care. Some influential commentators argue for the withdrawal of all state benefits for single-parent families in order to reinstate the conservative-marital model as the only acceptable family form.[315]

Conservative-marital family proponents also push for non-resident fathers to be required to maintain financial responsibility for their offspring through child-support payments and to be involved in their children's lives (whether or not they have an existing relationship with their children).[316] Where this has been taken up, the state imposes marriage-like economic relations on single-parent families beyond the end (and even in the absence) of marriage itself. Little attention is paid to the impacts on children and their mothers when fathers do not pay, or when payments are insufficient to meet the single-parent families' needs.[317] Thus, the social and political appeal of the conservative-marital family combines a desire to limit public spending, control 'unruly populations and their sexual behaviour' and facilitate the market economy.[318] It requires single parents and their families to be punished to 'curtail a massive exodus from the regulatory familial net in what amounts to a form of government *through* the family in the classic Donzelotian/Foucaudian sense.'[319] The strength of this prescription is such that single

[315] Diduck (n 292) 192-193; Mary McIntosh, 'Social anxieties about lone motherhood and ideologies of the family: Two sides of the same coin' in Elizabeth Bortolaia Silva (ed), *Good Enough Mothering? Feminist perspectives on lone motherhood* (Routledge 1996).

[316] Mavis Maclean and John Eekelaar, 'Child Support: The British Solution' (1993) 7 IJL and the Family 205, 213; Diduck (n 292) 179.

[317] Susan B Boyd, 'Equality: An uncomfortable fit in parenting law' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Taylor and Francis 2014) 43-44, 51-52; Christine Skinner and others, 'Child Maintenance and Social Security Interactions: the Poverty Reduction Effects in Model Lone Parent Families across Four Countries' (2017) 46 JSP 495.

[318] Diduck (n 292) 54.

[319] ibid 54.

mothers themselves show evidence of internalising the message that failing to have a father in their children's lives has negative impacts on their children.[320]

Nevertheless, as Fineman highlights, 'Focusing on family form will not help us begin making coherent policy to help our families.'[321] She explains:

> [E]ven if civil societarians are correct in that divorce produces harmful effects on children, their analysis fails to consider, let alone add to the equation, the costs suffered by women (and, ultimately the children they care for) if we deter divorce and punish single motherhood through establishing economic and normative disincentives. The children who today live within the families we seek to discipline are punished along with their mothers in the effort to lessen the harms it is argued will be suffered by other children in the future. … [H]arm to the primary caretaker will inevitably negatively affect those children for whom she cares.[322]

Disturbingly, the hegemonic power of this limited notion of the family is strengthened through its proponents' co-option of the language of human rights. Advocates of the conservative-marital family call for protections to be afforded the family under international human rights law, stressing that the family should be recognised as the natural unit of society via active participation in forums such as the Doha International Conference on the Family, which resulted in the Doha Declaration.[323] The version of the family they advocate is, however, Malik's version which was rejected by the drafters of the UDHR.

As others involved in the drafting of the UDHR noted, the conservative-marital conception of the family undermines the universal claims of human rights and fails to protect the most vulnerable. Moreover, it places women in an economically subordinate position compared to their male spouses due to its failure to address the reduced

[320] Boyd and others (n 8) 30 and 33.

[321] Fineman, *Autonomy* (n 35) 93.

[322] ibid 87-8.

[323] Doha International Conference for the Family and Jamal Nasser Al-Bader, 'The Doha Declaration' A/59/592 Annex to the letter dated 2 December 2004 from Qatar to the UN Secretary-General.

bargaining power created by a failure to adequately safeguard caregivers who are in a position of derivative dependency. The expectation that women will undertake the primary care of children and other dependents without financial recompense (rather than developing fully integrated labour market roles) leaves them wholly or partially reliant on their husbands for their material needs.[324] Thus, the reification of the conservative-marital model as the only acceptable family type is discriminatory insofar as it fails to incorporate a gender-neutral reading of IBOR's provisions concerning the right to a wage or social security sufficient to maintain one's family and conflicts with the purpose and provisions of CEDAW.

In addition, despite placing the procreation of children at its core, the conservative-marital model of family does not respect children's autonomy rights in the CRC sense. Rather, the parent (or, in some cases, the patriarch) has the right to make decisions for their children and is presumed to act in the child's best interests. Such a notion of 'parental rights' has been recognised by the US Supreme Court as a constitutional or foundational right and which dictates non-interference by the state with parental decision-making.[325] In contrast, under international human rights law, parents' role in the upbringing and development of children is a 'primary responsibility' to be exercised by parents with 'the best interests of the child' as their 'basic concern,' including 'within their abilities and financial capabilities, [securing] the conditions of living necessary for the child's development.'[326] In a recent statement, the CRC clarifies

[324] Lorraine M Fox Harding, '"Parental responsibility": the reassertion of private patriarchy?' in Elizabeth Bortolaia Silva (ed), *Good Enough Mothering? Feminist Perspectives on lone motherhood* (Routledge 1996) 130.

[325] *Troxel v Granville* 530 US 57 (2000); Andrew Bainham, 'Is Anything Now Left of Parental Rights?' in Rebecca Probert, Stephen Gilmore and Jonathan Herring (eds), *Responsible Parents and Parental Responsibility* (Hart Publishing 2009) 24-26.

[326] CRC Articles 3(1), 18(1) & 27(2).

that parental rights are limited to providing direction and guidance to children, consistent with their evolving capacity, in the exercise of their rights, and on matters such as thought, conscience and religion.[327]

Far from providing a valid model of the family for the purposes of international human rights law, the conservative-marital model rationalises the stigmatisation of and denial of rights to families outside its narrow confines.

2.3.3 The libertarian-contractual family

In contrast to the conservative-marital model of the family, the libertarian-contractual model of family arose in the 1960s on the back of Western liberal values of individual autonomy and gender neutrality.[328] As the name implies, it is a contractual rather than a status-based family model. Thus, the boundaries of the relationship are thought to be mutually agreed upon by autonomous negotiating parties. As such, it puts a high value on rights of a particular sort. Liberty is the prime value, which in the context of family is expressed via rights to autonomy and privacy and the concept of choice.[329] The right to privacy in this account incorporates a mix of ideals, including the notion that sexual and reproductive relationships, the family and the home form a separate sphere from which state intrusion is excluded. The US Supreme Court, for example, identifies privacy as the basis of rights to contraception,[330] homosexual behaviour[331] and, until 2022, abortion[332] in a line of reasoning that developed independently of a person's right in international

[327] CRC, 'Statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child' (11 October 2023).

[328] Dwyer (n 44) 107 and 124.

[329] Boyd and others (n 8) 177-8.

[330] *Griswold v Connecticut* 381 US 479 (1965); *Eisenstadt v Baird* 405 US 438 (1972).

[331] *Lawrence v Texas* (02-102) 539 US 558 (2003).

[332] *Roe v Wade* 410 US 113 (1973); *Dobbs v Jackson Women's Health Organization* US 19-1392 (2022).

human rights law to protection from 'arbitrary interference with his privacy, family, home or correspondence.'[333] The model is favoured by proponents of neoliberal philosophy, whose commitment to small government means that the state's role is limited to providing regulatory frameworks and some institutional structures, such as courts and police. However, despite recognising certain rights of individuals within families, the libertarian-contractual model cannot be reconciled with the conception of family as a group unit that holds positive economic, social and cultural rights as recognised in international human rights law. The approach is 'averse to dependency', celebrates independence and seeks 'to enable people to engage with one another as freely contracting parties.'[334]

In libertarian-contractual thinking, caregiving is presumed to be a choice.[335] Three A's: abstinence, abortion and contraception, and adoption may be presented as alternatives for women who wish to avoid mothering. The purported gender-neutrality of the model is undermined by women's and men's different biological, experiential and social involvement in reproduction. A man can avoid being linked to his biological offspring in ways that are impossible for a woman. At its crudest, the view seems to be that by having heterosexual intercourse, a woman is agreeing to any reproductive consequences.

In terms of human dignity, the model also assumes that individuals commence life with equality of opportunity and perfect information. The implications of this for gender equality are under-theorised by the model's proponents. In two-parent families, the costs

[333] UDHR Article 12.

[334] Hartley Dean, 'Social Policy and Human Rights: Re-thinking the Engagement' (2007) 7 Social Policy & Society 1, 7.

[335] Steven D Levitt and Stephen J Dubner, *Superfreakonomics: Global cooling, patriotic prostitutes and why suicide bombers should buy life insurance* (Penguin 2009) 49.

of social reproduction may be shared in a manner that obscures the unequal contribution of women to this work and her resultant derivative dependency: such illusions break down when a woman becomes the sole parent in her family.[336]

Whereas in the conservative-marital model, parental rights and responsibilities coalesce in the god-given or natural status of 'parent' (possibly with some residual responsibilities residing in society and the state), the libertarian-contractual thinker has to determine the liberal basis of any rights exercise, and the contractual basis of any responsibilities. Such thinkers are divided as to how to deal with these. At least three distinct possibilities arise. Although each has reputable authority, particularly in US legal thought, none is palatable from an international human rights perspective.

First, law and economics theorist Richard Posner argues that there is unmet demand for healthy white babies and that a regulated market in adoptions ought to be established on a trial basis, as he believes it has a likelihood for individual and societally positive outcomes. In his argument, infants' rights are subordinate to adults in the adoption market, provided that the infants' 'third party' interests are protected.[337] Posner goes further, arguing that such a market is the de facto reality in the world (or at least the USA) today. He does, however, mitigate his arguments by asserting that parents' rights do not extend to enslaving or abusing children,[338] and that they have legal duties towards their child's welfare, even when they do not want the child or the child disappoints them, stating 'Natural parents are not permitted to reject their baby, either when it is born or

[336] Brid Featherstone, 'Gender, rights, responsiblities and social policy' in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds), *Rights, Gender and Family Law* (Routledge 2010) 29-36.

[337] Richard A Posner, 'The Regulation of the Market in Adoption' (1987) 67 Boston ULRev 59, 67.

[338] ibid 70; Landes and Posner (n 44), 344.

afterward, because it turns out to be handicapped or otherwise not in conformity with their expectations'.[339]

A second possibility, put forward by child rights theorist James Dwyer, agrees that parents often gain emotional dividends from their time and financial investments in children but argues that children should not be forced into less-than-ideal relationships with inappropriate parents. Rather, Dwyer bases his argument on the claim that universally, across societies, there is nothing inherent in the fact that bio-genetic parents are recognised 'parents' of a child in the sense of the various incidences that exist within the concept of 'parent', (including parenting, parental responsibility, legal parenthood, parentage and social parenthood). Taking a classical liberal view of rights as being about individual autonomy, Dwyer argues that the ability to choose whom one associates with is fundamental. In his argument, parents are legally able to avoid having a relationship with a child, and children should have the corresponding right to avoid having a relationship with a parent. In his view, an infant's lack of capacity is no barrier to this right being exercised, as the state has a fiduciary obligation to act on the infant's behalf and accord them the best available parents based on an actuarial-type assessment of the likelihood of various parental candidates' parenting capacity and capabilities.[340]

Neither Posner nor Dwyer include economic, social and cultural rights of families in their analysis. This is unsurprising given that they are writing in the USA, which has ratified neither ICESCR nor the CRC. However, for our purposes, it is noteworthy that both writers use caricatures of young single mothers to illustrate the type of people whom should be deprived of parenting their infants; and whom it is presumed to be in the best

[339] Posner (n 337) 67.

[340] Dwyer (n 44) 130-135 and 158-159.

interests of such infants not to be parented by.[341] In other words, these ostensibly gender-neutral rights-based and choice-based notions for the family are presumptively opposed to the existence of the stereotypical single-parent family, which is unable to succeed as an economically self-sufficient unit.

Such extreme libertarian-contractual models of the family have thankfully not become embedded in actual politico-legal systems. Conversely, a third libertarian-contractual approach has: this model assumes that children's rights may be subsumed into parental rights, which it presumes will be exercised in the best interests of the child. This view has the weight of US Supreme Court decisions behind it. [342] Because infants and young children are unable to contract or do much else autonomously, they are 'human becomings'[343] rather than 'human beings' and, therefore, not full legal rightsholders. The model imputes a duty on someone to care for dependent children and gives this person associated rights. In the absence of a clearly contracted alternative, most libertarian-contractual thinkers attach this duty to the biological parent(s), effectively making the child-parent relationship status-based without providing tools for unpacking how care will be delivered. To understand this, it is necessary to remember that the traditional liberal subject was the 'rational man': historically a white property owner with legal authority over his family (including, in some instances, his slaves). The question of how the self-interested atomised public individual and the private benevolent patriarch are envisaged to inhabit the same being is not dealt with in liberal philosophy. It remains

[341] Posner (n 337) 59; Dwyer (n 44) 271.

[342] *Pierce v Society of Sisters of the Holy Names of Jesus and Mary* 268 US 510 (1925).

[343] Jens Qvortrup, 'Are Children Human Beings or Human Becomings? A Critical Assessment of Outcome Thinking' (2009) 117 Rivista Internazionale di Scienze Sociali 631.

obscured by the veil of family privacy.[344] As a result, the tendency of libertarian-contractualists to elide the concepts of 'family' and 'individual family head' remains.[345] This tendency creates the problem of elision of the autonomous individual and autonomous family. As Boyd and others write, 'Neoliberalism equates work with paid employment and defines the necessary, unpaid tasks associated with social reproduction, such as childcare and housework as a "private" individual responsibility.'[346]

Despite its shortcomings, public policy has been highly influenced by the idea of a freely negotiated gender-blind family. The libertarian-contractual approach does not necessarily hold one form of family to be morally superior because it purports to see the family as a relationship between individuals who rationally agree to their own family forms. Thus, it may be theoretically agnostic in its view of single-parent families provided that such families do not threaten to drain state resources either in the present or through the production of delinquent children. However, structural conditions that render it difficult or impossible for most single-parent families to achieve an adequate level of economic self-sufficiency result in proponents placing an economic stigma on single-parent families based on their 'concern with the bottom line'.[347] Notably, some single-mothers-by-choice themselves embrace neoliberal notions of autonomy and personal

[344] Paula England, 'The Separative Self: Androcentric Bias in Neoclassical Assumptions' in Marianne A Ferber and Julie A Nelson (eds), *Beyond Economic Man: Feminist Theory and Economics* (University of Chicago Press 1993) 40.

[345] Shazia Choudhry, Jonathan Herring and Julie Wallbank, 'Welfare, rights, care and gender in family law' in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds), *Rights, Gender and Family Law* (Routledge 2010) 18.

[346] Boyd and others (n 8) 152.

[347] ibid 28-29.

financial responsibility to present themselves as 'competent, ethical, and mainstream'[348] to distance themselves from the stigma typically associated with single-parent families.

Whereas the conservative-marital model may hold that states have a role in extracting child support from absent fathers as a means to provide for children, the libertarian-contractual approach is more concerned with using child support to offset state provision of welfare benefits. Indeed, the modern emphasis on getting single mothers into paid employment suggests that the neoliberal state has given up on the belief that absent fathers will contribute meaningfully to the costs of raising their offspring. Increasingly, it is viewed as the single parent's responsibility to negotiate strongly to protect her and her children's interests.[349] The influence of this model can be observed in the Child Maintenance regime introduced in England in 2012, which changed the focus of the Child Maintenance Service to one that encouraged 'Direct Pay' (where parents manage arrangements between them) and penalised those who required the Service's assistance to pursue compliance with payments.[350] In its gender-blindness, the libertarian-contractual model fails to account for differential bargaining power between parents, where one has reduced economic strength because of gender disparities in the labour market combined with personally reduced earning power resulting from the derivative dependency that stems from their prioritising of parenting work commencing with the labour of gestating and birthing itself. Responsibility for any failure rests with her: 'the heavy reliance of state and society on women's "free" reproductive labour … is rendered more acute under

[348] Bock (n 184) 62. See also Fiona MacCallum and Susan Golombok, 'Children Raised in Fatherless Families from Infancy: A Follow-up of Children of Lesbians and Single Heterosexual Mothers at Early Adolescence' (2004) 45 Journal of Child Psychology and Psychiatry.

[349] Featherstone (n 336) 37.

[350] Sumi Rabindrakumar, *Direct Pay child maintenance: innovation or failure?* (Gingerbread 2019).

neoliberal policies that privatize the costs of care and download them onto families.'[351] The unequal imposition of costs goes beyond the financial to include the greater use of sanctions against single mothers than absent fathers in response to care concerns and children's anti-social activities.[352] In some cases, a single parent's precarious economic situation may lead her to lose custody of a child, even when she has been their sole caregiver since birth.[353]

A pure application of the libertarian-contractual model is not possible in the real world as it fails to provide justifications for parental care of offspring or of extremely disabled, ill or older people who lack the means to pay, despite the complete abandonment of innocent or 'deserving' dependent people being unpalatable to many members of liberal democracies. This problem can cause libertarian-contractual thinkers to abandon strict rationalism in favour of a neo-conservative view in which family power and dependency dynamics are assumed and essentialised. As a result, hybrid versions of the model arise, which address the dependency dilemma by linking the restoration of conservative-marital family values to the discourse on cutting welfare expenditure. These hybrids provide a rhetorical rationale for winding back the state and privatising social responsibilities.[354] In doing so, they lose the intellectual rigour that marks the pure libertarian-contractual model and read in conservative gender roles, as well as religious or natural law beliefs that require females to care. Such models doubly stigmatise single-parent families as morally and economically deficient.

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[351] Boyd and others (n 8) 5-6.

[352] Felicity Kaganas, 'Child protection, gender and rights' in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds), *Rights, Gender and Family Law* (Routledge 2010) 64-68.

[353] *Green v Weaver* [1999] OJ no 5106 (QL)(OntSupCt); Boyd and others (n 8) 127.

[354] Boyd and others (n 8) 152-3; Diduck (n 292) 40-42 and 79.

Libertarian-contractual thinkers who reject religious dogma tend to look to neo-Darwinian evolutionary psychology to support the intrinsic nature of arrangements as resulting from an innate drive of genetic material to reproduce itself. Individual free will is viewed as guided towards ensuring one's genetic material is passed to future generations, and therefore, it is in one's interests to ensure this material is nurtured and protected. Gender difference is acknowledged in this version of the model, which purports to provide a natural rationale for women's tendency to continue caring for their offspring even in difficult circumstances and men's greater propensity to sow their oats widely.[355]

None of the libertarian-contractual approaches contemplates the state markedly improving outcomes for disadvantaged children within their current families. Nor do they imagine a role for the state in spearheading structural change to make society more responsive to family functioning. Rather, the libertarian-contractual notions of rights are:

> based on an image of individuals living isolated lives protected by their rights of privacy and autonomy…. [It] place[s] no weight on relationships and imagines a society full of self-satisfied individuals unaffected by gender roles, ethnicity and social status.[356]

As Fineman argues, the libertarian-contractual way of thinking about the 'desirability and attainability of autonomy for individuals and families has seriously limited the ways in which we think about equality' by separating the family from other societal institutions such as the market and the state, and assigning 'primary responsibility for dependency to it.'[357] Therefore, the approach is contrary to the requirement under international human rights law for states and societies to support the family in its role in raising dependent

[355] Richard Dawkins, *The Selfish Gene* (40th Anniversary edn, Oxford Landmark Science 2016); Matt Ridley, *The Red Queen: Sex and the Evolution of Human Nature* (Penguin Press Science 1994).

[356] Choudhry, Herring and Wallbank (n 345) 15.

[357] Fineman, *Autonomy* (n 35) xiii.

children. Policy developments based on this model concerning single-parent families bring the problematic nature of the model into stark relief: not giving value to unpaid work, the model prioritises single parents' engagement in the paid workforce regardless of whether the families' care needs are met.[358] At the same time, under the rubric of (family) self-responsibility, neglect of children is also held to be a failing of the single parent.

2.3.4 Plurality of family forms: the examples of *whānau* and *aiga*

Although the conservative-marital family is often referred to as 'traditional', its ambit was historically confined to North-Western European societies (including settler societies stemming from those roots). However, the notion of 'family' encompassed by international human rights law cannot be ethnocentric. Early anthropologists, many of whom were also lawyers, had attempted to delineate the key characteristics of family since before the start of the modern human rights project (though their work has been called to account for its ethnocentric bias). They were motivated partly by legal questions of family and kinship across cultures.[359]

The drafting of the UDHR gave rise to vigorous debate on the meaning of family in the diverse societies of the globe. A number of those involved stressed the importance of not limiting references to the family to a Western-European cultural construct. Even participants who shared broad ideological, cultural or religious backgrounds disagreed on their conceptions of the family. For example, Begtrup, the Danish delegate, and Beaufort, the Dutch delegate clashed on the questions of divorce despite their shared backgrounds in North-West European Christian countries. Moreover, the shared Islamic heritage of

[358] See Chapter 4.

[359] David M Schneider, 'What Kinship is all about' in Robert Parkin and Linda Stone (eds), *Kinship and Family: An Anthropological Reader* (Blackwell Publishing 2004) 257-274.

Baroody of Saudi Arabia and Ikramullah of Pakistan did not create agreement between them on whether discrimination against women was acceptable in relation to the family.[360] Nevertheless, Baroody's injunction to not limit one's vision to 'only the standards recognized by western civilization' but to also include notions of family from other societies, including those he described as 'more ancient civilizations which were past the experimental stage' is valid.[361]

While it is beyond the scope of this thesis to traverse the anthropology of the family worldwide, it is worth noting that Confucian, Sharia-based and indigenous worldviews all offer theories of the family. By way of illustration, Māori and Polynesian models of family, such as *whānau* and *aiga,* are based on genealogy and extended relationships in which the romantic dyad may take a secondary role. In these models, older/younger sibling status is emphasised.[362] Children may be raised collectively by numerous family members and may refer to all adult same-sex relatives of a generation by the same title.[363] Care work is often but not exclusively undertaken by females and is valued (at times more highly than paid employment). In New Zealand, widespread indigenous dissatisfaction with the notions of family embedded in the post-colonial legal system resulted in family law and policy providing greater recognition to the Māori extended-collective model, thus moving towards a pluralistic notion of family.[364]

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[360] UNGA (3rd Committee), 'Summary Record of the 124th Meeting' (6 November 1948) A/C3/SR124; E/CN4/SR13' (n 164).

[361] E/CN4/SR13' (n 164).

[362] Ruru (n 36) 59-65.

[363] ibid 64 footnote 20.

[364] Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare, *Puao-te-ata-tu (Day break): The report of the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare* (September 1988); Oranga Tamariki Act 1989 (NZ) ss 4(1) & 5(1)(b) & (c); Te Puni Kōkiri, 'Whānau Ora' (Te Puni Kōkiri, Ministry of Māori Development, <https://www.tpk.govt.nz/en/nga-putea-me-nga-ratonga/whanau-ora> accessed 9 April 2017.

Ruru explains:

> In Māori thinking children are not the exclusive possession of their parents. Indeed the ideas of possession and exclusion, separately or in association outrage Māori sensibilities. Children belong not only to their parents but also to the whānau [extended family], and beyond that to hapū [sub-tribe]and iwi [tribe].[365]

Moreover, children may be given to a person other than a biological parent to *whāngai* (foster/culturally adopt) and may be raised in a different geographic area from their parents. Nevertheless, the child's genetic origins are acknowledged and their genealogy preserved, along with information about their geographic belonging.[366] On death, a person's body may be returned 'home', regardless of where they have been raised or domiciled and the wishes of their spouse.[367] In this context, single-parent families are not traditionally subject to moral opprobrium as long as they are embedded in wider family relationships.[368] Single-parent families that are disconnected from wider family support may, however, be viewed as a negative consequence of colonisation's destruction of traditional structures, giving rise to a duty on the state of remediation.

Regardless of the impacts of colonisation, it remains the case that the majority of the world's population derives its models of family, in part or in whole, from models other than Western European Christian constructs. The plurality of ways in which the family is constructed across cultures was well recognised by the drafters of IBOR and was the prime reason for leaving the definition of family open-ended. In determining the nature of the family as a group unit today, this open-endedness must be maintained in order to retain the universal relevance of international human rights protections across societies and cultures.

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[365] Ruru (n 36) 63.

[366] ibid 73-77.

[367] *Takamore v Clarke* [2012] NZSC 116.

[368] Ruru (n 36) 62-64.

2.3.5 Beyond stigmatising notions of the family: the caring-vulnerable model

The conservative-marital family model stresses the importance of the family as a group unit of society that deserves the support of society and the state and emphasises the need to protect motherhood and childhood. Nevertheless, the model cannot be accepted as definitive of the family in international human rights law due to its denial of certain types of family. It lacks the universality to serve as a model on which to base a human rights analysis. It fails to accommodate societal change to end discrimination against women. Furthermore, this model condemns single-parent families as morally inferior, functionally deficient and/or a threat to society, thus creating and perpetuating cultural stereotypes that serve to justify discrimination.

The libertarian-contractual model of the family, meanwhile, is unable to deal with dependency in a way that honours children's rights. Blind to the dependency of childhood, it is incapable of addressing women's derivative dependency as caretakers. Instead, it views gender inequality as the result of different choices men and women make. This model is also pessimistic about the possibility of state action creating positive cultural change. The version of rights on which it is based is unreasonably individualistic, with no weight placed on relationships. The failure of the USA to ratify ICESCR is mirrored in the failure of the model's US proponents to acknowledge the existence of economic, social and cultural rights as equal to and indivisible from civil and political rights. Furthermore, the model's status in neoliberal political discourse has resulted in policy changes that disproportionately harm single-parent families. As Fineman argues, 'the pressures generated by uncontrolled market institutions are at least as relevant to the health and well-being of children and families' and 'the irresponsibility of the state in not regulating or mediating the excesses of market activities is at least as devastating to a

child as the irresponsibility of any unwed or divorced parents'.[369] The false separation of the workings of the family from the workings of the state-public sphere and the private-market sphere renders these forces invisible. At the same time, proponents of neoliberalism regularly attribute poverty and other negative situations of marginalised families to the poor choices of parents. Such choices are given a moral flavour, and the state is encouraged to avoid any generosity that might incentivise them. Supports from the state or charitable sector are encouraged to be conditional on the basis that those parents whose decision-making was so defective as to put them into a situation of needing assistance have lost the rights to autonomous agency accorded to less needy adults.

Meanwhile, acknowledgement of the plurality of family forms in diverse societies is necessary to maintain the universality of the international human rights law project. However, it does not provide analytic tools to understand the family as simultaneously a relational group and a site of (re)production requiring support from society and the state.

I, therefore, turn to the concept of the caring-vulnerable family for a model which is both compatible with the IBOR' meaning of family (in terms of the plain meaning of the word in its context and in light of its meaning and purpose, as supplemented by an analysis of the *Travaux Préparatoires* of the UDHR), and is analytically useful in understanding families' needs for support, without negating the rights of individual family members. Fineman's recognition that all humans are vulnerable and dependent on others is of central importance to this undertaking.[370] In this conception, the family is defined purposively as a unit within which the members care for, and are cared for by,

[369] Fineman, *Autonomy* (n 35) 89.

[370] ibid xiii.

each other.[371] The caring relationship involves commitment over a significant period of time. However, it has a fluidity in its definition, with the model rejecting status-based definitions in preference for descriptively assessing the actual subjective relationships between family members in real cases.[372] The family is recognised as vulnerable because humans' embodied nature makes us all vulnerable and 'profoundly dependent on others for our physical and psychological well-being',[373] and family is the primary means through which human beings express and address this aspect of our nature. This, I submit captures the heart of what the UDHR drafters intended by bringing the notion of family into the international human rights law project.[374]

Vulnerable relationships are said to encapsulate something fundamental about what it is to be human.[375] Proponents of the caring-vulnerable family speak in terms of vulnerability, dependence and interdependence, relationship, love and an ethics of care.[376] Potentially, a caring-vulnerable family may consist of a romantic couple, a two-parent family, a single-parent family, adult siblings, or very close friends who depend on each other for emotional and practical support in an ongoing manner. The LGBTQI+ community, in which members have often been shunned by families of origin and barred from creating new legal families by heteronormative status-based laws, pioneered the creation of 'families of choice' based on significant friendships. Nor are extended family

[371] Some qualifications exist, eg, care-home workers would not normally be considered family members of those they care for.

[372] Diduck (n 292) 26-29.

[373] Jonathan Herring, *Vulnerable Adults and the Law* (OUP 2016) 10.

[374] E/CN4/AC1/SR/38 (n 2); E/CN4/SR13' (n 164).

[375] Robin West, 'The Right to Care' in Eva Feder Kittay and Ellen Feder (eds), *The Subject of Care: Feminist Perspectives on Dependency* (Rowman & Littlefield 2002.

[376] Fineman, 'Vulnerability' (n 210).

types necessarily excluded, provided the vulnerable relationships are sufficiently interdependent. Roles may have an element of reciprocity, and often switch over time.[377]

Sevenhuijsen and others argue that an ethic of care paradigm based on the mother-child dyad (rather than the romantic couple-dyad) and emphasising the relational (rather than autonomous) self is the fundamental model of family in the modern world.[378] Beck and Beck-Gernsheim go so far as to argue that 'the child becomes the last remaining irrevocable, unique primary object of love. Partners come and go, but the child stays.'[379] As such, the model perfectly encapsulates the realities of single-parent families. However, there is debate as to whether the caring-vulnerable model family essentialises gender-roles.[380] Empirical research in the UK supports the idea that parenting roles are, in fact, experienced as gendered even when fathers are the primary caregivers.[381] Nevertheless, theorists use the concept of 'mothering' to describe the intense work of undertaking the primary nurturing and caring for a dependent child without limiting it to work done by bio-genetic mothers or even to women.[382]

Fineman's theory of vulnerability 'understands dependency as both universal and inevitable–all of us were dependent as children, many of us will become dependent as we age.'[383] Recognising this allows us to acknowledge that caretakers face a derivative

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[377] Susan Golombok, *We are family: the modern transformation of parents and children* (1st US edn, PublicAffairs 2020).

[378] Diduck (n 292) 10-12.

[379] Ulrich Beck and Elisabeth Beck-Gernsheim, *The normal chaos of love* (Polity Press 1995) 37.

[380] Diduck (n 292) 82.

[381] Featherstone (n 336294) 33-36.

[382] Sara Ruddick, 'Care as Labor and Relationship' in Mark S Haflon and Joam C Haber (eds), *Norms and Values: Essays on the Work of Virginia Held* (Rowman & Littlefield 1998).

[383] Fineman, *Autonomy* (n 35) xvii.

dependency in the form of reliance on others for the resources to allow them to devote time and energy to caretaking. Fineman argues that 'if those resources must primarily come from the family, gender inequality will be hard to undo.'[384] In her analysis, 'we all live subsidized lives', and while 'not all subsidies are labelled as such', it is unjust and anti-equality for caretakers to bear the weight of subsidising reproduction and care.[385]

The state's role is to support the family and its members, not replace the family's caring element. In international human rights law, the idea of the dignity of all members of the 'human family' expressed in the first phrase of the Preamble of the UDHR is an appeal to the essentially interconnected nature of humanity on a global level, implying that, although rights usually adhere to individuals, we are not autonomous, but rather vulnerable, interdependent and ideally caring.

Nevertheless, the purposive and fluid definition of the caring-vulnerable family leaves the model open to criticisms of indeterminacy and incoherence from those looking for concrete units on which to base policies and laws.[386] As Callus notes, domestic law has generally struggled to balance 'rights based on biology and rights based on care.'[387] However, international human rights law is more able to work with such uncertainty: human rights apply universally across all states and societies, and thus their expression requires a degree of open-endedness. As discussed, the founders of the international human rights law framework recognised the need for latitude in avoiding a definition of

[384] ibid xvii.

[385] ibid xvii.

[386] Diduck (n 292) 7-10, 36 and 198-200; Helen Reece, 'Book Review: Caring and the Law' (2014) 23 Social & Legal Studies 278.

[387] Therèse Callus, 'A new parenthood paradigm for twenty-first century family law in England and Wales?' (2012) 32 Legal Studies 347 and 347.

family in the UDHR, choosing to avoid a direct linkage between family and marriage despite long debate on the matter.

Further, the caring-vulnerable family accords with people's lived experience of family. For example, Edwards and Duncan find that single mothers are best viewed as neither 'economic man' nor as 'passive respondents in a simple stimulus-response policy model' but rather as 'creating and shaping opportunities for themselves and their children … within the constraints and opportunities provided by different social contexts'.[388] This involves single mothers balancing economic calculations, family responsibilities and other roles in the context of horizontally and vertically sex-segregated labour markets while also bearing disproportionate effects of recessionary job losses and insecurity.[389]

By adding flesh to the notion of family, the vulnerable-caring model points to the daily realities of rightsholders, thus ameliorating the abstraction that can beset human rights discourse. What the model lacks in definitional precision, it makes up for in the broad resonance of the term and its ability to capture what is essential about family. The fluidity of the model aptly mirrors the fluidity of many families whose members move through periods of two-parent coupledom, single parenthood, extension through reliance on relatives or close friends and blendedness (not necessarily in that order). It is also potentially accepting of individuals having more than one family simultaneously (for example 'Mum's family' and 'Dad's family'[390]).

In this model, caregiving is a reciprocal relationship in which both the carer and the cared-for must be vulnerable and open. Far from being a negative, responding to the

[388] Rosalind Edwards and Simon Duncan, 'Rational economic man or lone mothers in context? The uptake of paid work', *Good Enough Mothering? Feminist perspectives on lone motherhood* (Routledge 1996) 129.

[389] ibid 119.

[390] Colloquial terms are used to reflect how children tend to view their relationships.

dependency of children or other dependents gives carers opportunities for enhanced and authentic expression of humanity, leading to personal and societal growth.[391] While some writers, such as Fineman, stress the inherently vulnerable and dependent nature of each individual over their life course, others view it as important to recognise the greater dependency of some individuals and demographic groups, arguing, for example, that the inescapable dependency of infancy, childhood and infirmity deserve recognition as creating particular vulnerability, and therefore particular duties on others to care.[392] Again, this accords with international human rights provisions.

Importantly, under the caring-vulnerable model, unlike some formulations of the conservative-marital model, the intrinsic benefits a caregiver receives do not negate her rights to material-financial recompense. Nor do they negate the commensurate duties on someone to provide recompense. Rather than viewing the caretaker as the angel in the house, the caring-vulnerable model sees her as a flesh and blood human. Just as the satisfaction a bricklayer or a brain surgeon gets from a job well-done is not diminished by accepting payment, most vulnerability theorists argue a caretaker's efforts are not incompatible with financial support or recompense, although some have expressed reservations about how payment may affect the relational family.[393] Views vary about who should provide recompense (possibilities include the state, the recipient of care and the other parent of a dependent child) and how such a payment should be calculated. For now, it is enough to observe that the model's lack of policy prescription suggests that it is

[391] Herring, 'Disability Critique' (n 265).

[392] Fineman, 'Vulnerability' (n 198); Kate Brown, Kathryn Ecclestone and Nick Emmel, 'Review article: The many faces of vulnerability' (2017) Social Policy and Social Work.

[393] Mary Daly, 'Care As A Good For Social Policy' (2002) 31 JSP 251, 260-2; Diduck (n 292) viii; Fineman, *Autonomy* (n 35) 125; Choudhry, Herring and Wallbank (n 345) 19-23; Featherstone (n 336) 33-4; Boyd and others (n 8) 158.

flexible enough to accommodate the notion of international human rights law's deference to states' domestic choices regarding *how* to meet their international human rights obligations where budgetary matters are concerned.

The caring-vulnerable family reflects how many people perceive their families and is an increasingly influential model in legal academic thinking, as well as gaining traction in political discourse and public policy (although this is complicated by the tendency to label certain populations as vulnerable for targeting purposes, which is an entirely different concept).[394]

Nevertheless, proponents of the vulnerable-caring family have not tended to focus on international human rights law. Much of their attention has been directed towards asserting the validity of the vulnerable-caring model vis a vis the conservative-marital and libertarian-contractual models. Their consideration of rights has often been expressed in terms of the problems of individualistic conceptions of civil and political rights and the ideas of rights stemming from US foundationalism**.** Some theorists go so far as to claim that rights arguments undermine the 'welfare paramountcy' principle of family law (which states that the welfare of the child is the paramount consideration), replacing it with an unhealthy focus on balancing competing individual human rights and reinforcing status-based arguments at the expense of function-based conceptions of family.[395] My claim is the opposite: using the caring-vulnerable model of the family in the international human rights law framework not only accords with the realities of marginalised people, is

[394] Brown, Ecclestone and Emmel (n 404).

[395] Lisa Glennon, 'The limitations of equality discourses on the contours of intimate obligations' in Julie Wallbank, Shazia Choudhry and Jonathan Herring (eds), *Rights, Gender and Family Law* (Routledge 2010) 169-170.

consistent with fundamental human rights and supports the intentions of the founders of the international human rights law project, it also provides the possibility of:

> [A] synthesis of the ethics of care and justice, recognising the importance of a language of rights in a context where responsibilities are stressed so strongly and a language of care in a context where independence through paid work is stressed so strongly.[396]

Thus, the caring-vulnerable family provides the correct model for considering single-parent families' economic, social and cultural rights based on recognition of the dependency and derivative dependency at the heart of the family as a centre of human social reproduction. This understanding of the family must be upheld against more restrictive, non-universal contenders, which are themselves covers for discrimination and stigmatisation.

2.3.6 Subchapter conclusion

This subchapter examined four models of family to find a conceptual model that captures what 'family' means in terms of UDHR Article 16 and ICESCR Article 10. The marital-conservative model was rejected as too narrow. It does not include many cultural expressions of family, nor the range of actual families 'on the ground'. Moreover, the *Travaux Préparatoires* of IBOR show that the drafters debated the marital-conservative notion of family and explicitly rejected it as ethnocentric and discriminatory against those most needing rights protection.

Libertarian-contractual models of family can also be dismissed because they do not allow for an approach in which the family as a group unit is either fundamental or a subject of human rights. No expression of the libertarian-contractual family deals adequately with human beings' universally vulnerable nature, nor with dependency and derivative dependency. Moreover, the libertarian-contractual model rejects (implicitly or

[396] Featherstone (n 336) 42.

explicitly) claims based on economic, social and cultural rights. If families were only about autonomous choice, there would be no need for UDHR Article 16(3) or ICESCR Article 10(1). A hybrid neoconservative model pragmatically repackages the language of libertarianism and conservatism for rhetorical effect. However, the result is intellectually incoherent, requiring, as it does, a return to the melding of individual patriarchal autonomy with family autonomy in a manner that is fatal to women's and children's rights.

Recognition of a plurality of family forms assists us to take a less rigidly Eurocentric view of the family. Examples such as *whānau* and *aiga* demonstrate how some family types elevate non-marital bonds, such as those between a brother and a sister. Nevertheless, such recognition does not in itself provide a conceptual paradigm to identify the essence of family.

In contrast, the vulnerable-caring model provides purposive criteria for determining what a family is. It does not negate the existence of extended-collective expressions of family or marital-conservative ones. An understanding of how family members negotiate positions and enact power relationships (as hinted at by the libertarian-contractual model) is an important aspect of the analysis to be carried out under the vulnerable-caring rubric. In the realm of international law, moreover, the relative indeterminacy of the vulnerable-caring model may be an asset. The founders of international human rights law realised that it was unhelpful to tie the concept of 'family' to any one cultural-legal expression. The vulnerable caring model closely reflects the concepts the drafters of IBOR expressed as being of importance in their determination to include Article 16(3) in the UDHR: namely, identification of the family as a relational realm of care, nurturance and social reproduction, within which equality should be promoted, and which as a group unit was both fundamental to society and in need of the

state's protection. This, then, is the model I adopt as correctly encapsulating the meaning of 'family' in ICSECR Article 10(1) as well as UDHR Article 16.

2.4 A note on the family as a group rightsholder

My argument rests on ICESCR Article 10(1) as group right. ICESCR Article 10(1), like UDHR Article 16(3), refers to the family as a 'group unit'. As a doctrinal matter, the plain meaning of the text of in its context, in light of its object and purpose and with reference to the preparatory work on the treaty and the circumstances of its conclusion as supplementary means of interpretation requires that Article 10(1) be interpreted as a group right.[397] The drafters of the IBOR included provisions relating to the family group out of a recognition that a purely individual approach omitted something essential.[398] Moreover, the practice of UN bodies and states, as well as the writings of a many jurists demonstrate broad acceptance of the validity of group rights in various circumstances.[399]

My analysis is informed by two theorists' notions of the nature of group rightsholders. First, Gould's social ontological concept of group rights as rights of individuals-in-relation suggests that the group rightsholder is neither a reified object, nor reducible to the sum of its individual members. This accords with my analysis of the IBOR drafters' intentions and aligns with modern scientific findings of the centrality of attachment in human development. It is consistent with most people's self-definition as 'members of larger groups or communities, not as autonomous entities.'[400] In this

[397] VCLT Articles 31(1) and 32.

[398] E/CN4/SR13 (n 164); UNCHR, 'Summary Record of the 14th Meeting' (4 February 1947) E/CN4/SR14; E/CN4/AC1/SR/38 (n 2); A/C3/SR124' (n 360); E/CN4/SR13' (n 164); UNGA (3rd Committee), 'Summary Record of the 144th Meeting' (18 November 1948) A/C3/SR144.

[399] UNDRIP; Christine Sistare, 'General Introduction: Groups, Selves, and the State' in Christine Sistare, Larry May and Leslie Francis (eds), *Groups and Group Rights* (UP of Kansas 2001).

[400] Relis (n 27) 513.

conception, groups ‘come into being by virtue of actual relations among their constituent individual members but are not reducible to the individuals distributively'.[401]

Second, Réaume explains that some participatory goods exist only in groups, and rights to those goods must be held by groups to make their realisation effective.[402] Language rights and communal aspects of religious rights are examples.[403] Similarly, the family (understood in its vulnerable-caring sense) offers profound and fundamental goods that are difficult or impossible to replicate outside such groups, including development, wellbeing, identity and ongoing love and care.[404]

Space does not permit me to delve further into the scholarly debates on group rights, nor the drafters’ discussions concerning the group nature of the family. However, for interested readers, I provide supplementary materials on this point.

2.5 Do single-parent families constitute an outgroup protected by non-discrimination and equality provisions?

2.5.1 Subchapter introduction

In the previous subchapters, I established that the family is the rightsholder under ICESCR Article 10(1), that it should be conceptualised as a ‘vulnerable-caring’ unit, and that, as a group unit, it is the holder of collective rights in the social ontological sense. Now, I consider whether the category ‘single-parent families’ constitutes an outgroup analogous to the categories listed in ICESCR Article 2(2) and, therefore, is covered by

[401] Gould (n 43) 143.

[402] Denise Réaume, 'Individuals, Group, and Right to Public Goods' in Peter Jones (ed), *Group Rights* (2009).

[403] ibid; *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (No 2)* (1968) 1 EHRR 252; *Mahe v Alberta* [1990]1 SCR 342.

[404] Herring, *Relational Self* (n 35) 60.

the non-discrimination protection. Thereafter, I turn, in subchapter 2.6, to consider whether members of single-parent families—parents and children— are outgroups covered by non-discrimination and equality provisions in relation to their individual rights.

It is important to note that the term 'group' in the context of outgroups entitled to protection from discrimination and inequality refers to a class of a category. This must be distinguished from the use of the term 'group' in relation to the family group unit as a holder of group rights.

2.5.2 Single-parent familyhood as a protected category under ICECSR

Single-parent families are not explicitly listed as a protected category in ICSECR Article 2(2). However, that list is non-exhaustive. It concludes with the phrase 'or other status'. Discrimination law considers that to be protected, the 'other status' must be analogous to the categories in the list. As the understanding of discrimination has evolved, treaty bodies, courts and legal academics have developed increasingly sophisticated analyses of the types of categories protected on analogous grounds. In particular, CESCR provides guidance on the meaning of the guarantee of non-discrimination in Article 2(2) in its General Comment 20. Here it explains that 'other status' includes 'the intersection of two grounds of discrimination.'[405] Socioeconomic status is also an analogous ground, and includes being homeless or living in poverty.[406]

Although most single-parent families fall into the portion of the population most at risk of discrimination based on socioeconomic grounds, equating single-parent family

[405] CESCR, 'General Comment No 20: Non-discrimination in economic, social and cultural rights (art 2, para 2, of the International Covenant on Economic, Social and Cultural Rights)' (adopted 2 July 2009) E/C12/GC/20 [17].

[406] ibid [35].

status with low economic status for the purposes of protection from discrimination and inequality is unsatisfactory. My argument centres the single-parent family as one of the most discriminated against family types globally. Analytically, it is important to recognise single-parent family status as an analogous status in its own right because the discriminatory harms experienced by single-parent families are distinct in their causes, operation and effects from discrimination based on socioeconomic status generally. The failure of economic, social and cultural rights realisation for single-parent families leads to deprivation and poor outcomes for these families and their members. This discrimination is rooted in systemic structures protected by strategic misrecognition.

There are unique characteristics of discrimination against single-parent families which are common across diverse societies. This is not to discount the existence of significant local and regional differences in single-parent families' lives stemming from diverse socio-cultural, attitudes, religions, legal and political systems and economies. Nevertheless, many of the causes of the discrimination and inequality experienced by single-parent families arise from social structures which penalise dependency and make inadequate provision for the support of those whose parenting and other caregiving work makes them derivatively dependent. In other words, the impacts of societies' failure to address dependency as a collective concern fall disproportionately on single-parent families. Employment structures continue to limit the type of paid work that can be undertaken by a person who also has sole responsibility for the care and supervision of children (including being on-call in emergencies 24/7 and, for example, during pandemics). It is often precarious, low-paid and lacking in opportunities for advancement.

Furthermore, societal, cultural and religious norms that value the formation and preservation of marital two-parent families, stigmatise women's independent sexual-reproductive agency and laud patriarchal family structures combine to punish or

stigmatise single-parent families as a threat to social stability and morality. The operation of discrimination against single-parent families is couched in moralistic, sexist and social Darwinian terms. Single-parent families are characterised as failing due to the absence of a male family head. They are viewed as deficient and 'other'. Their existence must be discouraged to protect society, the next generation and the economy. This stigmatisation shapes the way in which society, public discourse and policy treat single-parent families and how their needs are (or are not) addressed.

State interventions purporting to improve socio-economic and cultural conditions for people experiencing low socio-economic status often exacerbate discrimination against single-parent families. Policies to lift people out of poverty may be based on inaccurate and discriminatory assumptions.[407] They may be premised on the belief that children benefit from two-parent families *per se*, that intergenerational failure is transmitted through benefit-dependent single-parent households, or that single parents are lazy and need 'activating' to participate in the paid workforce. These ideas perpetuate discrimination. Myths of autonomy and the benevolent patriarch are protected through the stigmatisation of single-parent families. Such misrecognition puts single-parent families on the back-foot in any attempt to negotiate for a better position. Rather, single-parent families are framed as supplicants who are required to admit their deficiency to deserve help, thereby undermining their dignity, personhood and civic agency.

The most obvious measurable effect of discrimination against single-parent families is poverty, and the grounds of low socioeconomic status and single-parent family status often overlap. From an intersectional perspective, this results in a compounding of the impacts of discrimination. However, the effect of poverty on single-parent families

[407] See, *R (DA)* (n 53) which I analyse in Chapter 4.

also has distinctive characteristics. Direct and indirect impacts of discrimination against single-parent families can include isolation, internalised stigma and mental health issues; exhaustion; failure of state policies to recognise the value of in-person parenting undertaken within these families; housing insecurity; sanctions within the youth justice system; and restrictions on freedom of movement and privacy. General measures to address discrimination on the grounds of socio-economic status fail to address the specifics of discrimination against single-parent families, including the time poverty experienced by single parents who engage in the paid workforce.[408] For example, rather than critically reappraising the assumptions underpinning the myth of autonomy, provisions for single-parent families in many Western liberal democracies have cast the state in the role of reluctant male-breadwinner, providing some minimal assistance to families but jealously controlling aspects of their lives in return. It is common for the sexual and emotional attachments of single mothers to be particularly regulated, and their parenting skills and children's behaviour to be given heightened scrutiny.

The continuing omission of a non-discrimination and equality approach to ICESCR Article 10(1) robs the provision of much of its force and obscures its purpose. In according the family rights to the widest possible protection and assistance, attention must focus on the families who are most discriminated against in the realisation of economic, social and cultural rights. Although the particulars of discrimination against single-parent families overlap and intersect with the operation of discrimination on the grounds of socioeconomic status, they are sufficiently distinct in their causes, operation and effects to require separate elucidation by treaty bodies.

[408] In subchapter 4.3.8, I calculate that meeting the requirements of a UK workfare approach would result in a single-parent family having no more than 70.5 hours left each week in which children could receive hands-on parenting, whereas a similarly placed two-parent family would have up to 166 hours available.

The illusion that independence is available to all fuels resistance to providing societal support to ameliorate the poverty of those dependent on others for material security. Nevertheless, state subsidies to 'farmers, airlines, savings and loan associations, and highway construction firms',[409] including bailouts in times of recession, are not treated with the same contempt. As Fineman states, 'we valorize activities associated with work for wages and accumulation of wealth, while we take for granted dependency work and the production of human beings' in a manner that is ultimately disastrous for families.[410] It is particularly disastrous for women-as-caregivers and children. For single-parent families, in which a single adult must meet both the nurturing needs of dependents and material provisioning, it is crushing.

In subchapter 2.3.4, I briefly discussed examples of non-Western worldviews which do not rest on the autonomy of the individual. Nevertheless, recognition of interdependence between mothers and their young children is not confined to non-Western jurisdictions. For example, the UK Supreme Court has observed that the interests of young children in benefit-dependent single-parent families are indistinguishable from those of their mothers.[411] Such examples illustrate the artificiality of insisting that rights be viewed only through the prism of the individual.

In focusing on the economic, social and cultural rights of single-parent families, I am not arguing that these trump the economic, social and cultural rights of the individuals within the single-parent family (any more than they trump the rights of other marginalised groups or individuals). In fact, by interrogating the failure of the

[409] Fineman, *Autonomy* (n 35) 32.

[410] ibid 33.

[411] *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39 Lady Hale, [4]; *R (DA)* (n 53) Lord Wilson [78].

international human rights project to-date to require economic, social and cultural rights realisation for this category of rights-holders, we also gain insight into a significant lacuna in human rights theorising about the reasons for the ongoing existence of discrimination against women, and continued lack of rights realisation for women and children generally. While the oppression and poverty experienced by single-parent families make action from the UN human rights bodies important in and of itself, looking into the barriers to rights realisation for these families and their members also offers a paradigmatic example of the ways in societies' adherence to the myth of individual autonomy binds women and children to the patriarchy. Women's and children's rights must be understood in the context of gendered and age-based power relations that render the inevitability of dependency invisible and privilege those who are best able to maintain an illusion of autonomy. A focus on women and children's welfare reveals that 'many individuals and the families they form cannot live up to the ideals of our autonomy myth … in terms of independence and self-sufficiency.'[412] In a two-parent family, this may be masked as economic and social status is generally measured on a household level (often with the male household head as a proxy). Failure to live up to ideals of household autonomy can be attributed (rightly or wrongly) either to insufficient economic effort by the adult family members or failure of the labour market to pay adequately. The derivative dependency of women as caregivers is invisibilised, along with the realities of dependents, including children. Fineman argues that if women's equality is to be realised, the autonomy myth must be confronted by bringing the family to the centre of legal theory and jurisprudence.[413] The same applies to the realisation of children's rights.

[412] Fineman, *Autonomy* (n 35) 170.

[413] ibid 208-9.

Centring the single-parent family as a site in which children's dependency and their mothers' derivative dependency are stripped of the presumed male breadwinner reveals the validity of Fineman's insight that as long as the resourcing of dependency and derivative dependency are located within presumed patriarchal family structures, attainment of gender equality and children's rights will remain a pipedream: no equality is possible 'as long as only some individuals bear the burdens of family and reproduction in society.'[414]

2.6 Rights of individuals within single-parent families

2.6.1 Subchapter introduction

My argument concerns the single-parent family as a group rights-holder. This is the correct approach in terms of the text and purpose of Article 10(1). It brings into international law Herring's insight that the carer and cared for cannot and should not only be conceived of as separate oppositional classes.[415] However, the approach does not discount members of single-parent families as holders of individual rights. It is to those rights that I now turn to consider whether an individual's membership of a single-parent family is a ground for protection from discrimination and inequality, in addition to and separate from the group rights of their families. Single-parent families have two types of members: single parents and dependent children. I examine the possible application of non-discrimination and equality protections in relation to each category in terms of both ICESCR rights and the provisions of the relevant population-based treaties: CEDAW and CRC, respectively.

[414] ibid 27.

[415] Herring, 'Disability Critique' (n 265) 8.

Understanding the relationship of ICESCR Article 10(1) to the individual rights found in ICESCR, CEDAW and CRC requires cognisance of the interrelationship between group and individual rights. The two types of rights are frequently viewed as oppositional. Like other rights, however, a group right and an individual right can complement each other or exist in resolvable tension, in addition to competing. The interplay of children's and women's rights is also important for our purposes. Like the interplay between the rights of the family as a group unit and the rights of individuals within it, the rights of children and the rights of their derivatively dependent mothers at times complement each other, are at times in tension and sometimes directly compete. The burdens of discrimination against members of single-parent families fall not only on the single parent but also on the children whose needs as dependents are met less fully than those of other children. Family poverty affects children as well as their parents. The single-parent's efforts to provision the family frequently necessitate less time for nurturing and caregiving than the parent might otherwise offer, as well as exhaustion that limits the quality of hands-on parenting. Other effects of stress, poverty and stigma, such as poor or insecure housing and physical and mental health deficits affecting the parent, also have negative repercussions for her children.

As women make up over 80 percent of single parents, my examination of the rights of single parents focuses primarily on the application of non-discrimination and equality protection to single mothers. Here, I consider the non-discrimination and equality provisions of ICESCR and the applicability of protections found in CEDAW. Thereafter, I briefly touch on the status of single fathers for non-discrimination and equality purposes, before turning to the question of whether children in single-parent families constitute a protected class in light of ICESCR and the CRC.

2.6.2 Single parents as a protected category

> The assignment of responsibility for dependency to the family in the first instance, and within the family (mainly to women) in the second, operates in an unjust manner. One result of this privatization of inevitable dependency is the frustration of our aspirations towards gender equality. … In the pattern of longstanding tradition, caretaking continues to be delegated to women—assigned as the responsibility of the person occupying the gendered role of wife, or mother, or grandmother, or daughter, or daughter-in-law, or sister.[416]

Because over 80 percent of single parents are women, single mothers experience of discrimination and inequality is integrally tied to gender inequality. I, therefore, focus on single mothers as an outgroup before briefly considering the situation of single fathers.

2.6.2.1 Single mothers as a protected category under ICESCR

Article 2(2) of ICESCR guarantees non-discrimination on the grounds of sex, and Article 3 requires state parties to ensure the equal rights of men and women to enjoy the economic, social and cultural rights set out in the covenant. CESCR General Comment 16 on the equal rights of men and women emphasises equality between the sexes as a fundamental principle recognised across the main international human rights instruments and aligned to the fundamental dignity of the person.[417] It adopts the definition of discrimination against women found in CEDAW Article 1, namely:

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[418]

Most importantly, the General Comment states that Articles 3 and 2(2) 'are not stand-alone provisions, but should be read in conjunction with each specific right guaranteed

[416] Fineman, *Autonomy* (n 35) 37, citations omitted.

[417] CESCR, 'General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art 3 of the International Covenant on Economic, Social and Cultural Rights)' (adopted 11 August 2005) E/C12/2005/4 [1].

[418] ibid [11].

under part III of the Covenant'.[419] It observes that the drafters of ICESCR recognised that Article 3 might overlap with Article 2(2) but found it necessary to include both to emphasise that equality is something more that the mere prohibition of discrimination (in its narrow formal sense). Rather, the drafters intended that 'suitable measures should be taken to ensure that women had the opportunity to exercise their rights'[420] and thought it necessary to reaffirm and constantly emphasise this fundamental principle in light of the 'many prejudices preventing its full application.'[421] The two articles 'are integrally related and mutually reinforcing.'[422] Thus, equality and non-discrimination are cross-cutting provisions which work together to form a dye washing over and colouring the interpretation of all other provisions. General Comment 16 states that guarantees of non-discrimination and equality must be given their de facto (substantive) as well as de jure (formal) meanings.

General Comment 16 also refers to earlier General Comments in which CESCR drew attention to factors negatively affecting gender equality in rights enjoyment, and the intersection of gender-based discrimination with other axes of discrimination.[423] It elaborates on the meaning of substantive equality and non-discrimination through the use of a conceptual framework which clarifies that:

> The enjoyment of human rights on the basis of equality between men and women must be understood comprehensively. Guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner.

[419] ibid [2].

[420] ibid [2].

[421] ibid [2].

[422] ibid [3].

[423] ibid [4-5].

> Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.[424]

In this regard, the barriers to women's enjoyment of their economic, social and cultural rights posed by discrimination against, and the inequality of single mothers would be grounds for state action to remedy.

Problematically, General Comment 16 does not acknowledge the extent to which social arrangements in which women undertake the vast majority of childcare are embedded in the fabric of states' social, economic and political structures, nor the biological abilities of cis-women (as a class) to gestate, birth and lactate at considerable cost to their bodies, which contrast to cis-men's lack of these abilities.[425] Furthermore, the existence of a substantial number of children who are de jure and de facto attached only to the parent whose identity is indisputable due to the child emerging from her body is ignored. By maintaining an unquestioning belief in the possibility of achieving gender equality in child-rearing in the absence of fundamental structural change, CESCR seems to mistake 'ought' for 'is' in a way that does disservice to the realities of millions of families who rely on a single mother.[426] As a result, General Comment 16 focuses on temporary special measures to achieve gender equality and not on the provisions of Article 10, which, in addition to requiring the widest possible protection and assistance be accorded to the family, also require special protections for pregnant women and new mothers, including 'paid leave with adequate social security benefits.'[427] In so doing,

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[424] ibid [7].

[425] Recognition of transgender and nonbinary identities challenges the characterisation of these biological abilities as belonging only to women, however this recognition is still evolving and the number of (trans)men gestating, birthing or breastfeeding infants remains too few to displace associations of these abilities with female biology.

[426] Eg E/C12/2005/4 (n 417) [22].

[427] ICESCR, Article 10(2).

CESCR misses an opportunity to guide states on how, by fulfilling their obligations relating to families in light of women's typical childbearing and childrearing roles, women's economic, social and cultural equality will be furthered.

The General Comment concludes by emphasising the immediacy of the primary obligation on states to ensure gender equality in the enjoyment of economic, social and cultural rights[428] and stressing that '[f]ailure to ensure formal and substantive equality in the enjoyment of any [of these] rights constitutes a violation of that right'.[429]

2.6.2.2 Single mothers under CEDAW

CEDAW has three interconnected goals: the elimination of discrimination against women, the achievement of gender equality and women's enjoyment of their human rights.[430] Unusually, CEDAW does not begin with articles requiring states to guarantee the rights contained therein without discrimination on the basis of listed and analogous grounds. Rather, it focuses wholly on the elimination of discrimination against the specific category 'women'. The only cross-cutting ground specified in the definition of discrimination in Article 1 is marital status. Nevertheless, CEDAW Article 2 condemns 'discrimination against women in all its forms'. Furthermore, states party agree under Article 3 to take all appropriate measures in all fields 'to ensure the full development and advancement of women, for the purposes of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.' These provisions ground a 'comprehensive obligation to eliminate discrimination in all its forms'[431] and require states party to be 'responsive to the de jure and de facto ways that

[428] E/C12/2005/4 (n 417) [40].

[429] ibid [41].

[430] Campbell, *Women* (n 34) 118.

[431] CEDAW, 'General recommendation No 19: Violence against women' (1992) A/47/38 [10].

sex and gender discrimination and inequality create obstacles to women 's human rights.'[432] CEDAW General Recommendation 35 on gender-based violence reaffirms that discrimination against women is 'inextricably linked to other factors that affected their lives'.[433] Therefore, Campbell observes:

> If women experience discrimination that is rooted in their sex and/or gender and this intersects with other aspects of their identity or experiences and results in a denial of human rights, it can be addressed through CEDAW.[434]

Campbell describes this as a 'novel approach to intersectional discrimination' which takes a wide view of intersectionality that is 'not wedded to the traditional cannon of identity grounds.'[435] Relevant gender-based obstacles to women's rights include poverty, violence, conflict and post-conflict situations, refugee status, asylum, nationality, statelessness and climate change. As Campbell explains, 'It is because women experience these forms of discrimination in a unique way intrinsically linked to their sex and gender that they are protected under CEDAW.'[436] Thus, where the CEDAW Committee is persuaded that something is a gender-based obstacle to women's rights, it is prepared to view CEDAW expansively to give effect to the call in the VDPA to treat human rights as indivisible and interconnected.[437]

Single-mothers experience discrimination that is rooted in their sex/gender and which intersects with other aspects of their identity and experiences in three distinct

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[432] Campbell, *Women* (n 34) 116.

[433] CEDAW, 'General recommendation No 35 (2017) on gender-based violence against women, updating general recommendation No 19 (1992)' (26 July 2017) CEDAW/C/GC/35 [12].

[434] Campbell, *Women* (n 34) 105.

[435] ibid 105 citations omitted.

[436] ibid 105.

[437] A/CONF57/23 (n 33) [5].

ways. First, this is through their roles as lone caregivers in the absence of structural supports that would make the concurrent caring for and provisioning of families by a single individual possible on the basis of equality. Second, it is a result of the stigma that stems from their misrecognition as variously sexually lax, a threat to social, cultural, religious stability and purity, lacking in independence and work ethic, or otherwise deficient. Third, it stems from economic, social, cultural, religious and/or legal impediments to women's participation in economic and civic life on a basis of equality with men.

Thus, the elimination of economic, social and cultural discrimination against single mothers clearly falls within CEDAW's ambit. That, however, has not been clearly articulated by CEDAW in its General Recommendations. Although CEDAW has issued two General Recommendations that touch on the issue, neither conceptualises the rightsholders as single mothers. Rather, they rest on a normative ideal of a two-parent family (assumed to contain a female and a male parent).[438] For example, General Recommendation 29 urges that women in de facto relationships be accorded the same rights as those who are legally married and that women should not be discriminated against when they leave marriages or de facto partnerships.[439] In doing so, it follows from a tradition that goes back to Committee on the Status of Women's submissions in the original Declaration of Human Rights drafting process.[440]

[438] CEDAW, 'General Recommendation No 21: Equality in Marriage and Family Relations' (1994) A/49/38; CEDAW/C/GC/29, (n 5).

[439] CEDAW/C/GC/29, (n 5) [30-31 and 39-53].

[440] Commission on the Status of Women, 'Draft Report of the Commission on the Status of Women to the Economic and Social Council' E/CN6/74.

This approach taken in CEDAW General Recommendations 16 and 29 has four significant flaws. First, by limiting their focus to women whose marriages have dissolved, rather than all single-mothers, the lesser status of unmarried single-mothers and their children is perpetuated. Second, the approach does not adequately differentiate between the status of divorced women (who may not have children) and single-parent families. While divorced women without dependent children may suffer economic, social and cultural rights violations in a variety of ways ranging from social stigma to lack of pensions, loss of land and low labour market status,[441] they do not face the impact of current derivative dependency. Third, the CEDAW approach does not address the impact on children of discrimination against them as single-parent family members nor the ways in which discrimination against their mothers also results in the children suffering rights violations. Fourth, by focusing on marriage dissolution rather than single-parent families' rights, a deficit-model is perpetuated, in which the marital family is portrayed as the norm, and the single-parent family as broken. As Fineman explains:

> [I]n our political rhetoric and policy we stigmatize with the label "dependent" the welfare mother who is unemployed and trapped within poverty. Her need for resources in order to undertake her caretaking responsibilities mandate she resort to public support in the form of government subsidy. Her circumstances are deemed to be her fault and the solution within her control—she is told she can marry or she can work, perhaps do both to relieve her situation. Her dependency, as conceptualized of her own making, means she is undeserving of a 'handout.' Disciplined into self-sufficiency, she is abandoned to assume responsibility for herself and her children.[442]

This portrayal, based on 'a narrow conception of self-interest in which each person is permitted only to care about his or her own circumstances and those of his or her family' fails single mothers because it fails to acknowledge that motherhood is itself 'mired in

[441] *Trujillo Calero v Ecuador* E/C12/63/D/10/2015 (CESCR).

[442] Fineman, *Autonomy* (n 35) 32 citation omitted.

dependency'.[443] In Fineman's words, 'There can be no autonomy to be found in motherhood'.[444] By focusing on the consequences of marriage dissolution, CEDAW misses the more significant factor in perpetuating women's inequality, namely state and societal relegation of care—but not recompense—to the private family sphere.

Moreover, the lack of realisation of economic, social and cultural rights of single-parent families impedes the exercise and enjoyment of human rights by all women. Married or partnered mothers suffer reduced bargaining power within their relationships as in any negotiation their BATNA[445] is constrained by the rights violations they (and their children) can expect to face if they leave. Childless women's choices in family formation are limited by similar constraints. For heterosexually active women, awareness of the marginalisation of single mothers increases the jeopardy they face for exercising their privacy rights to be sexually active in situations where safe, effective reproductive health measures are not readily accessible. Moreover, the lack of economic, social and cultural rights realisation for single-parent families—and in particular, the social stigma—may mean that women who wish to have children believe that they must accede to the patriarchal demands of a gendered marital family to do so.[446]

My argument that CEDAW requires states to take appropriate measures to address the discrimination against women attendant on society's relegation of responsibility for dependency and social reproduction on the private sphere, in the form of the family, could be countered with reference to CEDAW's calls for men to take equal responsibility

[443] ibid 32 citation omitted, 170.

[444] ibid 170.

[445] Fisher, Ury and Patton, 99-108 (n 10).

[446] Boyd and others (n 8) 4-6.

for childrearing.[447] In keeping with the international human rights project, the CEDAW committee has prioritised two strategies for addressing the derivative dependency women experience due to their caring responsibilities. First, states are urged to encourage men to take a greater role in child-raising, without consideration of how this may lock single mothers and their children into living within a prescribed area and making the children available to at regular times to fathers who may—or may not—show up to care for their children. Second, it is recommended that states ensure that accessible childcare is available outside of the family. If men did take equal responsibility for all aspects of caring and providing for their children (legal and biological), irrespective of their relationship with the child's mother, would not the social, economic and cultural hardships faced by single mothers vanish? Such responsibility would require men consistently to put the best interests of their children above desires to control their children's mothers, and to extend to biological fathership of children created in casual, secret and transactional relationships. Effective protections for mothers who had been abused by the fathers of their children would be needed.

In reality, neither the calls for increased childcare nor entreating men to take equal responsibility for children address the structural source of women's derivative dependency. Family roles have remained stubbornly gendered even as market roles and legal status have become more gender-neutral. Men have not proved keen to take on unpaid family caretaking roles with their consequent loss of income and social power. As Bell's analysis of the interest-convergence dilemma highlights, those who benefit from inequality tend not to agree to give up their advantage merely on the basis of appeals to

[447] CEDAW Preamble and Article 5(b); A/49/38 (n 438) [19-20].

their better nature.[448] Meanwhile, women, for whatever reasons, have proved unwilling to abandon dependents even when raising, caring for and nurturing them entails massive personal sacrifice. When children require additional care and support, for example, due to severe disability or high health needs, this pattern is even more apparent.

Meanwhile, the focus on childcare has been used by some states to undermine the rights of single-parent families and put their members in worse positions. For example, in the English cases of *R (SG)* and *R (DA)*, the government argued that the existence of childcare, however patchily distributed, and government provision of childcare subsidies legitimised a policy that capped the amount single-parent households could receive in social welfare benefits unless the parent engaged in 16 hours or more paid employment each week.[449]

2.6.2.3 The situation of single fathers

The South African Constitutional Court judgment in *Hugo* provides a useful starting point for considering whether single fathers are a discriminated-against category. In that case, an imprisoned single father unsuccessfully challenged the constitutionality of his exclusion from a pardon provided to imprisoned mothers of children under twelve years of age on the grounds that it unfairly discriminated against him and his child on the basis of sex. The majority found that while the provision did discriminate on the basis of sex, the discrimination was not unfair. Mothers and other women's disproportionate representation as carers of young children and the disadvantages that they faced as a result were noted. Justice O'Regan observed:

> The responsibility borne by mothers for the care of children is a major cause of inequality in our society. Being responsible for the rearing of children is a great

[448] Bell (n 16).

[449] *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16; *R (DA)* (n 53). See Chapter 4.

> privilege, but also a great strain. Many women rear children single-handedly with no help, financial or otherwise, from the fathers of the children. The need to support children financially is one of the reasons for women seeking work outside the home. However the responsibility for child rearing is also one of the factors that renders women less competitive and less successful in the labour market. The unequal division of labour between fathers and mothers is therefore a primary source of women's disadvantage in our society.[450]

In itself, that was not enough to justify discrimination in this instance. Rather, the Court looked to 'the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.'[451] Here, the presidential power of mercy was being used to pardon three categories of prisoners who were particularly socially vulnerable and who had been victims of past discrimination: 'disabled prisoners, young people and mothers of young children'.[452] The court observed that there were roughly fifty times as many men in prison as women, and to release all who were fathers of young children would have been unacceptable to society. Further, the reality that many fathers do not play a primary role in child rearing meant that their release would not have furthered the President's intentions of furthering the best interests of the children in the same way as releasing the mothers did.[453] While the Court agreed with the lower court's assessment of the categorisation as 'blunt', it found that this was not unfair. To hold otherwise, they observed, would likely lead to a situation in which neither mothers nor fathers of young children could be pardoned as a matter of political reality.[454] Furthermore, the Court observed that a single father such as

[450] *Hugo* (n 51) [110].

[451] ibid [44].

[452] ibid [47].

[453] ibid (n 51) [46].

[454] ibid [106].

Hugo could apply for special remission of his sentence in light of his particular circumstances.[455]

Somewhat similar conclusions can be reached when asking whether single fathers are a discriminated-against category in the eyes of international human rights law. There is no convention for the elimination of discrimination against men (equivalent to CEDAW) because men, as a category, have not been subject to widespread sex or gender-based discrimination. The dominance of men in the leadership of states and international organisations at the establishment of the UN international human rights framework and in its ongoing implementation suggest that men's interests would not have been sidelined. Nevertheless, the push from UN treaty bodies to encourage and support men to take greater responsibility for child-rearing acknowledges that men's ability to perform caregiving functions may at times be hampered by gender stereotypes about childrearing. Examples might include denial of access to spaces for feeding and changing babies, school and health authorities defaulting to communication with a female caregiver or a lack of provision for fathers to access leave to care for children on the basis of equality with women. While these impediments are likely to affect single fathers more than heterosexually coupled fathers, there is no evidence that they are of such significance as to justify viewing single fathers as a generally discriminated against category.

Conversely, single fathers may face marginalisation as single parents for many of the same reasons that single mothers do. For example, Fineman argues that men in carer roles face the same disadvantages and negative consequences as women and thus, '[i]t is important to emphasize that it is the *task* of caregiving, not the sex of the caretaker, that

[455] ibid (n 51) [114].

operates as a disadvantage.'[456] Other indications, however, suggest that single fathers may be somewhat less marginalised than single mothers for a range of reasons, including men's higher average earnings; the absence of a 'fatherhood penalty' in employment to correlate with the motherhood penalty; the tendency of men to be single fathers to older children rather than infants; the smaller proportion of single fathers who parent for disabled children or children with very high health needs; and a greater willingness of women in their extended families to provide childcare and domestic help to single fathers than to single mothers. Therefore, state efforts under ICESCR to ameliorate the discrimination and inequality experienced by single parents should include single fathers as relevant, without denying the necessity of also addressing the gender/sex-based dimensions of discrimination and inequality faced by single mothers.

2.6.3 Children in single-parent families as a protected category

Although many states have removed formal legal discrimination on the grounds of illegitimacy from their domestic law, substantive discrimination against children born to unmarried mothers continues despite the guarantee of non-discrimination on the grounds of social origin and of birth in ICESCR Article (2). Certain categories of children in single-parent families, such as those who do not know their paternity, those born to teenage mothers and those born to sex workers, may be particularly discriminated against on the grounds of birth and social origin. Other discrimination against children in single-parent families is not due to their birth or origins but rather to their current situation. For example, children in single-parent families may face greater scrutiny from youth justice systems. Moreover, children in single-parent families are disproportionately impoverished compared both to their peers and to the general population.

[456] Fineman, *Autonomy* (n 35) 172.

2.6.3.1 Children in single-parent families under ICESCR

Social origin and birth are included in the grounds on which discrimination is prohibited in ICESCR Article 2(2), thus protecting those born into single-parent families from discrimination on that basis. These grounds apply to children and adults. Age, however, is not a listed ground in Article 2(2) and while it could be argued that it forms an analogous ground, many provisions in ICESCR assume rightsholders are adults. Some are difficult to apply to children without substantial reinterpretation or caveats. The right to earn a living by work is one such example.[457] Its application to child rightsholders is undercut by the obligation on states to 'set age limits below which the paid employment of child labor should be prohibited and punishable by law.'[458]

ICESCR Article 10(3) recognises that children are not identical to adults by providing that '[s]pecial measures of protection and assistance should be taken on behalf of all children and young people'. Even so, as Saul et al observe, child benefits 'are typically paid to parents' and although 'in principle they are intended to benefit the children and the family as a whole, not individual interests or needs of the parents; it cannot be assumed that all parents use benefits in the interests of their children all of the time.'[459] The provision is also unusual in that it has its own non-discrimination wording, in addition to the text of Articles 2 and 3. Article 10(3) states that the measures should be undertaken 'without any discrimination for reasons of parentage or other condition,' a provision that is designed to ensure, among other things, that children are not

[457] ICESCR Article 6(1).

[458] ibid Article 10(3).

[459] Saul, Kinley and Mowbray (n 150) 777-78.

discriminated against on the basis of belonging to a single-parent family or having been born to an unmarried mother.

2.6.3.2 Children in single-parent families under CRC

Limitations to the adequacy of children's rights protection by existing international human rights instruments motivated the drafting of the CRC.[460] Four basic principles of the CRC have been recognised: non-discrimination (Article 2), the best interests of the child (Article 3), the right to survival and development (Article 6) and the right to be heard, which is also referred to as the right to participation (Article 12).[461] The prohibited grounds for discrimination set out in Article 2(1) include social origin, property and birth, thus encompassing many types of discrimination children experience that may be related to their membership in a single-parent family. Analogous grounds are also recognised.

Arguments for conceiving of children in single-parent families as an analogous category under CRC Article 2(1) are similar to those under ICESCR Article 2(2), with the proviso that the comparator is other children, not other people in general. Globally, children in single-parent families face disproportionate levels of *prima facie* violations of their CRC rights. It is reasonable to assume this inequality of rights enjoyment extends to the following: rights to life, survival and development (Article 6); enjoyment of the highest attainable standard of health, and access to health care, nutritious foods and clean drinking water (Article 24(1) and (2)); a standard of living adequate for their physical, mental, spiritual, moral and social development (Article 27(1)); education (Article 28(1)); rest, leisure, play, recreation and participation in cultural and artistic life (Article 31); and protection from economic exploitation (Article 32), sexual exploitation (Article 34) and

[460] Nevena Vuckovic Sahovic, Jaap A Doek and Jean Zermatten, *The Rights of the Child in International Law* (Stampfli 2012) 44.

[461] ibid 91.

trafficking (Article 35). These factors, in combination with the stigmatisation of children from single-parent families on the basis of their family type, also exacerbate the general lack of opportunities for children to exercise their participation rights under CRC Article 12.

Furthermore, CRC recognises children's particular position as dependents within families by including in CRC Article 2(1) protection from discrimination on the basis of a parent's membership of a protected category. Article 2(2) goes further, requiring states to 'take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status [or] activities …. of the child's parents, legal guardians, or family members.' This means children are to be protected from any discrimination related to their single parents' status as a member of an enumerated or analogous category. Suppose my arguments in the subchapter 2.6.2 are correct. In that case, single-parent status is an analogous ground for the purposes of ICESCR, and in addition, discrimination against single mothers is an aspect of sex/gender discrimination for the purposes of both ICESCR and CEDAW. CRC Article 2(1) uses ICESCR language 'or other status' to refer to analogous grounds and recognises sex/gender as a prohibited ground for discrimination. Unless circumstances require otherwise, these concepts should be interpreted consistently across the UN's human rights instruments. Therefore, children have rights to protection from discrimination arising from their parents' status as single mothers and single parents.

However, the realisation of children's rights is complicated by the tension between the liberal conceptualisation of rights as founded on individual autonomy and recognition of children's typical dependency and developing abilities. To deal with this tension, CRC recognises the family or parents as central mediating points in the fulfilment of children's rights. Article 5 provides that:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.[462]

The CRC recently explained that Article 5 'strikes a balance between the rights of the child and the responsibilities, rights and duties of parents as well as the State obligation to ensure the rights of the child'.[463] The Convention creates a legal obligation on states party to recognise children as rightsholders separately from their parents, and this exists alongside the recognition of the importance of the family and the responsibilities, duties and rights of parents.[464] CRC Article 27 limits parent(s) primary responsibility for securing a children's living conditions to that which is 'within their abilities and financial capabilities' and places an obligation on states, 'in accordance with national conditions and within their means' to 'take appropriate measures to assist parents to implement' children's right to a standard of living adequate for their 'physical, mental, spiritual, moral and social development' and to provide material assistance and support programmes in cases of need. It is a general principle of public international law that treaties impose obligations on states. In the case of UN human rights treaties, these obligations are for the protection of the human rights of the treaty's subjects. Thus, the CRC places obligations on the state, not on parents.

A second area of tension in interpreting CRC in relation to children in single-parent families, is the assumption implicit in some provisions that a child has precisely two parents to whom equal primary responsibilities, duties and rights are ascribed. Thus

[462] CRC Article 5, see also Articles 3(2), 10(2), 14(2), 18(1) and (2), and 27(2).

[463] CRC, 'Statement' (n 327) [1].

[464] ibid [4, 7 and 12].

Article 18(1) requires states to ‘use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.’ Under Article 27(4) states must ‘take all appropriate measures to secure the recovery of maintenance for the child’ including cooperating internationally to enable this to occur. Some states have made significant efforts to comply with this provision through administrative schemes for child support collection. Although Article 27(4) refers to ‘other persons having financial responsibility for the child’ as well as parents, the predominant focus has been on the responsibility of liable parents (typically fathers).

Do CRC provisions asserting the ongoing responsibilities of both parents, and state efforts to implement them undercut my claim that children in single-parent families form a suspect category? If children are benefitting from the full efforts of both parents to care and provide for them regardless of the parents’ relationship status, why should children in single-parent families receive special consideration? Unfortunately, states thus far have not implemented effective measures to ensure that fathers (genetic or legal) routinely undertake equal hands-on parenting, including caring, nurturing and providing material necessities of their children. Reasons for this may include norms of male autonomy as encompassing freedoms to move, work and engage in recreation unimpeded by hands-on care responsibilities, and fears that fathers will neglect or harm children if forced to care for them. Research has found that child support payment schemes may do little to keep children from single-parent families, or their families as a whole, out of poverty. Nor do such schemes create conditions of equality between men and women following separation.[465] Moreover the enthusiastic embrace of child support systems

[465] Skinner and others (n 317); Michael Fletcher, David C Maré and Tim Maloney, 'The Economic Consequences of Marital Separation for Parents in New Zealand: Insights from a Large Administrative Dataset' (2020) IJL Policy and the Family.

sheets women's derivative dependency home to their children's fathers. Despite many liable fathers not paying (or engaging in strategies to reduce liability), child support schemes allow the state to deflect attention from its obligations to address single-parent families' poverty by painting the issue as a matter to be solved through private family law (albeit often supported by administrative child support collection schemes). Regardless of whether there was ever a 'family' relationship between them, and irrespective of ill-will, coercion or threats of violence, public rhetoric in response to single mothers' claims for better public support for them to raise their children frequently stops at rhetorical questions of 'Where's the father?'. Thus, far from ensuring adequate standards of living for single-parent families or the children within them, states' focus on the rights and duties of both parents may add to the stigmatisation of single-parent families and obscure states' obligations under ICESCR Article 10(1) and CRC Articles 26 and 27.

Moreover, the text of CRC does not adequately address the interconnected nature of children's relationships with their parents, including the derivative dependence of women as children's usual primary caregivers. This creates a risk that children's rights may be interpreted in a 'Dwyer-esque' fashion, in which state concern for the best interests of the child sees children taken from marginalised single mothers who do not have sufficient support to adequately provide for the child's development, and given new 'families' whose privilege renders them better able, in the state's eyes to provide what the child needs.[466] Dwyer's proposed system, in which the state steps in at birth to exercise a baby's 'autonomy rights' to the best possible parents, based on predictions from big data actuarial models, provides babies with a family, but at the cost of the family rights of

[466] See Wells' critique of the CRC as a tool of neoliberal control of poor children and families. (n 193) 201-20.

biological/gestational parents, and with no protection from discrimination on individual or relationship grounds.

Guidance from the CRC on the interconnected nature of children's relationships with their parents, including the dependence of children and derivative dependence of women as their usual primary caregivers, would mitigate this risk by assisting states to understand their obligations to support children and assist their parents and caring-vulnerable families on a basis of non-discrimination and equality. This requires children's rights to be seen in the context of vulnerability theory, the autonomy myth and concepts of relational autonomy.

2.6.4 Subchapter conclusion

In this subchapter, I turned to the rights of individuals within single-parent families. I examined the question of whether single-parenthood could be considered an analogous ground under ICESCR Article 2(1) for the purposes of the non-discrimination protections and concluded that it could. First, regarding ICESCR Article 3 equality rights, I noted that CESCR has followed CEDAW's lead on sex/gender equality. Second, turning to CEDAW, I observed that the convention as a whole is aimed at the elimination of all forms of discrimination against women, the achievement of gender equality and women's enjoyment of their human rights. Rather than adopting the language of analogous grounds, CEDAW has taken a broad, intersectional approach concerning situations in which sex/gender combines with another aspect of women's interests, identities or situations with discriminatory results. I noted that CEDAW has issued General Recommendations concerning the economic effects of marriage and its dissolution but has thus far not extended its purview to single mothers as a category. I, nevertheless, concluded that single mothers do fall within the ambit of CEDAW as they suffer discrimination in the enjoyment of their human rights as a result of their sex/gender

combined with their mothering responsibilities. Third, I considered the situation of single fathers. I noted that single fathers may face marginalisation as single parents for many of the same reasons that single mothers do. They are included in the category 'single parents' as an analogous ground under ICECSR Article 2(1). Single fathers are not a separate category for gender/sex equality, as men are not subject to systemic inequality on the basis of sex/gender. Population-based evidence that shows single fathers as being somewhat less socio-economically marginalised than single mothers may be indicative of this.

Turning to the individual rights of children who are members of single-parent families, I explained that they, too, could be considered an analogous category under ICESCR Article 2(1). ICESCR enunciates universal rights, which appear at first glance to apply to everyone. A closer reading, however, reveals that many of its provisions are limited in their ability to address children's status as dependents whose capacity is presumed to be under development. Fuller recognition of children's rights in the context of their particular attributes is found in CRC. The non-discrimination provisions in CRC Article 2 protect children from discrimination based on parental or family characteristics, in addition to the standard grounds for non-discrimination. Given the marginalisation of children in single-parent families, the category of children in single-parent families should be viewed as an analogous ground under Article 2(1). In addition, under Article 2(2), children in single-parent families have a right to protection from discrimination and punishment based on their single parents' status as a single parent.

However, CRC references to parents' responsibilities, rights and duties risk muddying understanding of the relationship between children's rights and state obligations. Meanwhile, CRC language focused on both parents of a child could be seen to undermine arguments for children in single-parent families to be acknowledged as

such. Efforts to require single-parent families to remain in relationship with and rely on the 'other' parent have frequently proved detrimental to the well-being of single mothers and children involved and often do little to ameliorate their socio-economic marginalisation.

2.7 Chapter conclusion

In this chapter, I interrogated the idea of the family and the single-parent family as a sub-type of that idea. First, I set out the problem, namely that the situating of the family as a rightsholder in ICESCR Article 10(1) sits uneasily with the predominant focus of human rights instruments on the rights of individuals. I noted that this may be one reason why the provision has received little attention from CESCR and human rights theorists.

I began, in subchapter 2.2, by examining notions of rights, autonomy and dependency. Drawing from the work of vulnerability theorists, and relational autonomists, I critiqued the view that the individual boundaried self adequately reflects how human life is experienced, given the dependency that we are all born into and continue to experience to greater and lesser extents throughout life. Drawing on Fineman, I explained how the care and nurturing of dependent children entails derivative dependency, the responsibility for which has been rendered a private matter. As Fineman observes, '[m]eeting the needs of dependents has significant material implications for the caretaker'[467] and the costs of caring for others (in terms of labour, opportunities foregone and provisioning) have not been shared equally among society. Rather, gendered roles of wife, daughter and mother contain 'inherent economic dependency, self-sacrifice, and subservience'.[468] Meanwhile, changes in the workplace have been 'assimilationist in

[467] Fineman, *Autonomy* (n 35) 37, citations omitted.

[468] ibid 163.

nature', which means women's success depends on acting like men, behaving, and being treated as autonomous, unencumbered individuals.[469] I showed how the autonomy myth pathologises dependency and invisiblises care work. This acts as an impediment to the realisation of economic, social and cultural rights due to its failure to account for the dependency and derivative dependency that inevitably results from the universal vulnerability of human beings.

I also warned against theorists', policymakers' and commentators' tendency to elide individual and family autonomy. As Fineman's account of the autonomy myth reveals, the legal and political category of the family within society has operated to disadvantage women in ways that have been resistant to change because we have failed to subject the family as an entity to the same type of rigorous theoretical scrutiny that has been applied to other important social entities such as the market or the political sphere. Even feminist theorisation of the family does not generally go far enough. As Fineman explains: '[w]hen feminists have focused on the family, they have tended to divide it up into competing interests, assessing the disadvantaged and adversarial position of women vis-à-vis other family members'.[470]

Mindful of the universal claims of international human rights law, I considered the contribution of Chang to the drafting of the IBOR, particularly his role as a Confucian scholar stressing that the UN international human rights system must not confine itself to a limited Western notion of the self but must also reflect ontological stances such as 'two-man-mindedness'. I also referred to Buddhist and indigenous (particularly Māori) schools

[469] ibid 178.

[470] ibid 148.

of thought as examples of legal and philosophical traditions based on interconnection rather than autonomy.

I concluded that international human rights law acknowledges the family's right to the widest possible protection and assistance, at least in part, because the family is the site of nurturance of dependent children. The dependency of a child on one or more parents or caregivers is essential in the sense that it has always existed among human beings across time and culture. Modern neuroscience backs up the intuition that there is something about early attachment to a small number of caregivers that is important for human development. Given the existential significance of the nurture of dependent infants and children to humanity, it is unsurprising that the founders of the IBOR included the group unit within which this occurs as a human rightsholder.

In subchapter 2.3, I considered the meaning of family. I categorised conceptual models of the family into four types: the conservative-marital family, the libertarian-contractual family, the plurality of family forms, and the caring-vulnerable family. Interpreting Article 10(1) in light of its objects and purpose, with reference to both the intentions of the drafters and subsequent evolution of understandings, I concluded that the vulnerable-caring family, understood in a wide sense that allows for a plurality of family forms, best encapsulates the meaning of family as a holder of rights under the provision. This interpretation identifies the family as a relational realm of care, nurturance and social reproduction.

In subchapter 2.4, I noted that expressing the right in Article 10(1) as a group right opens the provision up to critiques of group rights validity. Nevertheless, I argued that the meaning of the text in light of the provision's object and purpose requires Article 10(1) to be accepted as articulating a group right. I explained that Reaume's participatory view of group rights, and Gould's social ontological conceptualisation of groups assist us

in making sense of the concept of the family as a group unit in international human rights law.[471]

Having established the necessity of moving beyond the autonomy myth and understanding ICESCR Article 10(1) as acknowledging the centrality of dependency, derivative dependency and relational autonomy in the context of the vulnerable-caring family as a group-rights holder, in subchapter 2.5, I considered the application of non-discrimination and equality guarantees to single-parent families. Noting that single-parent families are not specified in the list of protected groups in Article 2(2), I asked whether single-parent family status should be considered an analogous ground of discrimination. I concluded it should because the origins, operation and effects of discrimination and inequality suffered by single-parent families are sufficiently distinct from other groups.

In subchapter 2.6, I turned my attention to individuals within single-parent families. Here, I examined whether single-parenthood was a protected ground from discrimination under ICESCR. I concluded that the nature of single parents' marginalisation was sufficiently distinct from other grounds, such as socioeconomic status, to justify their categorisation as an outgroup in their own right. Noting that over 80 percent of single parents are women, I also considered the application of ICESCR Article 3 sex/gender equality protections to single mothers as a category and whether discrimination and inequality based on single motherhood was protected under CEDAW. My conclusion was that single motherhood was an analogous ground within the meaning of ICESCR Article 2(2) and that the discrimination faced by single mothers was sufficiently connected to sex/gender to come within the ambit of both ICESCR Article 3 guarantees of equality (noting that CESCR has followed CEDAW's lead in the content

[471] Réaume (n 402) 179-83; Gould (n 43) 143.

given to this provision), and CEDAW. I briefly considered the specific situation of single fatherhood and determined that there is insufficient reason to consider single fatherhood on its own to be an analogous ground. However, single fathers come under the umbrella of single parenthood and are thus protected by non-discrimination guarantees afforded on that ground.

Turning to whether children in single-parent families form a protected category under ICESCR Article 2(2), I concluded that they do, also as an analogous ground. In addition, I noted that some are protected by reference to specified ground of 'birth'. ICESCR is ambiguous in its protection of children's rights: despite being 'universal', children are excluded from full enjoyment of some rights, and others are assumed to be exercised by parents on their behalf. ICESCR Article 10(3), however, provides children with rights to 'special measures of protection and assistance' without discrimination based on parentage or other conditions. Specific attention is given to children through their own convention. The non-discrimination guarantees in CRC Article 2(2) include explicit protection of children from discrimination on the basis of their parents' status. Thus, while I conclude the category of children in single-parent families is an analogous ground for the purposes of CRC Article 2(1), such children are also protected under CRC Article 2(2). Nevertheless, in the CRC, the rights of the child in relation to the state are somewhat obscured by references to the rights, duties and responsibilities of parents (despite parents not being bound by the convention). The focus of some states on provisions of the CRC that relate to the involvement and ongoing financial responsibilities of both parents suggests that guidance from the CRC Committee would be beneficial in relation to states' obligations regarding non-discrimination in the enjoyment of economic, social and cultural rights by children in single-parent families.

In summary, accepting Fineman's characterisation of motherhood as the real gender issue because it is 'difficult, if not impossible, to break unequal historic patterns of gendered division of labor within the family when the family is also saddled with almost exclusive responsibility for dependency',[472] I contend that the failure of the international human rights system to give due weight to ICESCR Article 10(1) has stymied its ability to address this. The ongoing situation of substantive inequality between men and women cannot be resolved within the family because the family is only one piece of an interconnected system that depends on these arrangements. The separation of the rights of women who are mothers (which fall under CEDAW) and children's rights under CRC, with insufficient attempt to connect the two, creates a false split. Of course, there are occasions on which the interests of mothers and their children work in opposition, and women are not reducible to their status or roles as mothers. Nevertheless, the tendency (based on whatever combination of nature and nurture) of mothers to take the wellbeing of their children extremely seriously means that for a very significant proportion of women and children, their rights and interests are interdependent on essential levels.

ICESCR Article 10(1) provides a means to address this because human rights law looks beyond the realm of the family to the obligations of the state. ICESCR Article 10(1) thus provides a way to overcome the invisibilisation of dependency as a family matter. As a branch of public law, international human rights law can overcome the divide found in much domestic family law between the family as a sphere veiled in privacy and the public sphere. ICESCR Article 10(1) responds to the need for the state to act for the collective in ensuring that the burdens of derivative dependency do not fall only on some individuals or families. Rather than placing carers and the cared-for in opposition to each

[472] Fineman, *Autonomy* (n 35) 37, citations omitted.

other, Article 10(1) recognises their interdependence by identifying the family group unit as the subject of protection and assistance.

Taking this argument a step further, I drew attention throughout this chapter to the ways in which structures placing responsibility for dependency disproportionately on the family place single-parent families in positions of significant economic, social and cultural marginalisation. In Fineman's words,

> the so-called "male problematic"—men's abandonment of women and children—need not be problematic if there is social and economic support for those women and children from other sources. If women and children do not need protection from physical predators … and have access to material and other goods, it may not matter if men leave them, at least not to their ultimate survival.[473]

Because the solutions cannot be found within the family, it is incumbent upon states to take appropriate measures to fulfil their obligations under ICESCR Article 10(1) to address this conundrum. In my next chapter, I turn to the objects of the right in Article 10(1) and the obligations the provision imposes on states.

[473] Fineman, *Autonomy* (n 35) 101.

3 State obligations under ICESCR

3.1 Chapter introduction

> Unlike charity campaigns, economic policies or development programmes, human rights set normative standards and place duties on the duty-bearer to respect, protect and fulfil these standards towards the rights-holder.[474]

In Chapter 2, I examined the correct identification of the subject or rightsholder under ICESCR Article 10(1). I interrogated the reasons why a provision relating to the economic, social and cultural rights of the family as a group unit was inserted in ICESCR, given the predominant focus of liberal notions of rights on the autonomous individual. I established that this provision is directed at enabling the interdependence of family members to be addressed, particularly when the family is engaged in the care and nurturing of dependent children. Thereafter, I analysed the content of the term 'family' in the provision. I posited four possible models of the family and assessed which was most in accord with the object and purpose of the provision and the intentions of the drafters. I found the vulnerable-caring family offered the best fit. I explained that the vulnerable-caring family must be understood pluralistically to allow for the diversity of family forms across and within societies. Next, I noted the significance of the right in Article 10(1) being a group right. I concluded Chapter 2 by assessing whether single-parent families and their members constitute out-groups protected by the non-discrimination and equality guarantees of ICESCR and other UN human rights treaties and finding that they do.

I now turn to states' obligations under ICESCR. I begin by briefly considering historic critiques of the notion of economic, social and cultural rights. I outline the geopolitical context in which such critiques were raised and the rebuttals to them. I also stress that the justiciability of these rights is not determinative of their status as law,

[474] Campbell, *Women* (n 34) 4.

arguing that the normative value of international human rights is also important. Next, I elucidate the importance of economic, social and cultural rights being viewed in terms of an interconnected framework, taking an evolutionary approach. Here I suggest that the notion of 'wicked problems'[475] can help make sense of the complexity of economic, social and cultural rights. I then consider states' obligations under ICESCR with particular reference to the conception of poverty as a human rights violation from the standpoint of capabilities approaches.[476] Thereafter, I explore states' obligations in relation to non-discrimination and equality. After introducing Fraser's notions of (mal)distribution harms and (mis)recognition harms, I move on to focus on Fredman's four dimensions approach.[477] I round out my discussion of states' obligations under ICESCR generally by picking up on key elements of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, including obligations to respect, protect and fulfil; the margin of discretion; progressive realisation to the maximum extent of available resources; minimum core obligations; timing of non-discrimination and equality obligations; regressive measures, and; monitoring.[478]

Having dealt with states' obligations under ICESCR in broad terms, I turn in subchapter 3.6 to states' obligations to families under ICESCR Article 10(1). Here, I consider the analysis of Article 10(1) advanced by Kinley, Saul and Mowbray, [479] and

[475] Rittel and Webber (n 147).

[476] Martha Nussbaum and Amartya Sen, 'Introduction' in Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Clarendon Press 1993).

[477] Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, recognition, and participation', *The Tanner Lectures on Human Values: Delivered at Stanford University* (1996); Fredman, *Discrimination* (n 45).

[478] ICJ, 'Maastricht' (n 149) [6-16].

[479] Saul, Kinley and Mowbray (n 150) 721-853; HRI/GEN/Rev1 (n 276).

CESCR's observations, recommendations and requests for information in relation to both Article 10(1) and single-parent families. Given CESCR's limited engagement with Article 10(1) and the absence of a coherent scholarly statement of the right's content, I return to the VCLT's rules for treaty interpretation to determine the content of the provision based on the ordinary meaning of the text, in its context and in light of its object and purpose, including reference to the *Travaux Préparatoires* as a supplementary means of interpretation.[480] This analysis provides the justification for my argument that Article 10(1) is correctly read as a dye that washes over the substantive provisions of ICESCR, colouring them with the requirement that families as group units (understood in their vulnerable-caring conception) be accorded the widest possible protection and assistance in the realisation of their economic, social and cultural rights.

In the remainder of the chapter, I examine the meaning of the phrase 'widest possible protection and assistance', the application of a capabilities approach to understanding states' obligations under Article 10(1), issues of parental responsibility considered in light of gender-based poverty, the question of justifiable limits to the right in Article 10(1), the effects of guarantees of non-discrimination and equality, and state obligations in relation to data, planning and monitoring. I conclude by explaining how, in Chapter 4, I delve into the practical application of Article 10(1) in relation to single-parent families, using the UK benefits case *R (DA)* as an illustrative case study of the consequences of a state's failure to observe its Article 10(1) obligations when developing policies that disproportionately affect single-parent families.

[480] VCLT Article 31-2.

3.2 The status of economic, social and cultural rights

Before embarking on an examination of states' obligations under ICESCR, it is necessary to address challenges to the legitimacy of such rights that have been posed since early in the process of the IBOR' drafting, including claims that economic, social and cultural rights suffer from a fatal indeterminacy or are mere policy prescriptions.

Early in the development of the UN human rights framework, reluctance on the part of developed capitalist states to expose themselves to international obligations that might impinge on their ability to set their own policies on economic and spending matters became apparent.[481] Humphrey's draft outline of the UDHR commenced with reference to Franklin D Roosevelt's four freedoms including the freedom from want, and contained many socio-economic provisions drawn from Latin American constitutionalism.[482] However, it was not long before attempts to give economic and social rights international legal force became bogged down as a result of developed capitalist states' increasingly sceptical stance. Meanwhile, Soviet states vigorously promoted such rights. As emerging Cold War divisions rendered progress on a binding international convention on human rights difficult, Commission on Human Rights Chairman Eleanor Roosevelt took the strategic decision to separate the development of a universal declaration of rights from the drafting of legally binding covenants. The move allowed the UDHR to proceed quickly to adoption by the UNGA in 1948.

In contrast, the drafting of the ICCPR and ICESCR was only completed in 1954. The UNGA adopted the covenants in 1966 and they finally entered into force in 1976. States were slower to ratify ICESCR than the ICCPR, reflecting its more contentious

[481] Campbell, *Women* (n 34) 57.

[482] UNCHR, 'Draft Outline of International Bill of Rights (prepared by the Division of Human Rights)' E/CN4/AC1/3 (4 June 1947).

nature. Nevertheless, the current number of state parties to each covenant is not dissimilar: ICCPR has 173, whereas ICESCR has 170.[483] However, when it comes to giving the covenants' teeth, states continue to exhibit more wariness about ICESCR. Whereas the first Optional Protocol to the ICCPR, which allows individual communications to be made, was adopted alongside the ICCPR in 1966 and now has 116 state parties, the parallel Optional Protocol to ICESCR was not adopted until 2008, came into force in 2013 and only has 24 state parties.[484]

Much has been made of the fact that the USA has not ratified ICESCR. As the world's most powerful nation, US jurisprudence has a significant hegemonic effect on understandings of rights. However, most US legal writing is grounded in notions of rights drawn from US Constitutionalism rather than universal human rights.[485] Nevertheless, given the economic, military and cultural dominance of the USA, it is unsurprising that some scholars have viewed the non-acceptance of economic, social and cultural rights by that country as a blow to the legitimacy of such rights.[486]

Throughout the drafting process and thereafter, Soviet states led the charge on economic, social and cultural rights. Many Latin American states and a number of countries throwing off the shackles of colonialism also championed their importance. The eventual demise of the Soviet system in the 1990s risked taking economic, social and

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[483] OHCHR, 'Status of Ratification Interactive Dashboard' (UN, <https://indicators.ohchr.org/> accessed 31 March 2020.

[484] Ibid; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution (adopted 10 December 2008, entered into force 5 May 2013) A/RES/63/117 2009 ; Optional Protocol to the International Covenant on Civil and Political Rights (adopted 17 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[485] Michael Ignatieff, 'Introduction: American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton UP 2005) 14-17; Cass R Sunstein, 'American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton UP 2005).

[486] Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd edn, OUP 2008) 280-2.

cultural rights with it. Historians argue that the West's commitment to the idea of the welfare state and even weak notions of economic, social, and cultural rights only persisted to balance the appeal of the Soviet-style communist project. Once the threat of communism had been removed, there was no pressing need for Western states to retain such buffers, which allowed neoliberal capitalist ideologies to proceed largely unchecked.[487] Nevertheless, having come into force, the ICESRC legally binds states party.

Legal and philosophical arguments for economic, social and cultural rights to be given less status than civil and political rights include claims that they are 'second generation' rights and thus lower down a hierarchy. It has been suggested that they are inherently non-justiciable and merely aspirational. Concern has also been expressed that economic, social and cultural rights interfere with states' freedom to reach their own budgetary decisions. Critics argue this goes beyond the correct role of international human rights law, which is said to be solely to impose obligations of restraint on states. Such restraint obligations are styled as 'negative obligations' because they only limit what a state is allowed to do and do not impose duties of action. In contrast, it is claimed that positive obligations interfere with matters that are properly under the sole control of domestic state decision-makers as a matter of sovereignty and are, therefore, illegitimate. Civil and political rights, it is argued, impose only negative obligations and are thus rights in the true sense. Meanwhile, economic, social and cultural rights obligations are alleged

[487] Herbert Obinger and Carina Schmitt, 'Guns and Butter? Regime Competition and the Welfare State during the Cold War' (2011) 63 World Politics 246; Gary Gerstle, 'The Rise and Fall(?) of America's neoliberal order' (2018) 28 Transactions of the Royal Historical Society 241.

to be philosophically unsound and to suffer from fatal indeterminacy, incommensurability and radical disagreement. [488]

Since the 1990s, the UN human rights system and human rights scholars have thoroughly rebutted notions of economic, social and cultural rights lacking legitimacy or being of lesser status. The fallacy of arguments that there is a fundamental distinction between economic, social and cultural rights, on the one hand, and civil and political rights on the other has been exposed. Fredman, for example, argues that each right, whether economic, social and cultural, or civil and political, should be viewed as 'giving rise to a cluster of obligations' that can be analysed as duties to avoid, protect and aid.[489] These obligations include both positive and negative elements, and all three components are required of the state. Moreover, the incorporation of economic, social and cultural rights into the domestic law of states such as South Africa in a directly justiciable manner belies claims that they are too indeterminate to be justiciable.[490] Economic, social and cultural rights have also been found to be indirectly justiciable elsewhere.[491]

Most importantly, it is argued that the normative force of international human rights is what gives them greatest significance. As Fredman explains, '[n]orms are deontic modes, that is commands, prohibitions, or permissions' that frequently must be

[488] Fredman, *Transformed* (n 28) 65-71.

[489] ibid 69.

[490] Constitution of the Republic of South Africa (Act 108 of 1996)(SA) s 26-29; *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CCSA) [20-4 and 38]; Mirja Trilsch, 'What's the use of socio-economic rights in a constitution? - Taking a look at the South African experience' (2009) 42 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 552.

[491] Notably India; S Muralidhar, 'Judicial Enforcement of Economic and Social Rights: The Indian Scenario' in F Coomans (ed), *Justiciability of Economic, and Social Rights: Experiences from Domestic Systems* (Intersentia 2006).

weighed against each other.[492] Thus, positive obligations are correctly viewed as principles, a subset of norms that 'must be realized to the greatest extent possible given the legal and factual possibilities.' but which 'do not lose their *prima facie* binding force when they are outweighed in particular circumstances by other principles.'[493] Because both negative and positive rights are subject to limitations, the weighing-up process applies to both the positive and negative duties they entail. Nor is the positive and negative distinction robust. For example, the right to life found in Article 6(1) of the ICCPR is not merely a negative right, and its fulfilment goes beyond civil and political matters. Fredman explains:

> [T]he right to life is not genuine unless it can be exercised by the rights-bearer. This necessarily includes the right not to die of preventable causes, such as starvation, exposure, or reasonably avoidable illnesses, which in turn gives rise to a range of positive duties on the State. The result is a substantial overlap with socio-economic rights to food, health care, and shelter.[494]

Thus, economic, social and cultural rights and civil and political rights are connected in fact, as well as theory and both impose positive and negative obligations on the state. The fact that civil and political rights may impose positive economic, social and cultural obligations on the state has been recognised by domestic and regional jurisdictions including India, the UK and Europe.[495] Conversely, it has been held that socio-economic rights may impose negative obligations on the state.[496]

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[492] Fredman, *Transformed* (n 28) 72 footnote 22.

[493] ibid 72.

[494] ibid 67.

[495] ibid 67-8; Ssenyonjo (n 45) 187-8; Lee Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection' (2010) 8 Northwestern JIHR.

[496] *Grootboom* (n 490).

3.3 Interpretive frameworks and ICESCR

3.3.1 Subchapter introduction

In this subchapter, I introduce frameworks to assist with interpreting and giving effect to economic, social and cultural rights. I first outline the importance and challenge of the VDPA's affirmation that 'All human rights are universal, indivisible and interdependent and interrelated.'[497] Noting the complexity of the rights in ICESCR and the contexts in which they are to be fulfilled, I introduce the notion of 'wicked problems' and additional tools to support interpretive frameworks in this area.[498] Thereafter, I consider the particular contribution of capabilities approaches to understanding poverty as a matter of human rights in the context of ICESCR.

3.3.2 Universal, indivisible, interdependent and interrelated

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with equal emphasis.[499]

The concept of 'universal' in the VDPA has two aspects. First, it denotes that human rights pertain universally to all people. Second, it claims that human rights are based on a common understanding of values that can be agreed to universally across societies. The validity of both aspects of universality is contested. For example, the existence of conventions protecting the rights of specific categories of people, such as women or children, is sometimes said to undermine the notion of human rights as universally applicable. Further, some writers and governments from the Global South have argued that human rights law is grounded in Western modes of thought to the exclusion of other

[497] A/CONF57/23 (n 33) [5].

[498] Rittel and Webber (n 147).

[499] A/CONF57/23 (n 33) [5].

paradigms, although others reject this view.[500] It is beyond the scope of this thesis to resolve these debates. Rather, I take the approach that given the UN human rights framework's claims of universality, it is incumbent on those engaging with it to do so in ways that are in accord with that claim.

The reference to indivisibility in the VDPA re-emphasises that states party may not pick and choose among rights. Nor is it possible to sever certain categories of rights from the body of international human rights as a whole. The notion of indivisibility was present at the beginnings of drafting the IBOR. The UDHR, which stands as the overarching normative instrument of the UN human rights project, articulates both civil and political, and economic, social and cultural rights, as well as individual and group rights. Despite the splitting of IBOR into separate documents, the conceptual indivisibility has remained.

One reason why human rights are indivisible is that they are interdependent. The Preambles to ICESCR and ICCPR affirm as much. Subsequent preambles to UN human rights treaties typically recall the interrelationship between the rights they articulate and existing human rights instruments.[501] The VDPA's insistence on human rights' interdependence and interrelationship points to the need for an interconnected interpretive framework for understanding and implementing human rights. However, the universality, indivisibility, interdependence and interrelationship of rights also complicate their implementation. These complexities are particularly apparent when economic, social and cultural rights are considered. Economies, societies and cultures are complex interlocking

[500] Philip Alston and Ryan Goodman, *International human rights: the successor to international human rights in context: laws, politics and morals: text and materials* (OUP 2012) 475-665; Mikaere 'Seeing' (n 193); Relis (n 27).

[501] Eg, CEDAW, CRC.

systems. They are also inextricably intertwined with civil and political systems. In this context, addressing separate rights in an atomised decontextualized manner imposes artificial abstraction and leads to fragmented, inconsistent and perverse outcomes. Moreover, the weighing of rights against each other, and against other permitted considerations such as the maximum available resources, requires a whole-of-system approach to interpretation.

As I explained in subchapter 1.9.2, an evolutionary and comparative approach is to be taken to interpretating human rights treaties.[502] This allows use to be made of developments in thinking, research and technology. Where the object and purpose of a treaty indicate it, and the evolution of an interconnected interpretation is consistent with the terms of the text, it is not only acceptable but mandated by the VDPA to go beyond narrow single-article interpretations and adopt an interconnected interpretive framework.. Yet, without appropriate tools, to hold that everything is important and interconnected risks creating a conceptual mush and derailing implementation. The concept of 'wicked problems', drawn from public policy design, encapsulates the difficulties and suggests a way forward.

Wicked problems can be defined as social or cultural problems that are difficult or impossible to solve due to:

> [I]ncomplete or contradictory knowledge, the number of people and opinions involved, the large economic burden, and the interconnected nature of these problems with other problems'.[503]

Such problems are necessarily ill-defined, open-ended and contain moral and political dimensions. They defy solutions based on mechanistic tools of policy or programme

[502] CESCR, 'General Comment No 4: The Rights to Adequate Housing (Art 11(1) of the Covenant)' (adopted 13 December 1991) E/1992/23; Campbell, *Women* (n 34) 74.

[503] Austin Center for Design, 'Wicked Problems: Problems Worth Solving' (Austin Center for Design, <https://www.wickedproblems.com/read.php> accessed 20/08/2020.

design, or doctrinal legalism. Addressing wicked problems requires sophisticated tools and frameworks, many of which were not available at the commencement of the modern human rights era. While legislation may be part of a solution, it is never the end point.

> In coining the term, Rittel and Webber explain:
>
> > The formulation of a wicked problem *is* the problem! The process of formulating the problem and conceiving a re-solution are identical, since every specification of the problem is a specification of the direction in which a treatment is considered.[504]

Transdisciplinary expertise and multi-systems tools such as systems analysis, systems dynamics, theories of change and computational modelling can be used to assist with the attendant complexities.[505] In response to the ambiguous, political and contested nature of wicked problems which defy singular definitive formulations, template responses and testable scientific solutions, the aim is to find 'tractable ways to improve a situation'.[506] Poverty is an archetypal example.[507]

International human rights law responds to the moral and political dimensions of wicked problem resolution by stipulating universal parameters which affect the calculus of 'action-prospects' available to the state in addressing the problem.[508] Despite the legal duties on states to fulfil their treaty obligations, it is appropriate that the manner in which they do so is not prescribed, not only as a matter of sovereignty but also because wicked problems never have definitive solutions: their resolution is partial and contextual. Thus,

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[504] Rittel and Webber (n 147) 162.

[505] ibid 156-9; Paul Brest, 'The Power of Theories of Change' (2010) 8 Stanford Social Innovation Review 46; Nigel Gilbert and others, 'Computational Modelling of Public Policy: Reflections on Practice' (2018) 21 Journal of Artificial Societies and Social Simulation 14.

[506] Rittel and Webber (n 147) 160-7.

[507] ibid 161; see subchapter 3.3.3.

[508] ibid 166.

the realisation of ICESCR rights is subject to limitations including the maximum extent of a state's available resources.[509]

3.3.3 The contribution of capabilities approaches to understanding poverty and human rights

> Poverty is always capable of being constructed as an act of deliberate intervention by the State: it is the legal regime which creates property rights and protects them from theft and invasion.[510]

As Sen succinctly states, 'Starvation deaths can reflect legality with a vengeance.'[511] People are hungry because the law prevents them from eating food belonging to another. Property law prevents the homeless from building shelters on another's land.[512] In this section, I look at poverty and economic, social and cultural rights, and consider the contribution of capabilities approaches, which are based on the notion of '[h]aving, loving, being',[513] to understanding poverty in the context of the interdependent and indivisible nature of human rights.

UN human rights bodies' framing of poverty as a matter of economic, social and cultural rights has evolved with the adoption of increasingly sophisticated conceptual tools. In 2001, CESCR adopted a statement on poverty and ICESCR. Recognising that the UDHR established that poverty is a human rights issue, that this had been reaffirmed subsequently by UN bodies and that 'poverty is one of the recurring themes of the Covenant and has been one of the central concerns of the Committee', CESCR took 'the

[509] ICESCR Article 2(1); see subchapter 3.5.4.

[510] Fredman, *Transformed* (n 28) 12.

[511] Amartya Sen, *Poverty and Famines: An Essay on Entitlements and Deprivation* (Clarendon Press 1981) 166.

[512] Fredman, *Transformed* (n 28) 12.

[513] Erik Allardt, 'Having, Loving, Being: An Alternative to the Swedish Model of Welfare Research' in Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Clarendon Press 1993).

firm view that poverty constitutes a denial of human rights.'[514] It stressed that poverty exists in developed states as well as in developing and transitional societies.[515] Moving beyond traditional basket-of-goods income-based definitions of poverty, the statement observes that poverty is now understood 'as the lack of basic capabilities to live in dignity'[516] thus affirming a capabilities-based definition of poverty which encompasses features such as discrimination, vulnerability and social exclusion.

Capabilities approaches view poverty not merely as a shortage of income, nor even a shortage of wealth or insufficiency in one's bundle of material resources, but rather as 'capability deprivation.'[517] Sen provides three reasons for this. First, capabilities deprivation is intrinsically important (as distinct from low income, which can only be instrumentally significant). Second, other influences, in addition to low income, contribute significantly to capability deprivation. Third, the relationship between low income and low capability varies between and within communities, and even families. As Sen writes, 'the impact of income on capabilities is contingent and conditional'.[518] This third point acknowledges the impacts of age, (dis)ability, maternity, caregiving, and gendered labour markets, as well as the significance of relative financial deprivation.[519]

[514] CESCR, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights' E/C12/2001/10 [1].

[515] ibid [5].

[516] ibid [7].

[517] Sen, *Development* (n 105) 72-74, 87.

[518] ibid 87-88.

[519] E/C12/2001/10 (n 514).

Capabilities approaches incorporate the recognition that as social beings, humans 'can only fully realize our human rights through social co-operation'.[520]

Theorists have differed in their interpretation of certain core concepts of capabilities approaches and the emphasis they place on each. For example, Sen, an economist, emphasises comparative measures for the quality of life. He argues that the focus of evaluation should be on 'the substantive freedoms – the capabilities – to choose a life one has reason to value.'[521] Thus, a person with agency can act and bring about change. Achievements or functionings are to be judged on in terms of the person's own values and objectives regardless of whether external criteria are also applied. Valued functionings, in Sen's account, 'vary from elementary ones, such as being adequately nourished and free from avoidable disease to complex activities or personal states, such as being able to take part in the life of the community and having self-respect.'[522] Importantly, both are measurable.

Meanwhile, Nussbaum describes her approach to capabilities as seeking to articulate 'the philosophical underpinning for an account of core human entitlements that should be respected and implemented by the governments of all nations, as a bare minimum of what respect for human dignity requires.'[523] In her analysis, a theory of justice must help humans resolve issues in situations of asymmetric power, as well as those in which people similarly situated, and must be applicable beyond conditions of

[520] Fredman, *Transformed* (n 28) 3.

[521] Sen, *Development* (n 105) 74.

[522] ibid 75, citation omitted.

[523] Nussbaum (n 192) 70.

moderate scarcity.[524] The liberal Rawlsian idea of the social contract between free and independent individuals of roughly equal bargaining power in the context of an external aggressor and moderate scarcity of resources fails because it excludes or explicitly defers grappling with extremely important social justice issues 'about the allocation of care, the labor involved in caring, and the social costs of promoting the fuller inclusion of disabled citizens'. [525] In contrast, Nussbaum stresses that capabilities approaches include as central to the justice calculus those who 'are markedly unequal to others in their productive contribution or who live in a condition of asymmetrical dependency'.[526] Rather than grounding human rights, dignity or functionings solely in rationality (as Kantians do), she draws on Aristotle and Marx to argue that the corporal, temporal and relational aspects of human 'being' are essential parts of human dignity and flourishing aligned to human's innate desires to find fulfilment in living together well in accordance with justice.[527] Thus, unlike the reification of autonomy in classical liberalism, the concept of agency in capabilities approaches:

> [E]nvisages human beings as cooperating out of a wide range of motives, including the love of justice itself, and prominently including a moralized compassion for those who have less than they need to lead decent and dignified lives. [528]

As a consequence, 'the account of the benefits and aims of social cooperation is moralized, and socialized, from the very start.'[529] Nussbaum's capabilities approach has

[524] ibid 86.

[525] ibid 31.

[526] ibid 33.

[527] ibid 85-6.

[528] ibid 156.

[529] ibid 156.

had much to offer to feminist understandings of care ethics and vulnerability theory. It also offers much to international human rights law, including to the interpretation of ICESCR Article 10(1).

CESCR's statement on poverty holds that 'the common theme underlying poor people's experiences is one of powerlessness' and that connecting the powerless with the empowering potential of human rights can 'help equalise the distribution of power within and between societies.'[530] It asserts that the international human rights normative framework offers the means to bring essential elements into strategies to address poverty.[531] International norms of non-discrimination and equality are integral because of the mutually reinforcing nature of discrimination and poverty and the deep entrenchment of inequalities within institutions, societies, households and communities.[532] The active and informed participation of marginalised groups and their members in the formulation of policies and programmes is both a matter of rights and necessary for effectiveness.[533] Furthermore, accountability is essential. The removal of constraints and facilitation of agency are duties on states whose obligations in this regard are articulated in ICESCR and other UN human rights conventions. CESCR emphasises that states and other duty-holders must be held accountable for fulfilling their legal obligations to people in poverty. This includes fulfilling non-derogable minimum core obligations immediately and moving towards full ICESCR rights realisation 'as expeditiously and effectively as possible'.[534] Developing effective, sustainable, inclusive and equitable policies that are

[530] E/C12/2001/10 (n 514) [6].

[531] ibid [9].

[532] ibid [11].

[533] ibid [12].

[534] ibid [18].

meaningful to impoverished people requires all relevant policy-making processes to take the international human rights normative framework into account. This requires 'appropriately trained officials operating good processes that are informed by reliable, disaggregated data.'[535]

CESCR has continued the application of a capabilities approach to poverty in its subsequent practice and comments. For example, in CESCR General Comment 19 on the right to social security, states are reminded of their obligations to 'pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination',[536] the 'fundamental importance of social security for human dignity' and their legal obligations.[537] The General Comment draws attention to connections between social security and rights to an adequate standard of living, and the enjoyment of the highest attainable standards of health, as well as the families rights in Article 10.[538] CESCR suggests that the range of appropriate measures a state should adopt to implement its obligations is broad, and should be selected by the state to meet its specific circumstances.[539] In addition to respecting states' margin of discretion, this guidance is appropriate given the nature of socio-economic matters as wicked problems that defy template solutions, and the capabilities view that requires solutions to be relevant to their intended beneficiaries, especially the most marginalised. CESCR reminds states that a failure to act in good faith in the fulfilment of their obligations –

[535] ibid [13].

[536] CESCR, 'General Comment No 19: The right to social security (art 9)' (adopted 4 February 2008) E/C12/GC/19 [22].

[537] ibid [41].

[538] ibid [40].

[539] ibid [66] citation omitted.

whether through taking insufficient appropriate action to realise the right (acts of omission), or through the adoption of deliberately retrogressive measures that are incompatible with core obligations (acts of commission) – is a violation of international law.[540]

A scan of fifteen CESCR Concluding Observations for the period 2016-2023 revealed a frequent focus on poverty, particularly in relation to disadvantaged and marginalised groups. Observations and recommendations on poverty were found in the Concluding Observations for Armenia, Chad, Kenya, Sri Lanka and the UK[541] but were missing from other Concluding Observations, such as those for New Zealand and South Korea.[542]

3.3.4 Subchapter conclusion

The VDPA affirms that human rights are universal, indivisible, interdependent and interrelated.[543] However, paying due heed to this statement in relation to any particular right requires grappling with significant complexities. Suitable tools and frameworks are needed for the task. In this subchapter, I suggested that the notion of 'wicked problems' from policy design is helpful to confront the complexity and ambiguity of economic,

[540] ibid [61-5].

[541] CESCR, 'Concluding observations on the fourth periodic report of Armenia' (14/11/2024) E/C12/ARM/CO/4; CESCR, 'Concluding observations on the fourth periodic report of Chad' (30 October 2023) E/C12/TCD/CO/4 [35-6]; CESCR, 'Concluding observations on the combined second to fifth periodic reports of Kenya' (06/04/2016) E/C12/KEN/CO/2-5 [40-1]; CESCR, 'Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland' (14/07/2016) E/C12/GBR/CO/6 [47-8]; CESCR, 'Concluding observations on the fifth periodic report of Sri Lanka' (04/08/2017) E/C12/LKA/CO/5.

[542] CESCR, 'Concluding observations on the fourth periodic report of New Zealand' (01/05/2018) E/C12/NZL/CO/4; CESCR, 'Concluding observations on the fourth periodic report of the Republic of Korea' (19/10/2024) E/C12/KOR/CO/4.

[543] A/CONF57/23 (n 33) [5].

social and cultural rights and help navigate approaches to implementation.[544] Thereafter, I considered the contribution of capabilities approaches to interpreting economic, social and cultural rights, particularly in relation to poverty. I outlined key elements of capabilities approaches and discussed how CESCR has adopted them as the basis for its interpretive framework.

I return to these points in subchapter 3.6, when I address the duties on the state under ICESCR Article 10(1) as they pertain to single-parent families. But first, I consider two further key aspects of states' general ICESCR obligations. In subchapter 3.4, I examine states' non-discrimination and equality obligations. The scope, timing (including obligations of non-regression) and measurement of states' obligations are covered in subchapter 3.5.

3.4 Equality and non-discrimination

3.4.1 Subchapter Introduction

In my introductory chapter, I introduced ideas of equality and non-discrimination in relation to the rationale for focusing on single-parent families. In subchapter 2.5, I developed my argument that single-parent families constitute outgroups protected by non-discrimination and equality provisions. I also argued that single parents, single mothers and children within single-parent families constitute protected categories in relation to their individual rights. I now turn to an examination of the non-discrimination and equality guarantees in ICESCR from the point of view of the obligations they place on states.

Under ICESCR Article 2(2), states guarantee that the rights contained in the convention will be 'exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or

[544] Rittel and Webber (n 147).

other status'. Under Article 3, states 'undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights' set out in ICESCR. What do 'without discrimination' and 'the equal right to' mean? To answer, we need to understand the concepts of formal equality, direct discrimination and indirect discrimination on the one hand and substantive equality on the other. I set these out in subchapters 3.4.2 and 3.4.3. In subchapter 3.4.4, I consider how state compliance with equality and non-discrimination obligations can be monitored in practice.

3.4.2 Formal equality, and direct and indirect discrimination

The most limited but widely understood approach to non-discrimination and equality is grounded in formal equality, based on the Aristotelian principle of treating like cases alike and different cases differently.[545] CESCR defines formal gender equality as 'neutrality between men and women'.[546] Direct discrimination occurs when a law or policy explicitly excludes a person or treats them less well on the basis of their membership in a protected group. However, often, discrimination is not explicit. Therefore, a large number of cases have been concerned with indirect discrimination. These are situations in which it is argued that a policy or procedure results in members of a protected group being, in fact, treated less favourably than others despite the absence of an explicit discriminatory intent. Challenging indirect discrimination generally requires a plaintiff to find an appropriate comparator group—the so-called 'neutral comparator'—who can be shown to be treated better in the particular or essentially similar situation to the group alleged to be discriminated against. In other words, it must be shown that a group of people who are identical in all material characteristics but for their membership

[545] Fredman, *Discrimination* (n 45) 8.

[546] E/C12/2005/4 (n 417) [7].

of the protected group is treated better than protected group members.[547] For example, claims of gender discrimination based on fitness barriers that, in effect, prevented women from becoming firefighters while enabling men have succeeded.[548]

However, limiting the meaning of discrimination to direct and indirect discrimination raises problems. As Lady Hale observed in the *AL (Serbia) v Secretary of State for the Home Department*, the search for a comparator can be 'an arid exercise'.[549] There may not be an appropriate comparator to refer to. For example women's reproductive capabilities have been held to mean that they are not 'like' men and, therefore, not entitled to equal treatment.[550] Thus, women's rights relating to pregnancy, maternity and breastfeeding have gone unrecognised in some domestic courts due to the absence of a male comparator. The neutral comparator approach cannot adequately deal with the complexities of real life is because, as Campbell explains, it penalises divergence from the dominant norm:

> Comparisons when linked to consistent equal treatment actually require conformity to the comparator, which in the case of women requires conformity to the male norm. This in turn devalues difference, can result in exclusion, and does little to address the misrecognition harms.[551]

Conceptualisation of discrimination as solely a requirement to treat like categories alike regard differences from the dominant group as problems, instead of part of legitimate and inevitable expressions of diversity, the acceptance and protection of which is integral to

[547] Fredman, *Discrimination* (n 45) 8-14.

[548] Eg, *British Columbia (Public Service Employee Relations Commission) v BCGSEU* [1999] 3 SCR 3.

[549] *AL (Serbia) v Secretary of State for the Home Department* UKLH 42 [2008][28].

[550] Fredman, *Discrimination* (n 45) 169-72.

[551] Campbell, *Women* (n 34) 91, citation omitted.

respect from human dignity.[552] Moreover, no sound basis exists for deciding when one is alike or not alike.

Furthermore, by ignoring group identities and implying that individual fault or choice is the only reason for liability, structural and collective causes of discrimination and inequality are left untouched in these approaches. Thus, Fredman argues that 'equality as consistency is intensely individualistic'[553] and fails to address significant redistribution harms. The impact of gendered occupational segregation on women is one example of this: the absence of a male comparator, combined with the inability of the law to direct third-party solutions, such as requiring that childcare be provided by the state or another third party, prevents progress. Such cases cannot tackle the structural undervaluation of work traditionally assigned to women, the absence of pay or recognition for childcare work, or constraints such as the irregular hours of work and an absence of formal childcare that limit many women's opportunities to take up a full range of positions in the labour market.

As Campbell writes, 'The almost exclusive responsibility for childcare means many women have no choice but to accept low-paid and precarious informal and part-time work.' [554] For single mothers, this strain is intensified by the absence of a second adult to carry responsibility for children's parenting. The gendered attribution of childcare responsibilities within a two-parent family may put a partnered mother in a position of full or partial derivative dependency on her husband, but for the single mother, no such option exists. Even where governments put in place systems designed to require the second parent to pay child support, these routinely underestimate the true

[552] Fredman, *Discrimination* (n 45) 10.

[553] ibid 13.

[554] Campbell, *Women* (n 34) 96.

financial costs of raising children, do not allocate any value to the time single parents spend on parenting, do not take account of the opportunity costs imposed by full responsibility for children and often lack effective enforcement. Although extended family arrangements can, in some cases, mitigate these effects; generally, such arrangements are not legally enforceable or supported by government laws and policies (even in cases where law and policy effectively rely on the assumption of them being accessible). Moreover, extended family relationships may impose additional burdens on single-parent families by requiring reciprocity in exchange for support or imposing additional gendered expectations of unpaid care and domestic work on the single mother or her children. A formal equality approach fails to break these cycles of discrimination and inequality or address the social structures that perpetuate them.

The realities of life for single-parent families have been addressed by the UKSC in *R (SG)* and *R (DA).*[555] The UKSC in *R (DA)* spent time analysing the appropriate comparator for the respondent groups, which were mothers of children under five and their children, as well as mothers under two and their children. [556] The analysis included observing that, as well as being required to treat like categories alike, discrimination occurs when the state, '"without an objective and reasonable justification"', fails to treat people in significantly different situations differently.[557] I analyse this case in detail in Chapter 4.

Formal equality is also an inadequate framework for addressing the rights of children within single-parent families, even more so than for children generally. Numerous examples exist of children's rights being limited in a formal sense. Despite the

[555] *R (SG)* (n 449); *R (DA)* (n 53).

[556] *R (DA)* (n 53) [46-51] (Lord Wilson), [108] (Lord Carnwath), [134] (Lady Hale).

[557] ibid [105], citing *Thlimmenos v Greece* Application no 34369/97 (ECtHR) [44].

arguments of some child autonomy theorists, some are limitations justifiable on the basis of children's stages of development and their need for protection. For example, children are subject to care and control by their parents in all but defined circumstances; children are not allowed to engage freely in the labour market nor enter binding contracts; they are legally required to attend school; and, even if a child were to demonstrate that she could pass a driving test, she would not be entitled to a license to drive on public roads while below the permitted age.

An additional problem with formal equality arises from the fact that 'like' treatment can be achieved by reducing the rights of the better-off class (for example, men) to match those of the worse-off (for example, women). However, such achievement of formal equality at the expense of enhanced rights across the board is disallowed by ICESCR Article 2(1)'s requirement of progressive realisation, which the CESCR has explained, precludes retrograde steps, except in very limited circumstances.[558]

Limiting the content of equality and non-discrimination guarantees to formal equality has particularly pernicious effects for those who experience more than one axis of oppression. As Crenshaw argues in her article coining the term 'intersectionality', victims of discrimination based on multiple axes may find themselves excluded from any remedy for the violation of their rights due to an inability to point to a singular neutral comparator.[559] In the US case of *DeGraffenreid v General Motors*, for example, black women factory workers failed to win redress for the discrimination they suffered as black women because the employer could point to both white women and black men who did

[558] E/1991/23 (n 149) [9]; E/C12/2005/4 (n 149) [16].

[559] Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Legal Theory and Antiracist Politics' (1989) 140 The University of Chicago Legal Forum 139.

not experience similar discrimination.[560] Because the black women workers were not able to show that they were discriminated against as women (white women were not discriminated against in the same way), nor as Afro-Americans (black men were also not discriminated against in the same way), their case failed. The implications of intersectional discrimination for the realisation of the economic, social and cultural rights of single-parent families are immense. Not only does the dual discrimination against, and inequality of women and children coalesce in the single-parent family, but single-parent families disproportionately experience other axes of discrimination against their individual members and against them as families. Intersectional discrimination involving race, disability, and socio-economic status affects single-parent families disproportionately.[561] The stereotype of the black welfare queen in popular and political US discourse is a pernicious example of such intersectional discrimination.

Since the drafting of IBOR, developments in understandings of non-discrimination and equality have moved beyond the limits of solely formal conceptions of the terms. An evolutionary approach to treaty interpretation allows us to access these to aid analysis. As a result, we now have the language and knowledge to give the terms their fuller, more rational meanings. Whereas formal equality represents a negative obligation—merely requiring the state to refrain from discriminatory action—our understanding of non-discrimination and equality has evolved to include substantive conceptions of equality and the need for positive state action.

3.4.3 Substantive equality

In contrast to the formal conception of equality, Fredman writes that a substantive conception of equality:

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[560] *DeGraffenreid v General Motors Assembly Div, etc* 413 F Supp 142 (ED Mo 1976).

[561] Stats NZ (n 106).

> places a duty on the State to pay particular attention to those who are not in a position to exercise their rights to the full, even if this entails supplying more resources or providing greater facilitation for these individuals than for others not in the same category.[562]

This conception applies both to civil and political rights, and to economic, social and cultural rights. In comparison to approaches grounded in formal equality, substantive equality is multi-faceted. It might be conceptualised as 'equality of results, equality of opportunity, dignity, and transformative equality.'[563] However, the concept requires boundaries. For example, equality of results, taken at face value, negate essential values of autonomy and agency.[564] Further, distributive justice is not the only concern of anti-discrimination law: psychic tolls imposed on outgroups through the denial and denigration of marginalised identities must also be addressed.[565] In contrast to the over-reach of equality of results, the idea of equality of opportunity may be framed too narrowly. For example, the replacement of word-of-mouth recruitment with more widely disseminated job advertisements might be a procedural equal opportunities strategy. However, without concern for whether members of the disadvantaged group can take advantage of the opportunities advertised, the results may be slim.

The framework proposed by Fredman in D*iscrimination Law* overcomes these problems. Her model proposes that equality and non-discrimination, understood as obligations to substantive equality, consist of four overlapping dimensions: a distributive dimension, a recognition dimension, a transformative dimension and a participative

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[562] Fredman, *Transformed* (n 28) 3.

[563] Campbell, *Women* (n 34) 94.

[564] Fredman, *Discrimination* (n 45) 16. This is not to say autonomy and agency trump other concerns. See subchapter 2.2.

[565] ibid 16.

dimension.[566] It has been influential with bodies such as CESCR and UN Women and in academic discourse, thus moving towards the kind of shared understanding among international bodies, states and academics which is an important means of developing public international law.[567] Fredman's framework adopts and expands Fraser's social justice paradigm which, by recognising both (mal)distribution and (mis)recognition harms, had bridged a gap between theories of discrimination rooted in materialist conceptions of equality (such as 'vulgar' Marxist analysis) and post-structural insistence on the centrality of identity.[568]

To Fraser, (mal)distribution harms involve economic deprivations emanating from societies' economic structures, while (mis)recognition harms manifest in cultural domination, non-recognition and disrespect. The remedy for the former requires structural changes that address economic root causes, whereas the remedy for the latter lies in a re-evaluation of disrespected identities and the positive valorisation of cultural diversity. Outgroups typically suffer both dimensions of subordination. Both maldistribution and misrecognition harms are primary, yet have synergistic effects on each other.[569]

Applying Fraser's social justice paradigm to the case of single-parent families, the failure of states to create socio-economic systems to support dependents and derivative dependents adequately coupled with their failure to address gendered labour market and wealth inequalities, results in single-parent families suffering redistribution harms. At the

[566] ibid 25.

[567] UN Women, *Progress of the World's Women 2015-2016: Transforming Economies, Realizing Rights* (UN 2015)27-28; Statute of the International Court of Justice 1946 UN Article 38(1)(d); Hugh Thirlway, 'The Sources of International Law' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 104-7.

[568] Fraser; Nancy Fraser, 'Rethinking Recognition' (2000) 3 New Left Review 107, 111.

[569] Fraser, 'Social Justice' (n 477); Campbell, *Women* (n 34) 13-4.

same time, the routine stigmatisation suffered by single-parent families constitutes misrecognition harm. Single-parent families are regularly labelled broken, deviant or invalid, even by those who purport to help them. The parenting of children in such families is often seen as suspect. Time spent engaged in single-parenting is routinely dismissed as being of no importance, even compared to the typically less arduous burden carried by mothers in two-parent families. Children in such families are frequently assumed to be failures or 'at risk'. Their families may be subject to extra state monitoring and sanctions.[570] The two types of harms operate synergistically to marginalise single-parent families and violate their economic, social and cultural rights.

This is not accidental. Societies maintain patriarchal structures of power and control by making it clear that poverty and stigmatisation face those who depart from the norm. It is an example of what Marks refers to as 'planned misery' which 'denotes the necessary suffering of those dispossessed, exploited and oppressed today'.[571] As Marks explains, '[s]uch misery has beneficiaries who (directly or indirectly) live off the practices and processes that victimise others.'[572] Recognising the non-accidental nature of planned misery allows us to better understand 'how deprivation and privilege interrelate' and to focus on material explanations 'that account for phenomena not only in terms of the ideas informing them, but also in terms of their connection to the processes of social production'[573] and, to social reproduction. This is important because, in addition to a focus on ideas, 'if we are fully to understand a situation, it is also important to delve

[570] Eg reductions in state transfers, compulsory training to addressed presumed parenting and/or labour market attachment deficits, and criminal justice sanctions.

[571] Susan Marks, 'Human Rights and Root Causes' (2011) 74 MLR 57, 76.

[572] ibid 76.

[573] ibid 76.

deeper and ask about the socio-economic conditions within which these ideas were able to develop and gain influence.'[574]

Thus, in relation to single-parent families, it is vital to realise that the far-reaching rights violations suffered worldwide are not a matter of mere chance but rather serve to maintain patriarchal hegemonies by ensuring that women know that departing from marital-patriarchal norms gravely jeopardises not only their own but also their children's reputational, psychic and material existence. It also serves to alert men as husbands, impregnators and fathers to their expansive bargaining power in relation to the women with whom they create children. This assists in maintaining a situation where, even in marital relationships, women's care work and the derivative dependency that arises therefrom can be invisiblised, labelled a matter of only private importance, and dismissed as a matter of women's personal preferences and individual choices. Such a framing allows structural considerations to go unchallenged. Understanding that the human rights violations suffered by single-parent families are not random but rather stem from structures enabled by the state that maintain men's advantage at the expense of women and children strengthens the case that the state has positive duties to rectify these conditions as part of the aspiration of CEDAW to eliminate gender-based discrimination. These are in addition to obligations under ICESCR Article 10(1) read in light of the non-discrimination and equality guarantees found in Articles 2(2) and 3.

In Fredman's four-dimensional reconceptualisation of Fraser's model, the first dimension, redistribution, aims to break the cycle of disadvantage associated with out-group status. The second dimension, recognition aims to 'promote respect for dignity and worth, redressing stigma, stereotyping, humiliation, and violence because of membership

[574] ibid 76.

of an identity group.'[575] It includes an understanding that equality is undermined by government policies that stigmatise members of a discriminated-against group or treat them as having less inherent worth. In the field of social assistance this may include providing benefits only to males as the assumed heads of households or making benefit payments to mothers conditional on state intrusion into their child-rearing methods or their private and sexual lives.[576] This dimension of (in)equality echoes Fraser's conceptualisation of (mis)recognition harms as harms that manifest in cultural domination, non-recognition and disrespect.[577]

The third dimension of Fredman's model, transformative equality, encompasses Cusack and Pusey's two-pronged approach to equality as involving both the transformation of 'institutes, systems and structures that cause or perpetuate discrimination' and 'the modification or transformation of harmful norms, prejudices and stereotypes'.[578] Significantly, this dimension requires that conformity is not imposed as a price of equality. Instead structural change should occur to accommodate difference. Causes of both (mal)distribution and (mis)recognition harms must be transformed. Thus, the transformative dimension entails fundamental structural change to society including its social, political, economic, cultural religious and even international relations aspects.

It might be suggested that the transformational dimension is too nebulous a concept to function as a legal or monitorable criterion. Conversely, the radical transformation needed to deliver equality might push accepted notions of state

[575] Fredman, *Discrimination* (n 45) 25.

[576] Campbell, *Women* (n 34) 93.

[577] Fraser, 'Rethinking Recognition' 113-15.

[578] Simone Cusack and Lisa Pusey, 'CEDAW and the rights to non-discrimination and equality' (2013) 14 Melbourne JIL 54. 64.

sovereignty, freedom and majoritarian democracy beyond breaking point. Fears of such an outcome might generate reactionary counterforces that would threaten the legal and political legitimacy of non-discrimination rights in the economic, social and cultural arena. In turn, that could shatter the fragile convergence of interests committed to progressive change on the ground. However, abandoning the goal of transformative equality would mean conceding to structures that, intentionally or unintentionally, prevent equal realisation of economic, social, and cultural rights for outgroups. Such a concession would largely defeat the purpose of ICESCR and other economic, social and cultural rights measures. It is, therefore, essential to retain the transformative dimension as one of the interlocking dimensions of non-discrimination and inequality.

The final, participative dimension of equality and non-discrimination aims to 'facilitate full participation of outgroups in society, both socially and politically.'[579] In subchapters 2.5-2.6, I established that single-parent families and their members suffer from exclusion as outgroups. The lack of opportunities for single-parent families and their members to participate fully in society is an oft-overlooked aspect of the discrimination and inequality they face. Challenges to unjust situations are often avoided by excluding the oppressed from decision-making. Participation includes having a voice in all types of public, private, political, and social decision-making processes as an essential component of justice. To enable this, 'the distribution of material resources must be such as to ensure participants' independence and voice.' [580]

Within families, women are generally worse off economically than men which perpetuates imbalances of power that curtail women's participation in decision-making.

[579] Fredman, *Discrimination* (n 45) 25.

[580] Fraser, 'Social Justice ' (n 477).

While this is true within two-parent families, it also pertains to those single-parent families embedded in larger extended family structures, in which, for example, a grandfather, brother or uncle is regarded as the family or household head. In newly blended families, the female-headed single-parent family unit may be in a vulnerable situation compared to a male partner and those considered to be more directly 'his' family. Social security systems in which a single parent loses her eligibility for independent social welfare assistance as soon as the state deems her to have formed a new relationship exacerbate such inequalities.[581] Single mothers' ability to engage as equals with their children's fathers in discussions relating to parenting and other matters may also be limited by the need to maintain conciliatory and subordinate postures or face consequences such as the cutting of child support, being made the subject of allegations of illegal activity, facing litigation abuse, or being physically or sexually assaulted.

In the public sphere, single-parent families' participation in discourse and decision-making is restricted by a lack of childcare, time and resource poverty, and stigma.[582] Even where a state ensures that accessible, affordable, quality childcare is provided, it is usually limited to enabling single parents to engage in paid employment or vocational training. Thus, single parents' sole responsibility for the nurturing, care and supervision of children presents an often-insurmountable barrier to engagement in civic life. Opposition to the presence of children in civic life exacerbates this.

Meanwhile, children in general suffer from participation harms. Their views and experiences are routinely ignored. Children in single-parent families may suffer

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[581] Welfare Expert Advisory Group, *Whakamana Tāngata: Restoring dignity to social security in New Zealand* (Welfare Expert Advisory Group 2019) 113; Daphne Barak-Erez, 'Social Rights as Women's Rights' in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007) 405.

[582] Eg *Ruka* (n 52).

additional restrictions on participation because of the stigmatisation of their families and having fewer resources to support participation. Time poverty may mean parents are not available to facilitate participation, and older children may be required to supervise younger siblings rather than participate in sporting, cultural or civic opportunities available to their peers.[583]

3.4.4 Interpreting and monitoring substantive equality in practice

UN bodies have taken up Fredman's four-dimensional model of equality to aid their understanding of equality and non-discrimination guarantees. For example, the UN Women's *Transforming Economies, Realizing Rights* report relies strongly on Fredman's conceptualisation of equality.[584]

Increasingly, tools are available to assist with monitoring states' substantive equality and non-discrimination obligations in practice. For example, the Human Rights Measurement Initiative (HRMI) provides tools for monitoring and reporting on individual states' implementation of their equality and non-discrimination obligations in comparison to others with similar levels of resources.[585] As such tools gain traction and are further developed, state reporting is likely to improve, and CESCR and other treaty bodies will become increasingly adept at assessing compliance.

3.4.5 Subchapter conclusion

In this subchapter, I investigated the meaning of equality and non-discrimination in ICESCR and considered the significance of these concepts in relation to states' obligations to single-parent families. I concluded that these terms are correctly

[583] Babe (n 109).

[584] UN Women (n 567).

[585] HRMI, 'Human Rights Measurement Initiative' (Human Rights Measurement Initiative, <https://humanrightsmeasurement.org/> accessed 06/12/2023.

understood to include substantive as well as formal equality and non-discrimination. I adopted Fredman's understanding of the obligations that guarantees of equality and non-discrimination impose on states, which has been influential in the thinking of UN human rights bodies. In this model, substantive equality involves four overlapping dimensions, namely distributive, recognition, transformative, and participative dimensions.[586] The insights of social justice theorists such as Fraser provide tools for understanding the multiple interleaving aspects of harms such as poverty, particularly the co-existence of (mal)distribution and (mis)recognition harms.[587] Meanwhile, Marks draws our attention to the non-accidental nature of such harms. Applied to single-parent families, we saw that (mal)distribution and (mis)recognition harms affect women and children within single-parent families as individuals and group units, and also that such harms serve a hegemonic purpose in maintaining patriarchal structures in which children's dependency and the derivative dependency women experience as their carers are deemed private inconsequential matters, or mere preferences. In contrast, the bargaining power of family patriarchs is bolstered. The interconnected analytical framework for interpreting economic, social and cultural rights informed by social justice theory, which has evolved within UN treaties bodies, provides tools to dig beneath such hegemonic narratives and demand that states take action to address disproportionate levels of violation of single-parent families' economic, social and cultural rights.

3.5 Additional aspects of ICESCR obligations

3.5.1 Subchapter introduction

In this subchapter, I outline additional aspects of states' obligations under ICECSR that are significant for our consideration of states obligations towards single-

[586] Fredman, *Discrimination* (n 45) 25.

[587] Fraser, 'Social Justice' (n 477).

parent families under Article 10(1). I draw particularly on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (a subsidiary means of interpretation) and CESCR General Comment 3 which corrects earlier misapprehensions about the nature of states' obligations.[588]

3.5.2 Obligations to respect, protect and fulfil

The Maastricht Guidelines set out the three types of obligations imposed on states in relation to human rights, namely to respect, protect and fulfil.[589] The Guidelines explain:

> The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. … The obligation to protect requires States to prevent violations of such rights by third parties. … The obligations to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights.[590]

States have both positive and negative obligations based on the duty to take 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant'[591] within a reasonably short time of becoming party to it. Each type of obligation contains obligations of conduct and obligations of result. The former require states to take 'action reasonably calculated to realize the enjoyment of a particular right', while the latter require '[s]tates to achieve specific targets to satisfy a detailed substantive standard.'[592] Moreover,

> A violation of economic, social and cultural rights occurs when a State pursues, by action of omission, a policy or practice which deliberately contravenes or

[588] ICJ, 'Maastricht' (n 149); E/1991/23 (n 149); Ssenyonjo (n 45) 52.

[589] E/1991/23 (n 149).

[590] ICJ, 'Maastricht' (n 149) [6]; see also E/1991/23 (n 149) [4-7].

[591] E/1991/23 (n 149) [2].

[592] ICJ, 'Maastricht' (n 149) [7].

ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result.[593]

3.5.3 Margin of appreciation

The margin of appreciation doctrine developed by the European Court of Human Rights (ECtHR) provides that a latitude of deference should be accorded to domestic authorities in deciding human rights matters. It is based on the longstanding principle that the power of regional and international courts is subsidiary.[594] Proportionality requires the weighing of the nature of the particular right against the aim of the contested measure in order to determine the extent of the deference to be given to the state.[595] In response to governments' and commentators' fear that giving full force to economic, social and cultural rights would impose runaway financial requirements on states, it is argued that the margin of appreciation must be particularly wide in this area. Under European Convention on Human Rights (ECHR) law, a government decision with budgetary implications must be shown to be 'manifestly without reasonable foundation' before courts may interfere.[596]

The Maastricht Guidelines, however, reflect the different test applicable to UN human rights treaties. Although states 'enjoy a margin of discretion in selecting the means for implementing their [ICESCR] obligations',[597] the burden falls on the state to demonstrate its 'measurable progress toward full realization of the rights in question.'[598]

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[593] ibid [11].

[594] Howard Charles Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (1987) 3 Connecticut JIL 111.

[595] Alston and Goodman (n 500) 946.

[596] *R (DA)* (n 53) [55-66].

[597] ICJ, 'Maastricht' (n 149) [8].

[598] ibid [8].

How states comply with treaty obligations is an internal matter for each state, provided the means chosen do not undermine or contravene other human rights obligations or defeat the object and purpose of the provision. Compliance does not depend upon nor require states' adherence to any particular kind of political or economic system. For example, the means of rights fulfilment chosen might be different in a parliamentary democracy, a communist state and a theocracy. Nor do a state's obligations require it to carry out all aspects of rights fulfilment itself.[599] The freedom to choose the means of fulfilling its duties rests with the state concerned. Nevertheless, states cannot 'justify derogations or limitations of rights … because of different social, religious and cultural backgrounds'[600] and 'the ultimate determination as to whether all appropriate measures have been taken remains one for [CESCR] to make.'[601]

3.5.4 Progressive realisation to the maximum of available resources

ICESCR recognises the particularly close association between realising economic, social and cultural rights and state budgets by introducing a qualification on how and when states must ensure citizens enjoy the substantive rights it contains. States must 'take steps … to the maximum of its available resources, with a view to achieving progressively the full realization' of ICESCR rights.'[602] In General Comment 3, CESCR reminds states that 'progressive realisation' is not to be 'misinterpreted as depriving the obligation of all meaningful content' but rather 'imposes an obligation to move as expeditiously and effectively as possible towards' the goal of rights realisation.[603] States are required to take

[599] Fredman, *Transformed* (n 28) 70.

[600] ICJ, 'Maastricht' (n 149) [8].

[601] E/1991/23 (n 149) [4].

[602] ICESCR Article 2(1).

[603] E/1991/23 (n 149) [9].

certain steps immediately and 'others as soon as possible.'[604] They cannot use Article 2(1) to resile from obligations to respect, protect, and progressively fulfil ICESCR rights.

3.5.5 Immediacy of obligations of equality and non-discrimination

Unlike states' general obligations to fulfil economic, social, and cultural rights, the equality and non-discrimination guarantees in ICESCR Article 2(2) and 3 are not subject to progressive realisation. Rather, '[n]on-discrimination is an immediate and cross-cutting obligation in the Covenant.'[605] Thus, delays cannot be justified by reference to a state's limited resources. This reflects the wider UN human rights approach to equality and non-discrimination. Some argue that the state's immediate obligations are to respect and protect the right to non-discrimination, whereas the obligation to fulfil of full equality remains a progressive one. However, such a reading inserts a separation between the concepts of non-discrimination and equality that is untenable in light of the text of ICESCR and other international human rights treaties read in conjunction with comments issued by treaty bodies to guide interpretation.[606]

On the other hand, UN treaty bodies, despite their role in applying legal tests, exist in a geopolitical context. While required by ICESCR, immediate fulfilment of equality and non-discrimination in the transformative sense would require such enormous upheaval to state economies and cultures as to risk destabilisation. Such revolutionary change might itself threaten human rights in a states. It might also run counter to many interests of states' ruling classes to such a degree that states' continued acceptance of the legitimacy of the UN human rights treaty system would be jeopardised. Public

[604] ICJ, 'Maastricht' (n 149) [8].

[605] E/1991/23 (n 405) [7].

[606] Campbell, *Women* (n 34) 124-5.

international law relies on the consent of state parties for its legitimacy.[607] In this context, fudging the timeframes of transformative equality and non-discrimination obligations may be an understandable exercise in realpolitik, however unpalatable from a doctrinal point of view. A more defensible resolution is to understand non-discrimination and equality guarantees as imposing immediate obligations on states to respect, protect and take immediate substantive action to fulfil them. Acknowledging that substantive inequality cannot be done away with by a mere edict or flick of a wand, the first stage of meeting the fulfilment obligation may, for example, involve setting a strategy and action plan which include immediate start dates, designation of accountabilities across agencies and to senior members of government, and sufficient budget allocations. Those facing discrimination and inequality – including members of the most marginalised groups— should be included in the development of the strategy and action plan. Clear intervention logics, measurable indicators, milestones, and opportunities for review and finetuning of interventions based on evidence of what works would be essential. Continuous concerted implementation of such a strategy and action plan, accompanied by monitoring to show that ambitious benchmarks are being met, might constitute ongoing fulfilment of a state's obligations regarding the transformative dimension of non-discrimination. As improved technical tools for monitoring states' fulfilment of their transformative obligations are developed, CESCR and others will be able to exercise increasing rigour in assessing and holding states to account for meeting targets.

3.5.6 Minimum core obligations

CESCR General Comment 3 introduced the concept of a minimum core of obligations to 'ensure the satisfaction of, at the very least, minimum essential levels of each of the

[607] Dinah Shelton, 'International Law and 'Relative Normativity'' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014).

rights',[608] fulfilment of which is also an immediate obligation. Where a significant segment of the population is 'deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education', this is a *prima facie* failure of the state to discharge its obligations.[609] States are obliged to rectify such failures immediately. In circumstances where a state is unable to meet the minimum core, it is obliged to seek international assistance.

The concept of a minimum core has, however, decreased in visibility in CESCR General Comments and Concluding Observations partly because of its reductionist nature. By focusing on discrete requirements for survival, the concept misses essential aspects of human dignity and flourishing.[610] For example, in relation to the situation of single-parent families in brothel communities, some states might seek to address the immediate material needs of individuals, particularly the protection needs of children via paternalistic solutions that further diminish the dignity and agency of such families and their members. Examples of this kind of intervention might include increased policing of prohibitions on sex work (resulting in incarceration and/or loss of livelihood for those the measures claim to protect) and the removal of children from mothers.[611] Furthermore, focusing on a minimum core may detract attention from states' obligations to fully realise economic, social and cultural rights to the maximum extent of their available resources. Equally worryingly, the concept may encourage a tendency to focus only on rights

[608] E/1991/23 (n 149) [10].

[609] ibid [10].

[610] K Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale JIL 113, 130.

[611] Removing the child from such situations does not fulfil the state's obligations as, even if immediate physical needs for basic food, shelter and safety were addressed, the mother and child[ren] would be deprived of privacy and family rights. Situations like this highlight the importance of implementing the family group right in ICESCR Article 10(1).

violations in poor and unstable countries while providing insufficient direction to more wealthy states on their economic, social and cultural rights obligations. One helpful aspect of the minimum core approach has, however, been the guidance given in General Comment 3, that:

> [E]ven in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.[612]

This guidance has maintained traction and is of relevance to wealthy and medium-income states undergoing relative resource constraints, as well as to poor states. Where a state does not comply with its core obligations, the onus falls on it to show that this is because it is unable to do so due to reasons beyond its control as distinct from it being unwilling to comply. As an example of the latter, the Maastricht Guidelines cite a state's 'elimination of a social security scheme without an adequate replacement programme'.[613] Unfortunately, single-parent families have often not received protection in times of resource scarcity or austerity.[614] Greater awareness of states' obligations under ICESCR Article 10(1) might go some way to counter this.

3.5.7 Violations of state obligations including through deliberate retrogressive measures

The Maastricht Guidelines provide examples of violations of state obligations, including acts of commission and acts of omission. Examples of acts of commission include:

> (a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed; …

[612] E/1991/23 (n 149) [12].

[613] ICJ, 'Maastricht' (n 149) [13].

[614] Gingerbread, 'Soaring inflation spells summer struggles for single parent families' (2023) <https://www.gingerbread.org.uk/our-work/news-and-views/soaring-inflation-spells-summer-struggles-for-single-parent-families/#_ftn2> accessed 27/09/2023.

> (d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;
> (e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed.[615]

Although CESCR General Comment 3 allows the possibility that a deliberately retrogressive measure might not constitute a violation provided the state had given it 'the most careful consideration' and was able to fully justify the measure 'by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources',[616] subsequent practice indicates that the stronger prohibition found in the Maastricht Guidelines is now preferred.

In 2012, Pillay, in his role as Chairperson of CESCR, drew states' attention to the requirement that even in times of economic or financial crisis, they should avoid making decisions that might infringe on economic, social and cultural rights. Reminding states of the high bar for satisfying the burden of proving that any retrogressive measures were justified, he clarified that all proposed policy changes must be temporary, necessary and proportionate 'in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights', and non-discriminatory. The response to financial or economic crisis should:

> [c]omprise all possible measures, including tax measures to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected.[617]

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[615] ICJ, 'Maastricht' (n 149) [14].

[616] E/1991/23 (n 149) [9].

[617] Ariranga G Pillay, 'Letter to States parties on economic, social and cultural rights in the context of the economic and financial crisis' (16 May 2012) CESCR/48th/SP/MAB/SW2.

Even when retrogressive measures are necessary, the minimum core content of rights and ILO social protection floors must be protected. States should call on international cooperation and technical support to assist if needed.

In General Comment 19, CESCR states that there is a 'strong presumption that retrogressive measures taken in relation to the right to social security are prohibited'.[618] It will look carefully at any such measures to assess:

> [W]hether (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) there was an independent review of the measures at the national level.[619]

This test stands in stark contrast to the 'manifestly without reasonable foundation' test adopted by courts dealing with cases brought under the ECHR.[620]

The Maastricht Guidelines also provide examples of state violations through acts of omission, including failing to: take the required appropriate steps; regulate third party activities to prevent them from violating ICESCR rights; utilise the maximum available resources towards the full realisation of ICESCR; monitor the realisation of ICESCR rights; or implement without delay those rights required by ICESCR to be provided immediately.[621] These last include obligations of equality and non-discrimination. General Comment 19 also encourages states to incorporate international instruments into

[618] E/C12/GC/19 (n 536) [42].

[619] ibid [42].

[620] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 (4 November 1950), ETS 5. See Chapter 4.

[621] ICJ, 'Maastricht' (n 149) [15].

the domestic legal order and urges judges, adjudicators and lawyers to pay greater attention to violations of the right to social security.[622] It stresses the right of those who experience rights violations to 'have access to judicial or other appropriate remedies' nationally and internationally and be entitled to 'adequate reparation' for violations.[623]

3.5.8 Measuring states' compliance with economic, social and cultural rights obligations

Rather than seeking to define a universally applicable minimum core that covers all ICESCR rights, current CESCR practice implicitly recognises that realising rights to the maximum extent of available resources is contextual and contestable. To provide greater coherence and certainty to assessing states' progress, the focus has turned increasingly to the development and application of human rights indicators.

The complexity of assessing the availability of resources across states party, competing proposals as to how resources should be calculated and progress measured, and the difficulty of contextualising assessments of resource allocation for each state present challenges.[624] From the earliest days of ICESCR reporting, these challenges have been cited by states to justify inadequate and poor-quality reporting to CESCR. In response to such claims and confusion about the importance of monitoring, in 1981 CESCR issued General Comment 1: Reporting by States Parties, setting out the seven objectives of state reporting, of which six have ongoing relevance.[625] Objective 2 of the General Comment is:

> to ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various

[622] E/C12/GC/19 (n 536) [79-80].

[623] ibid [77].

[624] Campbell, *Women* (n 34) 123.

[625] CESCR, 'General Comment No 1: Reporting by States Parties' (adopted 27 July 1981) E/1989/22.

> rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction.'[626]

Special attention is to be given to any 'specific groups or subgroups which appear to be particularly vulnerable or disadvantaged.'[627] CESCR emphasises that 'the essential first step towards promoting the realization of economic, social and cultural rights is diagnosis and knowledge of the existing situation.'[628] States are not able to shrug off reporting obligations as too difficult without being explicit about the nature of their difficulties and the steps they are taking to overcome them. CESCR recognises that monitoring and data gathering is often time-consuming and costly. However, if a state concludes it does not have the capacity to undertake adequate monitoring, it should inform CESCR and indicate the international assistance it requires to meet these obligations.

Objective 3 of the reporting process is to allow the state to show that 'principled policy-making has in fact been undertaken'[629] to establish priorities which reflect ICESCR's provisions. The obligation to take steps by all appropriate means implies that states have an obligation 'to work out and adopt a detailed plan of action for the progressive implementation' of each right in ICESCR.[630] Objective 4 is to allow civil society to participate more effectively in influencing, implementing and monitoring the realisation of ICESRC rights by facilitating:

> public scrutiny of government policies with respect to economic, social and cultural rights and … [encouraging] the involvement of the various economic,

[626] ibid [3].

[627] ibid [3].

[628] ibid [3].

[629] ibid [4].

[630] ibid [4].

> social and cultural sectors of society in the formulation, implementation and review of the relevant policies.[631]

Objective 5 is to 'provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of' ICESCR obligations.[632] In implicit acknowledgement of the contextual nature of economic, social and cultural rights realisation, CESCR suggests that national or other more specific benchmark may provide more effective indicators of progress than global ones. The concept of progressive realisation means that states' reporting should show progress over time. CESCR emphasises the importance of including both qualitative and quantitative data.[633] Lastly, General Comment 1 stresses the importance of information exchange between states to facilitate 'better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the rights contained in the Covenant.'[634]

As Campbell observes, 'A fully developed maximum available resources test would involve a detailed analysis of the resources and budget of the state to determine if the maximum portion of its resources were directed towards socioeconomic rights'.[635] This kind of analysis is not something CESCR is likely to have the capacity to do itself. Nevertheless, complexity and difficulty are not the same as impossibility and there are promising options developing that would assist with such analysis. As discussed in

[631] ibid [5].

[632] ibid [6].

[633] ibid [7].

[634] ibid [7].

[635] Campbell, *Women* (n 34) 122-3.

subchapter 3.3.2, the notion of wicked problems helps policy practitioners name complexities and focus thinking on where to start, what types of initiative to pursue, and how to design practical indicators of progress. Academics, NGOs and monitoring and evaluation firms have also been instrumental in developing and deploying evidence-based indicators and other monitoring measures. The relationship between UN development goals and human rights indicators is also becoming better understood, enabling each sector to benefit from developments of monitoring tools and techniques by the other.[636] Attention is being paid to measuring quality and accounting for non-financial resources when monitoring states' compliance with economic, social and cultural rights obligations.[637]

One initiative advancing the boundaries of human rights measurement is HRMI which uses a comparative methodology. Taking account of states' incomes as well as levels of rights realisation, it makes weighted comparisons of states' economic, social, and cultural rights scores across a range of domains available through simple website searches (depending on data availability). By building links to the Sustainable Development Goals, HRMI has begun to provide a joined-up approach that enables greater clarity to states to measure their own progress. Such a tool could also support CESCR to monitor ICESCR compliance. HRMI uses transdisciplinary, mixed-methods approaches, supplementing quantitative analysis with in-depth qualitative data based on

[636] UNGA, 'Transforming our world: the 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1; Ignacio Saiz and Kate Donald, 'Tackling inequality through the Sustainable Development Goals: human rights in practice' (2017) 21 The IJHR 1029, 1042-43.

[637] S Skogly, 'The Requirement of Using the Maximum Available Resources for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12 Human Rights Law Review 393.

country experts' commentary.[638] It includes reporting on children's rights and on rights realisation of single-parent families.[639]

Within the UN system, Special Rapporteurs also fulfil important functions by illuminating *how* states can measure their own progress, as well as how UN bodies can measure state performances.[640] Thus, although monitoring states' performance of the obligations under ICESCR remains difficult it can no longer be claimed that it is impossible. However, in the case of single-parent families, there is much work to do.[641]

3.5.9 Subchapter conclusion

Gaps in understanding the scope, timing and measurement of states' economic, social and cultural rights obligations present impediments to rights realisation. Issues of national sovereignty, the demands of balancing state budgets, the complex intersecting nature of the economic, social and cultural harms, and the difficulty in designing interventions that address such harms without causing unintended consequences can make states' fulfilment of their economic, social and cultural rights obligations seem onerous. Nevertheless, economic, social and cultural rights are not merely aspirational. States party have both positive and negative obligations to respect, protect and progressively fulfil all economic, social and cultural rights and a duty to use all appropriate means to take deliberate, concrete and targeted steps within a reasonably short period of time to do so.[642]

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[638] Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, *Fulfilling Social and Economic Rights* (Oxford University Press 2015); Anne-Marie Brook, K Chad Clay and Susan Randolph, 'Human Rights Data for Everyone: Introducing the Human Rights Measurement Initiative (HRMI)' (2020) 19 JHR 67.

[639] HRMI (n 585).

[640] Eg HRC, 'The right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Report of the Special Rapporteur, Paul Hunt' (16 February 2004) E/CN4/2004/49; HRC, 'Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona' (22 May 2014) A/HRC/26/28.

[641] See subchapter 3.7.10.

[642] E/1991/23 (n 149) [2 and 9].

Moreover, fulfilment of the minimum core of rights and guarantees of non-discrimination and equality are immediate obligations.

This subchapter has explained that states are afforded a margin of appreciation in determining how best to fulfil economic, social and cultural rights especially in relation to policies with major fiscal implications. Nevertheless, states do not have an unfettered rein in this regard. A blanket rejection of any monitoring or accountability for realising obligations agreed to in human rights treaties would carry an extraordinary risk of depriving such treaties of meaning. In relation to ICESCR, the burden falls on states to show measurable progress towards the full realisation of those rights subject to progressive implementation. They must also show that they are meeting their immediate obligations of non-discrimination and equality and of fulfilment of the minimum core. States are warned against taking regressive steps, including in times of economic restructuring and austerity. Full justification is required of any assertion that exceptional circumstances necessitated such steps. Moreover:

> [E]ven in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.[643]

As we shall see in subchapter 4.4, this has implications for assessing the impacts of state policies on single-parent families in times of crisis, particularly in relation to austerity programmes.

Monitoring and accountability mechanisms are essential to allowing CESCR to assess states' adherence to their obligations and encourage greater progress.[644]

[643] ibid [12].

[644] E/1989/22 (n 625).

Difficulties in reporting arising out of the complexity and interconnected nature of economic, social and cultural rights obligations are being greatly ameliorated by developments in the creation and use of evidence-based indicators and other monitoring tools. I described HRMI as an example of the use of mixed-method interdisciplinary comparative techniques. Such developments represent an important step towards ensuring rights' realisation. However, work on economic, social and cultural rights monitoring as it relates to single-parent families is still in its infancy.

3.6 Rights to the widest possible assistance: ICESCR Article 10(1) and state obligations to families, including particularly single-parent families

3.6.1 Subchapter introduction

Having surveyed in general terms the obligations ICESCR imposes on states in the previous subchapters, in this subchapter, I look in detail at the central right on which my claim relies: the right of families to the widest possible assistance. I examine in-depth the meaning of Article 10(1) in terms of state obligations, particularly in relation to single-parent families as outgroups. My thesis rests on the premise that ICESCR Article 10(1) provides families, particularly while responsible for the care and education of dependent children, with a right to the 'widest possible assistance' and that this right imposes a complementary obligation on the state.

Familiar arguments that economic, social and cultural rights are too indeterminate to have binding force and must be read as merely aspirational could be seen to have particular force in relation to ICESCR Article 10(1). The provision does not employ the commonly understood language of rights. Instead, it says that the family 'should' be accorded 'the widest possible protection and assistance'. As Craven observes, 'It is arguable that the use of the word "should" imposes nothing more than a moral obligation

upon States.'[645] Moreover, the provision offers little guidance as to what is required of states: the provision does not specify the measures states should take.[646] However, as Craven concludes, it would be incorrect to dismiss Article 10(1) as not creating a legal right with parallel legal obligations.[647] The principle of *pacta sunt servanda*, codified in Article 26 of the VCLT, tells us that treaties are binding on their parties 'and must be performed by them in good faith'. Under the principle of effectiveness, this requires that provisions should be taken to mean something.[648] Therefore, rather than disregarding Article 10(1) as too broadly worded, it is incumbent upon scholars and human rights practitioners to determine the content of the right it sets out, not just in terms of the subject of the right (which formed the topic of my second chapter), but also in terms of the duty imposed. The customary rules of treaty interpretation, which are reflected in VCLT Articles 31 to 33, set out the correct approach to this task. Treaties bind states, and therefore, it must be the state that has a duty under ICESCR Article 10(1). Despite the specification in the parallel Article of the UDHR Article 16(3) that the duty is owed by 'society and the state', typically only the state can be directly bound by the provisions of an international human rights treaty.

Since the drafting of ICESCR, knowledge and theorising about the family (and the economic, social and cultural positions of women and children within it) has exploded. There has been extensive discourse on the ways in which the family shapes (and is shaped by) economic, social and cultural structures. Feminist theory has

[645] MCR Craven, *The International Covenant on Economic, Social, and Cultural Rights: a perspective on its development* (Clarendon Press 1995) 135.

[646] Saul, Kinley and Mowbray (n 150) 773.

[647] Craven (n 645) 135.

[648] ibid 135; Dixon (n 115) 74.

highlighted negative impacts of these forces for women's equality and sought to identify solutions. However, this has not been reflected in any burgeoning movement to define the content of the family's right in Article 10(1) to the 'widest possible assistance'. The thinness of commentary and scholarly inquiry into the meaning and contents of Article 10(1) complicates the task of teasing out the content of the provision and how it is to be implemented.

3.6.2 Saul, Kinley and Mowbray's *Commentary*

The chapter on Article 10 in Saul, Kinley and Mowbray's *Commentary* on ICESCR stands out as an exception to the general lack of scholarly attention that the article has received. Observing that Article 10(1) is light on detail, they survey commentary, cases and materials related to the provision to attempt to draw out the content of the right. These are supplemented with recourse to material related to family rights in the ICCPR and regional conventions.[649]

Saul, Kinley, and Mowbray's *Commentary* is a thorough analysis of each ICESCR article based on a detailed study of existing authority. Their approach works well for the bulk of ICESCR provisions but in the case of Article 10(1), where existing commentary and cases are largely absent, Saul, Kinley and Mowbray make the mistake of turning to similar provisions in the ICCPR and regional treaties for guidance without accounting for the different purposes of these instruments.[650] With the exception of the African Charter,[651] economic, social and cultural rights are outside the ambit of the instruments considered. Saul, Kinley and Mowbray see their task as describing the content of each provision of ICESR based on decided sources, not examining what any

[649] Saul, Kinley and Mowbray (n 150) 721-853.

[650] ibid 721-853.

[651] (n 217).

provision might mean from a first principles or philosophical basis. Unfortunately, by relying on inappropriate parallels as templates, they remove the possibility of interpreting Article 10(1) in such a way as to enable it to function properly as an economic, social and cultural provision. Specifically, Saul, Kinley and Mowbray ignore the possibilities of evolutionary interpretations of Article 10(1), which would better breathe life into the ordinary meaning of the terms in their context and in light of the provision's object and purpose, as illuminated by the *Travaux Préparatoires*.[652]

Despite arguing that Article 10 establishes autonomous, substantive rights 'and does not merely particularize the application of other ICESCR rights to families, mothers or children',[653] Saul, Kinley and Mowbray limit the ambit of Article 10(1) by claiming that its value is 'residual'.[654] In their analysis, its purpose is to focus attention on the special needs of families in relation to economic, social and cultural rights, even if the specific modalities for addressing such concerns are found elsewhere in ICESCR.[655] Superficially, this may appear similar to my argument that Article 10(1) washes over the other substantive articles of ICESCR. However, whereas my argument asserts that the provision functions as a dye, colouring the content of all these rights in a manner similar to the cross-cutting effects of Article 2 and 3's equality and non-discrimination provisions, at times Saul, Kinley and Mowbray's approach seems to limit Article 10(1) to something more akin to a pale wash: colouring only those areas of other provisions in relation to which the absence of mention of family creates a gap.

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[652] VCLT Articles 31 & 33.

[653] Saul, Kinley and Mowbray (n 150) 723.

[654] ibid 783.

[655] ibid 783-84.

Nevertheless, Saul, Kinley and Mowbray's *Commentary* provides a useful starting point for the examination of the obligations of states under Article 10(1). Using the respect, protect and fulfil framework, they argue that the obligation to respect includes, for example, an obligation to not interfere 'directly or indirectly with the enjoyment of rights of families, mothers and children'[656] and the obligation to protect 'requires states parties to take measures that prevent third parties from interfering with the enjoyment of such rights.'[657] In their analysis:

> The obligation to *fulfil* includes the obligations to provide, facilitate and promote the rights in Article 10. It implies that states parties should adopt appropriate legislative, administrative, budgetary, judicial and other measures to ensure their full realization. States are obliged to fulfil (provide) the rights in Article 10 where families, mothers or children are unable, for reasons beyond their control, to realize those rights themselves by the means at their disposal. This includes an obligation to adopt national legislation and policies, strategies or plans for the protection of families and children, with adequate funding to realize such policies over time.[658]

Furthermore, they explain that where the state fails to meet its obligations, families should have access to national remedies.[659]

Saul, Kinley and Mowbray argue that a 'wide range of measures is possible and what is necessary in a given society will depend not only on resource availability, but social conceptions of the respective responsibilities of the family, the state and non-state actors.'[660] Noting that in Article 10(1) the family is recognised as responsible for the care and education of dependent children, they claim that the state is called on to play a

[656] ibid 852.

[657] ibid 852.

[658] ibid 852-53.

[659] ibid 853.

[660] ibid 773.

'subsidiary role'.[661] They also assume that Article 10(1) measures are limited to those designed to 'protect and assist' families in the care and education of dependent children specifically, whereas the text of the article makes no such limitation. In so doing, the interpretation that Saul, Kinley and Mowbray propose ignores what I contend to be the prime purpose of Article 10(1), namely, to serve as a dye that runs through ICESCR to ensure that the rights enumerated therein are applied in a way that guarantees economic, social and cultural rights of families as vulnerable-caring group units.

Saul, Kinley and Mowbray do soften the limiting effect of their assessment of the state's obligations somewhat by adding that the state's responsibility is 'albeit to take the "widest possible" measures to protect and assist the family in discharging its functions.'[662] Unfortunately, they do not square their acknowledgement of Article 10(1)'s textual requirement that the state's supportive measures be the 'widest possible' with their claim that such measures must remain 'subsidiary'. In my view, there are four reasons for this. First, Saul, Kinley and Mowbray do not delve into the significance of Article 10(1) as a group rights provision rather than an individual rights provision. This means that the unit of their analysis is incorrect: at times, there is a methodological fuzziness about who is the subject of the right, while at others, the subject is taken to be an individual who has relationship rights with regard to one or more other individuals.

Second, Saul, Kinley and Mowbray's book aims to 'engage empirically with how such rights have manifested in international practice.'[663] In the absence of authorities on ICESCR Article 10, Saul, Kinley and Mowbray's chapter on this provision rests heavily

[661] ibid 773.

[662] ibid 773.

[663] ibid 3.

on interpretations of articles concerning the family in other treaties, including the HRC's comments on mentions of the family in ICCPR and the ECtHR' interpretation of ECHR Article 8, neither of which deal with economic, social and cultural rights.[664] Many of the HRC's comments on the family relate to ICCPR Article 17, which provides the individual with protection from 'arbitrary or unlawful interference with … privacy, family, home [and] correspondence' as well as 'unlawful attacks on … honour and reputation', rather than to Article 23 which as the parallel provision to ICESCR Article 10(1) is worded as a group right. Saul, Kinley and Mowbray themselves note that '[c]ommentators suggest that [ICCPR] Article 23 should be interpreted more broadly than Article 17 to encompass positive measures to protect the existence of the family', such as 'financial assistance, protection of mothers, tax, privileges, relief in setting up a household, etc.'[665] However, they do not apply the group economic, social and cultural rights lens that the object and purpose of ICESCR Article 10(1) require. Instead, they stop at the point where the civil and political rights discourse stops. As such, they miss the opportunity to apply well-established tools of economic, social and cultural rights discourse, including capabilities approaches.[666]

Third, Saul, Kinley and Mowbray do not adopt a substantive discrimination stance.[667] Their chapter, therefore, misses the opportunity to consider the distributive, recognition, transformative and participative dimensions of Article 10. For example, Saul, Kinley and Mowbray give the example of adopting legislation prohibiting discrimination

[664] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950, ETS 5); Saul, Kinley and Mowbray (n 150) 724-822.

[665] Saul, Kinley and Mowbray (n 150) 724.

[666] See my subchapters 1.2 and 3.4.2

[667] See my subchapters 2.5 and 3.4.

against children or groups of children as part of states' obligation to protect,[668] but the wider non-discrimination aspects of Article 10 are not explored. In accordance with Article 2(2), all aspects of the right in Article 10(1) must be ensured without discrimination towards protected outgroups. As explained in subchapter 3.4.5, under ICESCR Article 2(2), the obligation of states to ensure that outgroups are not discriminated against is an immediate one. While social origin and birth are explicitly listed as protected categories, other outgroups are included by virtue of the phrase 'or other status'. In subchapters 1.8 and 2.5, I established that single-parent families are an outgroup and suffer from distributive, recognition, structural and participative harms. This places on states a concomitant immediate duty to address discrimination against single-parent families in their enjoyment of their Article 10(1) rights to the widest possible protection and assistance across distributive, recognition, transformative and participative dimensions.[669]

Fourth, Saul, Kinley and Mowbray assume that the state's supportive measures will be designed to 'protect and assist' families *in* the care and education of dependent children.[670] They observe that:

> Given the global diversity surrounding concepts of family responsibilities and the proper role of state intervention, it is difficult to prescribe a universal template for the kinds of measures of state support which must be taken in all circumstances under Article 10(1). Nonetheless, state measures of support for the 'care' of children will most commonly involve financial support (such as cash benefits or tax breaks), services (such as child care), and other assistance to maintain the balance between family and work life (such as paternity, parental and adoption leave; maternity leave is separately guaranteed by Article 10(2)).[671]

[668] Saul, Kinley and Mowbray (n 150) 852.

[669] Fredman, *Discrimination* (n 45) 25.

[670] Saul, Kinley and Mowbray (n 150) 773.

[671] ibid 776.

Elsewhere, they describe the key elements of the obligation to fulfil as including 'institutions and/or funding for family, maternity and child benefits; childcare and early childhood education services; foster care and alternative care arrangements; and child protection policies.'[672] The types of measures identified by Saul, Kinley and Mowbray are all relevant. [673] Financial support for the care of children in the form of cash benefits or tax breaks, as well as parental leave, are useful, as is the provision of childcare. Nevertheless, it is necessary to recognise that the text of Article 10(1) does not limit the obligation to protecting and assisting with children's care and education. The fact that the provision also applies to families without dependent children (albeit without the particularity given to families with dependent children) means that such a limitation would make no sense. Incorporating the insights of vulnerability theorists, ethics of care theorists and experts in family dynamics allows a vantage point for understanding Article 10(1) centred on the vulnerable-caring family.[674] From this point of view, even families with no dependent children may need support from society and the state. Examples might include labour policies that facilitate the care of elderly family members, housing suitable for different family sizes and types, and support for families to live without violence.[675] Such protection and assistance may also be needed by families with dependent children.

The particular emphasis in Article 10(1) on families that include dependent children is therefore better interpreted as recognition of two realities. The first is that children's dependency places particular demands on these families. Rather than laying the

[672] ibid 852-53.

[673] ibid 776.

[674] See subchapters 1.3, and 2.2.

[675] This way negates the individual rights of victims of family violence to leave their family, or to reconstitute it through the exclusion of the perpetrator.

whole of these demands on the privatised family (which puts women as children's usual primary caregivers in a position of heightened derivative dependency), Article 10(1) obliges states to ensure these families, in particular, receive assistance and support. For example, in relation to the examples given above, the presence of dependent children in a family may create particularly acute needs for protection and assistance. The dependency of children creates additional demands on families that are also caring for elderly family members while engaging in the labour market, as it does for families with complex housing needs and families struggling to live without violence. The second reality may be a nascent recognition that the impacts of social and material hardship on children are particularly pernicious. From a child development point of view, it makes sense to give particular emphasis to supporting families with dependent children in order to provide children with environments of nurture and security. Protection and support from this perspective go beyond the scope of support for children's care and education in a direct sense, and require other contingencies and structural features which threaten families' security and wellbeing be addressed. For single-parent families, support to counter discrimination and to participate in communities' social and political life are examples.

Furthermore, in my analysis, the difficulties in prescribing a universal list of the types of support that states are obligated to take arise firstly from the global diversity of actual families and the vast variation in their needs for protection and assistance on the ground. Disparities in state resources and the diversity of mechanisms a state may choose to use to meet its obligations are additional factors, Saul, Kinley and Mowbray are wrong to attribute the difficulty of list-making to 'global diversity surrounding concepts of family responsibilities and the proper role of state intervention'. [676] As I emphasise in

[676] Saul, Kinley and Mowbray (n 150) 776.

subchapter 2.3, to allow states to determine who comes within the definition of family unilaterally would risk leaving the most marginalised families without protection and would subvert the intention of Article 10's drafters. Moreover, if states could assert that in their societies, the family is conceived as self-supporting and the state role is conceived as narrow, they could avoid being held to the same obligations as others. My discussion of Fineman's *Autonomy Myth* and the work of other vulnerability theorists reveals that notions of the autonomous private family are more myth than reality, as is the purported independence of the public spheres (state and commercial) from it.[677] Therefore, to accept the implications behind Saul, Kinley and Mowbray's approach would be to accept that families were subject to the whims of geography in terms of both their eligibility for rights and the content of the rights to which they were entitled. This would be antithetical to the universality of international human rights, as well as the object and purpose of the provision.

As a result of the limitations imposed by their approach, we must go beyond the analysis provided by Saul, Kinley and Mowbray in order to determine the content of ICESCR Article 10(1) correctly.

3.6.3 CESCR observations on Article 10(1)

VCLT Article 32(3)(b) directs one to take account of 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.[678] Pronouncements of treaty bodies can assist in this process as they are regarded as authoritative guidance on the content of the human rights obligations to which they pertain. These include relevant General Comments/General

[677] Subchapter 2.2.

[678] VCLT Article 32(3)(b).

Recommendations as well as Concluding Observations on progress in the implementation of treaties, responses to individual complaints, and other statements.

CESCR has not issued a General Comment guiding states on their obligations under Article 10(1).[679] Nevertheless, it has referred to the provision in its Concluding Observations and other communications with states. Saul, Kinley and Mowbray's survey of CESCR's treatment of Article 10(1) reveals that CESCR has made sporadic reference to the provision in relation to concerns ranging from domestic and sexual violence to trafficking and exploitation and harmful traditional practices including dowry deaths, widow-cleansing, widow burning, honour killings and witch-hunting. CESCR has also used the provision to criticise social trends that it sees as undermining the family unit's ability to care for children. Furthermore, CESCR has called for housing assistance, leave to support work/family balance, and support for the education of children, and has touched on economic issues.[680]

Similarly, CESCR has not provided general guidance on states' obligations to single-parent families as a particularly marginalised or disadvantaged category using a non-discrimination lens. In the past, CESCR's consideration of poverty and marginalization affecting single-parent families and their members has problematically styled these as issues of family disintegration, desertion by male family heads, teenage pregnancies and the like.[681] This suggests that the CESCR did not have a practice of engaging closely with the scholarly feminist advances that would have allowed it to develop an understanding of concepts structuring the situations of single-parent families

[679] Saul, Kinley and Mowbray (n 150) 724.

[680] ibid 733-84.

[681] ibid 733-8.

across diverse societies, including vulnerability theory, dependency and derivative dependency, and the linkages between patriarchal ontologies and the low status of caregiving work typically undertaken by women.[682] Instead, CESCR comments on single-parent families often adopted deficit approaches that focused on single-parent families as the problem rather than on state obligations to single-parent families as Article 10(1) rightsholders. The discriminatory structural aspects of single-parent families' marginalisation were also ignored.

To assess current CESCR practice relating to Article 10 with specific reference to single-parent families, I undertook a search of the OHCHR Universal Human Rights database for any recommendations and observations made by CESCR that cited Article 10 in Concluding Observations during the period 2016 to 2023.[683] The search netted 117 results. The database codes search results in a number of ways, including by 'Concerned persons/groups' and 'Human Rights Themes'. It allows multiple coding of a single reference. A large proportion of the results of the search listed 'Children' and 'Women & girls' as concerned persons/groups. In addition to the broad category of children, many entries were given additional coding such as 'Children in vulnerable situations (abused, living on the street, institutionalized, indigenous, migrant children etc)'. Other categories appearing frequently included 'Persons living in poverty' and 'Vulnerable persons/groups'. More specific categories were also observable, such as 'Law enforcement/police & prison officials', 'Lesbian, gay, bisexual and transgender and

[682] Eg Fineman, *Autonomy* (n 35); Boyd and others (n 8); Waring (n 167).

[683] The search term 'Art. 10' was used. This produced more results than, eg, Article 10 or Article 10(1). Some documents appear more than once because they reference Article 10 in multiple places. OHCHR, 'Universal Human Rights Index' <https://uhri.ohchr.org/en/search-human-rights-recommendations?mechanisms=0c43227f-61e1-48f9-878d-5af39566249b&searchText=Art.+10&mechanismsOpened=0c43227f-61e1-48f9-878d-5af39566249b> accessed 08/03/2024.

intersex persons (LGBTI)', and 'Roma, Gypsies, Sinti & Travellers'.[684] It appeared that a degree of latitude has been allowed in coding.

However, none of the 117 results were coded as pertaining to single parents, single mothers, single-parent families, or children in single-parent families. Nor were the rights of single-parent families featured as human rights themes. Nevertheless, further investigation found three results in the dataset potentially relating to single-parent families or their members. First, in its Concluding Observations on Capo Verde in 2018, CESCR highlighted the situation of 'children in single-parent family households' as particularly likely to be living in poverty, giving rise to concern under Articles 10 and 11.[685] Second, in relation to Sri Lanka in 2017, CESCR expressed concern:

> [T]hat many women-headed households, in particular those in the north and east, are vulnerable to poverty, face food insecurity and lack livelihood opportunities, which increase their vulnerability to exploitation, sexual harassment and violence, including sexual exploitation and bribery by officials (arts.10–11).[686]

CESCR recommended that Sri Lanka:

> [U]rgently adopt and implement the national action plan on women-headed households and ensure that women who head households have access to livelihood assistance, housing and land in their own name, as well as low-interest or interest-free credit schemes.[687]

This recommendation is remarkable for being the first indication found showing CESCR conceiving of a state as having an obligation to undertake a national, planned programme of action to ensure better realisation of the rights of women-headed households—a category which overlaps considerably with the category of single-parent families.

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[684] ibid, eg entries relating to Yemen and China in 2023, Czechia in 2022 and Azerbaijan in 2021.

[685] CESCR, 'Concluding observations on the initial report of Cabo Verde' (12/10/2018) E/C12/CPV/CO/1 [42].

[686] E/C12/LKA/CO/5' (n 541) [54].

[687] ibid [54].

Furthermore, in the same paragraph, CESCR urges Sri Lanka 'to ensure that officials who commit sexual exploitation, bribery and harassment are prosecuted and sentenced, and victims have access to remedy and compensation.'[688] This latter recommendation draws the link between violations of economic, social and cultural rights and the misuse of state power by officials.

CESCR's Concluding Observations on Luxembourg include continued concern about discriminatory legal stigmatisation of children of unmarried mothers. CESCR highlights '[t]he persistence of the distinction between children born in and out of wedlock and the terminology used—"legitimate children" and "natural children", respectively—in the State party's legislation (art. 10)'[689] and recommends that Luxembourg:

> Take the necessary measures to eliminate all forms of discrimination against children born out of wedlock, including by adopting bill No. 6568 concerning the reform of the law on filiation, which seeks to remove the concepts of "legitimate" and "natural" children.[690]

This was not, however, linked to any recommendation addressing social discrimination against single-parent families in which these children may reside (some will likely live with unmarried parents in a two-parent family), nor their unmarried mothers.

A textual review of a sample of 15 Concluding Observations issued by CESCR between 2016 and 2023 revealed occasional observations and recommendations relating to states' obligations to single-parent families or their members, however, CESCR did not

[688] ibid [54].

[689] CESCR, 'Concluding observations on the fourth periodic report of Luxembourg' (15 November 2022) E/C12/LUX/CO/4 [30].

[690] ibid [31].

link these to Article 10.[691] For example, in its 2016 Concluding Observations to the UK, CESCR 'notes with concern that certain groups of the population are more affected by, or at an increased risk of, poverty, in particular … single-parent families and families with children' [692] and recommends the state 'take steps to introduce measures to guarantee targeted support to all those living in poverty or at risk of poverty, in particular … single-parent families and families with children.'[693] CESCR's 2023 Concluding Observations to Armenia recommend that the state '[s]upport and facilitate the provision of care for children in their families of origin, including single-parent families'.[694]

To understand what information CESCR asks states party to provide to allow it to monitor implementation of Article 10 (1), I reviewed ten CESCR Lists of Issues addressed to states party between 2016 and 2023.[695] These lists guide states' preparation of their monitoring reports. Half of the lists asked for information pertaining to single-

[691] E/C12/KEN/CO/2-5 (n 541); E/C12/GBR/CO/6 (n 541); E/C12/KOR/CO/4 (n 542); E/C12/LKA/CO/5 (n 541); E/C12/CPV/CO/1 (n 685); E/C12/NZL/CO/4 (n 542); CESCR, 'Concluding observations on the initial report of South Africa' (29/11/2018) E/C12/ZAF/CO/1; CESCR, 'Concluding observations on the fifth periodic report of Mongolia' (10/11/2022) E/C12/MNG/CO/5; E/C12/LUX/CO/4 (n 689); CESCR, 'Concluding observations on the seventh periodic report of Belarus' (24 March 2024) E/C12/BLR/CO/7; CESCR, 'Concluding observations on the fifth periodic report of France' (30/10/2023) E/C12/FRA/CO/5; CESCR, 'Concluding observations on the third periodic report of China, including Hong Kong, China, and Macao, China' (22/03/2023) E/C.12/CHN/CO/3; CESCR, 'Concluding observations on the initial report of Qatar' (06/11/2023) E/C12/QAT/CO/1; E/C12/ARM/CO/4 (n 541); E/C12/TCD/CO/4 (n 541).

[692] E/C12/GBR/CO/6 (n 541) [47].

[693] ibid [48].

[694] E/C12/ARM/CO/4 (n 541).

[695] CESCR, 'List of issues prior to submission of the sixth periodic report of Australia' (07/04/2022) E/C12/AUS/QPR/6; CESCR, 'List of issues prior to submission of the seventh periodic report of Belarus' (14/11/2018) E/C12/BLR/QPR/7; CESCR, 'List of issues prior to submission of the seventh periodic report of Canada' (07/04/2020) E/C12/CAN/QPR/7; CESCR, 'List of issues prior to submission of the fifth periodic report of Chile' (9 April 2020) E/C12/CHL/QPR/5; CESCR, 'List of issues prior to submission of the seventh periodic report of Finland' (09/04/2019) E/C12/FIN/QPR/7; ; CESCR, 'List of issues prior to submission of the fifth periodic report of France' (06/04/2020) E/C12/FRA/QPR/5; CESCR, 'List of issues prior to submission of the sixth periodic report of Italy' (16/04/2020) E/C12/ITA/QPR/6; CESCR, 'List of issues prior to submission of the fifth periodic report of Mongolia' (21/11/2019) E/C12/MNG/QPR/5; CESCR, 'List of issues prior to submission of the fourth periodic report of New Zealand' (12/04/2016) E/C12/NZL/QPR/4; CESCR, 'List of issues prior to submission of the seventh periodic report of Sweden' (16/11/2020) E/C12/SWE/QPR/7.

parent families. Topics included disaggregated data[696] and data on poverty incidence, [697] antipoverty measures, [698] income support,[699] rights of advocacy and support organisations, and rights generally. [700] No pattern was discernible.

Turning to state responses, an examination of eight periodic reports submitted in the period 2016 to 2023 revealed that references to Article 10 were rare.[701] However, half of the reports included information about single-parent families or their members, namely Belarus,[702] Finland,[703] Mongolia[704] and Sweden[705]. Two additional reports included information on closely connected categories: single principal carers[706] and female heads

[696] E/C12/SWE/QPR/7 (n 695) [2(b]).

[697] ibid [2(b)].

[698] ibid [2(b)].

[699] E/C12/AUS/QPR/6 (n 695)[19].

[700] E/C12/BLR/QPR/7 (n 695) [10].

[701] Australia, 'Committee on Economic, Social and Cultural Rights: Sixth periodic report submitted by Australia under articles 16 and 17 of the Covenant, due in 2022' (17 October 2023) E/C12/AUS/6; Belarus, 'Seventh periodic report submitted by Belarus under articles 16 and 17 of the Covenant, due in 2019' (04/02/2020) E/C12/BLR/7; Chile, 'Fifth periodic report submitted by Chile under articles 16 and 17 of the Covenant, due in 2021' (27 April 2022) E/C12/CHL/5; Finland, 'Seventh periodic report submitted by Finland under articles 16 and 17 of the Covenant, due in 2020' (23/04/2020) E/C12/FIN/7; Italy, 'Sixth periodic report submitted by Italy under articles 16 and 17 of the Covenant, due in 2021 E/C12/ITA/6' (26/08/2021) E/C12/ITA/6; Mongolia, 'Fifth periodic report submitted by Mongolia under articles 16 and 17 of the Covenant, due in 2020' (21/03/2022) E/C12/MNG/5; New Zealand, 'Fourth periodic report submitted by New Zealand under articles 16 and 17 of the Covenant, due in 2017' (06/10/2017) E/C12/NZL/4; Sweden, 'Seventh periodic report submitted by Sweden under articles 16 and 17 of the Covenant, due in 2021' (10/01/2022) E/C12/SWE/7.

[702] E/C12/BLR/7 (n 701).

[703] E/C12/FIN/7 (n 701).

[704] E/C12/MNG/5 (n 701).

[705] E/C12/SWE/7 (n 701).

[706] E/C12/AUS/6 (n 701).

of households.[707] Several provided extensive data on single-parent families.[708] The report from Mongolia stood out for its inclusion of information related to single-parent families with many children under multiple headings and in tables on social welfare benefits, access to services, and legislation.[709] Mongolia clearly recognised the marginalisation of this group as a significant human rights issue and described in detail the steps being taken to address this. Unfortunately, CESCR's Concluding Observations to Mongolia make no mention of either the issues or Mongolia's efforts.[710]

Overall, CESCR's practice in relation to states' Article 10(1) obligations is ad hoc. Obligations of states towards single-parent families as a marginalised outgroup are not clearly articulated. CESCR's the failure to develop an understanding of the family as it relates to gender, dependency and derivative dependency remains a blind spot with severe implications for the realisation of women's and children's rights.

To address this lacuna, CESCR should adopt a poverty lens centred on women's and children's realities, including their interdependence. Implementing ICESCR Article 10(1) must be recognised as essential to realising the economic, social and cultural rights of women (in light of their frequent derivative dependency) and of children as dependents. Single-parent families, as the apex example of women and children's intersecting poverty, should be centred in these efforts.

[707] E/C12/CHL/5 (n 701).

[708] E/C12/SWE/7 (n 701).

[709] E/C12/MNG/5' (n 701) [20, 25, 26, 29 and 64] and tables 6 and 10.

[710] E/C12/MNG/CO/5 (n 691).

The VCLT principles of treaty interpretation provide rules for reaching a fuller understanding of ICESCR Article 10(1) and determining the provision's content. It is to these that we now return.

3.6.4 Identifying state obligations under Article 10(1) in light of the VCLT

Given the requirement for states to respect, protect and fulfil Article 10(1) in good faith, it is important to delve more closely into what that obligation involves. Under customary international law, as codified in the VCTL, the ordinary meaning of the terms of Article 10(1), in their context and in light of the object and purpose of ICESCR, provides the basis for its interpretation.[711] The title of ICESCR gives strong clues as to its overall object and purpose: it deals with rights related to economic, social and cultural matters. The Preamble recognises that:

> [T]he ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as civil and political rights.

Thus, it appears that as well as economic, social, and cultural matters, the purpose of ICESCR relates to freedom, specifically, freedom from fear and freedom from want. Civil and political rights are mentioned but are put to one side to focus on the economic, social and cultural aspects of human dignity and freedom. This makes sense, given the contemporaneous drafting of the ICCPR.

VCLT Article 32 provides that 'supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion' may be referred to as additional aids to interpretation. The *Travaux Préparatoires* to the instruments that comprise IBOR reveal the story of the drafters' separation of the Bill into a declaration elucidating universal rights norms and two conventions covering distinct

[711] VCLT Article 31(1).

areas, which 'expand and define [the UDHR's] terms and establish legal obligations to which States may bind themselves.'[712] The economic, social and cultural aspects of IBOR, which ICESCR elaborates in legal terms, owe much to Latin American constitutionalism and to the strong convictions of Soviet states.[713] The views of newly independent former colonies were also important.[714] Moreover, in referencing freedoms from want and fear, the preambles to the covenants hark back to FD Roosevelt's 'Four Freedoms' speech and the ideals of the American New Deal.[715] Although Western powers walked back some of the strongest provisions of the drafts, the text of ICESCR nevertheless stands as the internationally agreed legal statement of economic, social and cultural rights, which impose positive obligations on states. Article 10 must be read in this light.

Saul, Kinley and Mowbray argue that Article 10 overlaps with the subject matter of other ICESCR rights, such as 'rights to work, social security, non-discrimination and equality.'[716] In their view, the drafters of ICESCR recognised this overlap but deemed it necessary to keep the provision 'to focus attention on the family, mothers and children, since certain economic and social rights manifest uniquely in family and parental relationships.'[717] Nevertheless, the analysis by Saul, Kinley and Mowbray does not address *how* Article 10(1) interacts with other ICESCR provisions from a theoretical

[712] Craven (n 645) 7.

[713] E/CN4/AC1/3/Add1 (n 298); Craven (n 645) 9.

[714] William A Schabas, 'Introductory essay: the drafting and significance of the Universal Declaration of Human Rights' in William A Schabas (ed), *The Universal Declaration of Human Rights: The travaux préparatoires*, vol 1 (CUP 2013) lxxxvii.

[715] UNGA (Third Committee), 'Summary Record of the 139th Meeting' (16 November 1948) A/C3/SR139.

[716] Saul, Kinley and Mowbray (n 150) 723.

[717] ibid 723.

point of view. Adopting the metaphor of a dye that washes over the fabric of ICESCR overcomes this problem. To extend the metaphor slightly, if the substantive provisions form the warp of the fabric and non-discrimination plus equality form the weft, Article 10(1)'s insistence that the family group unit is to be accorded the widest possible protection and assistance is a dye that washes over the whole. It is not an even cloth—the dye attaches more richly to some provisions than others—but it washes over the entirety of ICESCR's substance.

The importance of Article 10(1) stems from its wholistic acknowledgement that families as group units have rights to protection and assistance in economic, social and cultural terms and that states have concomitant obligations. It does not require the state to provide such protection and assistance directly but merely to ensure it is provided: that is, to ensure that families responsible for the care and education of dependent children have access to the economic, social and cultural supports that make it possible to undertake the task adequately and in accord with the rights and dignity of their members. For the group rights of the family and the individual rights of its members to be realised, it must be possible for the family to survive and to care for and educate its dependent children without sacrificing the basic rights of any one member.[718]

To give content to Article 10(1) requires analysing its relationship with other substantive provisions of ICESCR. Saul, Kinley and Mowbray touch on these relationships in their *Commentary*, noting:

> Some of the forms of support to families mentioned by the CESCR or other treaty bodies, such as assistance in relation to housing, food, clothing and water, fall

[718] Moreover, individual rights are not unlimited. Eg, a person who has been convicted of family violence may have their rights to a family life curtailed to uphold the rights of the other family members, and the family as a whole: *JI v Finland CEDAW/C/69/D/103/2016 (2018)* (CEDAW).

> more squarely within other ICESCR rights. These especially include the rights to an adequate standard of living in Article 11 and health in Article 12.[719]

In my analysis, that is not the correct approach to Article 10(1). Rather than seeing it as a residual right which mops up matters related to the family that are not better addressed elsewhere, the provision should be interpreted as washing over the entirety of rights provided for by ICESCR, colouring them with a requirement that they be interpreted in a way that protects and assists the family group unit, particularly while it is responsible for dependent children. As I have observed, precedent for this approach to interpretation is found in the way in which non-discrimination and equality provisions of human rights treaties are interpreted. This is not to suggest that all provisions of human rights conventions are open to being interpreted as dyes that wash over one another. Despite the recognition in the VDPA of the interdependence of human rights, the VCLT requires that treaty provisions be interpreted in accordance with their ordinary meanings in their context. In general, substantive provisions of human rights treaties elucidate rights which, while related to other rights, do not need to be read as washing over them in order to give them meaning. The difference with Article 10(1) lies in three things. First, it focuses on a particular category of rightsholder—the family—which is not provided for elsewhere. Second, it specifies the right expansively in the broadest of terms—'the widest possible protection and assistance'—the boundaries of which cannot be easily established unless by reference to something else: the other substantive provisions of ICESCR provide that something. Third, analysis of the *Travaux Préparatoires* confirms the intention of the

[719] Saul, Kinley and Mowbray (n 150) 784.

drafters to ensure economic, social and cultural rights are accorded to families as well as to individuals.[720]

It is necessary to view Article 10(1) as a dye in this way because, even when the text of another provision makes specific reference to the family, it does so in the name of an individual rightsholder, who is typically assumed to be the adult male family-head. For example, although ICESCR Article 7(a)(ii) concerning the right to a family wage only makes sense if it is assumed that the worker will share the benefits of their wage with their family as a matter of course, a strict reading of the text of Article 7(a)(ii) does not provide a right to dependent family members to benefit from this wage. It is common for domestic law to fail to protect the rights of dependents to demand support from a family head.[721] Nevertheless, it is the family as a group, not the household head, that the right to social security, a living wage, and so on is intended to protect. Although the reference to family in Article 7(a)(ii) attests to an implicit recognition that even individual rights have a relational dimension, as relational autonomy theorists assert, this is in itself insufficient to protect the family as a group unit characterised by its vulnerable-caring functions. As Saul, Kinley and Mowbray observe, on a number of occasions CESCR has relied on Article 10(1) to add to the provisions relating to individual rights by requiring that attention be paid to the needs of families as group units in relation to those rights.[722] For example, housing assistance is to be provided in a way that meets the needs of families.[723]

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[720] E/CN4/SR13 (n 164); E/CN4/SR14 (n 398); E/CN4/AC1/SR/38 (n 2); E/CN4/SR58. (n 2); A/C3/SR124' (n 360). See my Supplementary Materials, Part 1.

[721] Eg, Fineman, *Autonomy* (n 35) 297-8.

[722] Saul, Kinley and Mowbray (n 150) 783-84.

[723] ibid 780.

Thus a housing policy which was based on families being split up is not consistent with the right, even if each individual within a family has a roof over their head.[724] Similarly, states' obligations in relation to an adequate standard of living;[725] conditions of work that include a family wage, equal opportunities for promotion, rest and leisure;[726] and social security[727] extend to ensuring that families with dependent children are particularly protected and assisted to realise their rights. However, the absence of a clear articulation of the role of Article 10(1) in this regard has weakened CESCR's use of the provision. In particular, it has prevented a clear analysis of the application of Article 10(1) in light of the immediacy of states' obligations to ensure non-discrimination and equality in the enjoyment of rights.

3.6.5 The meaning of 'widest possible'

In the absence of good reasons for taking a different interpretation, the term 'widest possible' should be given its plain meaning. There is no commonly agreed legal definition of the phrase, possibly because its meaning is considered relatively self-evident. The *Power Thesaurus* provides the following phrases as preferred synonyms out of a list of 212 phrases with similar meanings: 'ensure maximum'; 'fullest possible'; 'greatest measure'; 'largest possible number of states'; and 'make the fullest'. Other options suggested in the same thesaurus include 'broadest possible', 'utmost', 'as extensive as possible', 'as inclusive as possible' and 'greatest degree'.[728] All of these

[724] *Ben Djazia and Bellili v Spain* E/C12/61/D/5/2015 (CESCR).

[725] ICESCR Article 11.

[726] ibid Articles 6 & 7.

[727] ibid Article 9.

[728] ____ 'Widest possible: Synonyms' Power Thesaurus <https://www.powerthesaurus.org/> accessed 14/1/2021.

combine the expansive word ‘widest’ with a word indicating the limitations associated with what is possible. Although the protection and assistance must be maximal, full, great, and inclusive, the obligation on states is not unbounded. States are not required to do that which is not possible. The phrase ‘widest possible’ is similar to the reference to the idea of a ‘maximum extent’ found in ICESCR Article 2(1), but the ambit of the latter phrase is only limited solely by reference to the state’s resources. It is possible that Article 10(1)’s protection and assistance for the family recognises that other matters, beyond resource constraints, may influence what is possible. Given the central role of the family in the maintenance and transmission of culture and society, it may be that certain supports fall beyond what is politically possible for a state. In these instances, it may be permissible for a state not to provide some elements of protection and assistance to their full extent provided this does not countenance discrimination or inequality. This reading differs from Saul, Mowbray and McKinley’s claim that the requirements of the state are wholly limited by a ‘social conception of respective responsibilities of the family, the state and non-state actors.’[729] A state that claims its society’s construction of the family is one in which the family is entirely self-sufficient or dependent on charitable assistance from religious and other non-state actors for support cannot use that as an excuse if the result is that families are not adequately supported, if support is provided in a discriminatory manner, or if the results are substantively discriminatory.

The immediate prohibition on discrimination remains. The alleged impossibility of providing protection and assistance will not excuse the state from taking action (or failing to take action) if the reasons or results are discriminatory. Given that the family is

[729] Saul, Kinley and Mowbray (n 150) 773.

to be interpreted as the vulnerable-caring family,[730] a state cannot avoid its obligations to single-parent families (or other stigmatised and discriminated against family types, such as same-sex families, child-led families, minority or indigenous families, interracial families, interreligious families or families with disabilities) on the basis that meeting their needs is alleged to be impossible in light of the state's social or cultural norms, including the social conception of 'the respective responsibilities of the family, the state and other spheres.'[731]

3.6.6 Applying a capabilities approach to understanding states' obligations under Article 10(1)

As I observed in subchapter 3.3.2, the implementation of economic, social and cultural rights presents wicked problems. This is certainly true of Article 10(1). Fortunately, capabilities approaches have been found to provide useful tools for unpicking a fundamental part of the problem: how to describe the content of economic, social and cultural rights without resorting to reductionist measures of income or wealth that fail to take account of differences in individual situations or needs. As explained in subchapter 3.3.3, capabilities approaches view poverty not as a shortage of income or wealth or even as an insufficient bundle of material resources but rather as 'capability deprivation.'[732] They acknowledge that the relationship between low income and low capability varies between and within communities. Applied to Article 10(1), capabilities approaches require us to ask what protection and assistance particular families need in terms of

[730] see subchapter 2.3.5.

[731] Saul, Kinley and Mowbray (n 150) 773.

[732] Sen, *Development* (n 105) 72-74, 87.

'having, loving, being'[733] in order to achieve the substantive freedoms or capabilities to 'choose a life one has reason to value' in their particular contexts.[734]

Applying a capabilities approach to the family as a group unit is a departure from Sen's view of capabilities as inhering in the individual and his emphasis on ensuring that the individual is never sacrificed to the needs of the group.[735] To illustrate the dangers he sees in group rights, Sen recounts the example of parents who, to provide for their family in conditions of severe food shortages, keep one child famished in order to qualify for nutritional support. This nutritional support is used to maintain the family as a whole (with the exception of the famished child) and thus provides maximum utility to the family. Sen rightly observes that such a strategy represents a gross violation of the famished child's rights which cannot be trumped by the parents' practical rationale of maximising the benefits accruing to the family group.[736] Sen acknowledges that some instances are not this clearcut.[737] His stance may also be influenced by the overall goals of his work as an economist. Restricting the imputation of injuries arising from a misfortune suffered by one individual to that person alone simplifies the project of quantifying suffering across a matrix of indicators.

Moreover, others' versions of capabilities approaches do not rely on a rejection of group rights. For example, Durie's uses a capabilities approach to develop measures for *whānau* (used here to mean Māori families and groups based on common interests and

[733] Allardt (n 513) 88.

[734] Sen, *Development* (n 105) 74. I take 'one' to refer to a family group in this instance.

[735] ibid 31-33.

[736] ibid 132-33.

[737] Amartya Sen, 'Capability and Well-Being' in Martha Nussbaum and Amartya Sen (eds), *The Quality of Life* (Clarendon Press 1993) 37.

values), as well as for Māori as a people.[738] Nussbaum's philosophical foundations of a capabilities approach centre relational and vulnerable aspects of the human experience and acknowledge the interdependence of family members. She writes:

> Humans begin as needy babies, grow up slowly, and require lots of care as they grow. In the prime of life they have the 'normal' needs that the social contract model typically incorporates, but they may also have other needs, stemming from accidents or illnesses that put them in a position of asymmetrical dependency for a shorter or longer time. If they live to old age, they typically need a great deal of care again and are likely to encounter disabilities, either physical or mental or both. Moreover, many human beings are atypically disabled all through their lives.[739]

Human care needs are met by others. Typically, and archetypally, this occurs within the family. Nevertheless, as Nussbaum observes, characterising 'the bonds of family love and the activities that flow from them … as somehow precontractual or natural'[740] is unsatisfactory. Rather, the sentiments contained within the family 'are shaped in many ways by social background conditions and by the expectations and necessities that these impose.'[741] I do not take Nussbaum's position here as contradicting the reference in ICESCR Article 10(1) to the family as 'the natural and fundamental group unit of society'. Rather the natural aspect of the family stems from its ubiquity as a response to human vulnerability, but its form and attributes are political in the sense that they are 'defined and shaped in fundamental ways by laws and social institutions.'[742] These forces influence how families are structured, their detailed functioning, and who has power within and around them.

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[738] M Durie, 'Measuring Māori wellbeing' (NZ Treasury Guest Lecture Series August 2006).

[739] Nussbaum (n 192) 87-88.

[740] ibid 105.

[741] ibid 106.

[742] ibid 105-06.

The notion of freedom found within capabilities approaches is one of substantive freedom, and this underpins the four-dimensional conception of equality and non-discrimination developed by Fredman and adopted by others, including UN bodies.[743] Applied to single-parent families, such substantive freedom includes the ability to be a family in terms of ongoing relationships of care and to survive and thrive in this endeavour. It also includes the ability of family members to exercise individual agency. In contrast, rights deprivation for single-parent families includes the deprivation of capabilities to exercise basic freedoms. These may range from the freedom to obtain basic sustenance and safe, adequate shelter to the freedom to provide nurturance and education for family members and the freedom of equal opportunities for family members to engage in private life, employment, and civil and political life. If, for example, a single mother could only feed her children by going without basic food and medicine herself, the family's right to protection and assistance could not be said to have been fulfilled. Similarly, when a mother is forced into a sexually exploitative relationship with a landlord in exchange for housing, the family's rights are violated. Nor could the rights of the family be said to be fulfilled if the care and education of some of the children in a family could only take place at the cost of another child being kept out of compulsory schooling in order to work as a domestic help or a labourer. In addition, single-parent families' dignity is imperilled by stigma and prejudice. To borrow Campbell's description of the deprivations faced by women in poverty, the poverty routinely experienced by single-parent families involves 'not merely insufficient income' but also 'exclusion from

[743] See subchapter 3.3.

social life, political marginalisation, bodily and psychological insecurity, stigma, fatigue and voicelessness'.[744]

Different families have different needs for protection and assistance depending on their characteristics. Sen explains that an individual with disabilities may need greater resources to achieve certain freedoms than a person without disabilities.[745] Similarly, a single-parent family may need different levels of protection and assistance to a two-parent family, given that the amount of adult labour available to provide for the family's material, caring and other needs is halved.[746] The gendered nature of labour markets in which women earn consistently less than men and the various ways in which societies discriminate against children (for example, landlords' preference for adult tenants) add to such needs. Stigma and historic patterns of discrimination create additional protection and assistance needs. Other dimensions of disadvantage may also necessitate single-parent families requiring extra assistance. In societies which combine rigid gender roles with very high levels of gender inequality, the absence of a male adult in a household creates economic, social, cultural and legal precarity. Moreover, the multiplicative effects of intersectional discrimination generate additional needs for protection and assistance among families that experience more than one axis of marginalisation. A single-parent family in which one or more members are disabled is a common example of such a family.

[744] Campbell, *Women* (n 34) 13.

[745] Sen, *Development* (n 105) 74.

[746] See subchapter 4.3.8.

3.6.7 Article 10(1), parental responsibility and gender-based poverty

Much has been written on parental responsibility.[747] Saul, Kinley and Mowbray read down the phrase 'widest possible protection and assistance' in ICESCR Article 10(1) due to the view that the state's responsibilities towards children are subsidiary to the parents.[748] In doing so, they make three significant mistakes. First, they fail to consider the difference between 'protection and assistance' and 'responsibility'. Second, they equate children's individual needs with the group needs of the child's family. Third, they accept uncritically relativism in states' structural approaches to supporting and assisting families.

The concept of parental responsibility has been used to justify limiting the state's provision of protection and assistance to families in neoliberal societies, but those arguments lack coherence from a rights perspective. As Fineman argues, the family sphere, as it exists in societies like the USA, subsidises public (civic) and business spheres by providing the unpaid labour necessary for the maintenance of the myth of autonomy which underpins neoliberalism.[749] Ideas of parental responsibility are frequently expressed in gender-neutral terms that serve to obscure the vast gender difference in how that responsibility typically adheres to parents. As I articulated in subchapter 2.2, the notion of the family hidden behind a veil of privacy serves to render both dependency and women's derivative dependency as caregivers invisible. Not unrelatedly, it also helps to render intimate partner abuse and child abuse invisible. Linking parental responsibility and family autonomy to limits on state protection and assistance makes it impossible to adequately address the unequal bargaining power

[747] Eg Eekelaar, 'Forward' (n 203); CRC, 'Statement' (n 327).

[748] Saul, Kinley and Mowbray (n 150) 721-853.

[749] Fineman, *Autonomy* (n 35).

women have in relationships. It also leaves families that have insufficient resources and support in poverty. Single-parent families make up a vastly disproportionate number of these families.

Contrary to Saul, Kinley and Mowbray's analysis, I argue that for a state to use its society's conception of 'the respective responsibilities of the family, the state and non-state actors'[750] as a reason to not provide the widest protection and assistance to families that its resources allow violates Article 10(1). Even if one imagines a society in which libertarian views were so strong as to make it impossible for the state to ensure adequate protection and assistance for families, the state would nevertheless be obliged to provide as much protection and assistance as possible. Furthermore, a societal view that single-parent families are bad for children cannot excuse policies that discriminate against such families because non-discrimination guarantees place immediate obligations on states.

Fulfilling parental obligations exists in tension with exercising one's individual rights. The latter two sentences of CRC Article 18(1) read: 'Parents … have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.'[751] Despite the limitations of international human rights laws' ability to bind non-states, this statement reflects an international consensus that weighty care duties fall upon parents. Domestic laws reflect the absolute dependency of infants and the long process of reaching something considered autonomy by placing a duty on legal parents to provide for their children. For an infant to avoid contingencies such as starvation, exposure and the contraction of preventable disease, as well as to form the attachments necessary for brain development, health and wellbeing, they rely on at

[750] Saul, Kinley and Mowbray (n 150) 773.

[751] See also CRC, 'Statement' (n 327) [7].

least one person who must care for them in a direct, intimate and ongoing manner. Without such a person, the fulfilment of their rights to privacy, a home and family life is also impossible.

Throughout the world, despite the call in the first sentence of CRC Article 10(1) for states to use 'the best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child', and even when others are involved in a child's care, the primary person fulfilling these responsibilities is commonly the mother. Biological fathers often avoid legal parental responsibilities. In some jurisdictions, an unmarried biological father who has not lived with the child's mother during the pregnancy is deterred or excluded from legal recognition as a parent. In contrast, a woman who births a child automatically acquires legal parental status and parental obligations (although these can be removed in a range of circumstances at her instigation or at a state's).

Physiologically speaking, a person's first relationship as they are being born is with their gestational mother, and this provides a model for a human's first intense relationship. It is not necessary, however, to deny that someone other than a gestational parent can fulfil the mothering role—defined as the intimate attachment, nurturing, and provision of sustenance that we all need in infancy and continue to require to a greater or lesser extent throughout life—to grasp the point that fulfilment of this role is necessary for the ongoing existence, development, capabilities and freedoms of dependent infants. The person who provides such mothering incurs considerable material and opportunity costs in so doing.

Not only do parental obligations exist in tension with adult freedoms, but fulfilling some parental obligations may conflict with the fulfilment of others. For

example, a single mother may be required to engage in paid employment to provide for herself and her family while simultaneously being required to provide adequate care and supervision for her children in a situation where adequate, accessible and affordable quality childcare does not exist. At times, these tensions may become too great to balance. Fully recognising the gendered nature of derivative dependency of caregivers in the privatised family under patriarchy is essential to understanding what the obligation to ensure that the family is provided with the widest possible assistance and support entails, including requirements to ensure substantive equality and non-discrimination between family types.

Two strategies are prioritised by the international human rights project for addressing the derivative dependency women experience as a result of their caring responsibilities. First, it is recommended that states ensure that accessible childcare is available outside of the family.[752] However, the focus on childcare to enable greater participation of mothers in the labour market has been used by some states as justification for reducing single-parent families' entitlements. For example, in the English case of *R (DA)* the government argued that the existence of childcare, however patchily distributed, combined with government provision of childcare subsidies legitimised policies capping the amount single-parent families could receive in benefits unless a work-test was met.[753]

Second, states are urged to encourage men to take a greater role in child-raising.[754] However, in practice, the measures taken by states to encourage men to take a greater role in child-rearing are often ineffective in addressing the impacts of caregiving

[752] Eg, CEDAW Article 11(2)(c); E/C12/2005/4 (n 417) [24].

[753] *R (DA)* (n 53) [28]. See subchapter 4.2.

[754] Eg CEDAW Article 5; CRC Article 18(1).

as a source of gender-based poverty and sometimes operate coercively to limit single mothers' legal and substantive freedoms. This can occur when, for example, parenting orders lock a single-parent family into living within a prescribed area regardless of affordability, access to employment opportunities or support. It is also common for single mothers in some jurisdictions to be required to make their children available to fathers at regular times and places, with no commensurate responsibility placed on fathers to collect their children or actively care for them at these times.

In contrast, adopting a capabilities approach to considering the needs of the family—understood in its vulnerable-caring conception—places the focus squarely on what families determine they need to live a good life. ICESCR Article 10(1) places obligations on the state to do determine families' needs and respond with the widest possible protection and support on the basis of non-discrimination and equality.

3.6.8 Justifiable limits of rights

ICESCR Article 4 allows states to limit the enjoyment of ICESCR rights where the limitations are determined in law and are 'compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.'[755] Could, then, a state argue that its limitation of rights to single-parent families is permitted by virtue of Article 4? Two possible bases for such an argument stand out. First, a state might argue that the existence of single-parent families is detrimental to the welfare of society. Justifications proffered for such a view might range from claims that single-parent families promote disharmony and instability, to claims that they are contrary to the religious morals or cultural norms of a society, or to claims that they result in poor outcomes for children raised within them. The state could claim that respecting,

[755] ICESCR Article 4.

protecting and fulfilling the economic, social and cultural wellbeing of single-parent families incentivises their creation and/or weakens more beneficial family structures, such as the marital-conservative family.[756]

Second, it could be argued that to become involved in ensuring the distributive, recognition, transformative, and participative dimensions of single-parent families' rights would overstep the state's role in governing its citizenry. Such an argument would rely on the reference to democratic societies in ICESCR Article 4. By taking a narrow, majoritarian definition of democracy, a state might argue that it did not have a mandate to act on single-parent families' rights and was, therefore, justified in not protecting them. A second basis for this argument would be for a state to explain that it viewed free market mechanisms as the best protection of the general welfare in a democratic society. Interference to realise single-parent families' rights would create distortions in the market, perversely incentivise behaviour, and carry unacceptable risks of unintended consequences. Such an argument is consistent with libertarian-contractual notions of human society, including the libertarian-contractual notion of family.

Moreover, states might combine aspects of both these arguments to create a logically inconsistent but rhetorically powerful appeal to neo-conservatism. This argument would be that interfering in distributive, recognition, transformative and participative dimensions of society in order to economically, socially and culturally support single-parent families in a non-discriminatory manner would constitute an inadmissible overstep in state interference with the natural order of family formation and childrearing, which would go against the values and norms of their societies and remove

[756] As the economist does in the anecdote in subchapter 1.3.

incentives for adults to ensure that they raise children in the stable two-parent families that best serve the interests of the child.

How to respond to such arguments? First, as I have shown, the *Travaux Préparatoires* to IBOR show that phrases limiting the family to those based on marriage were rejected precisely because of the strong objections from a number of drafters and voting states to such an exclusive framing.[757] Second, we can look to the views of UN bodies and regional courts. The findings here are mixed. The HRC's General Comment 19, which deals with ICCPR Article 23 (the parallel provision to ICESCR Article 10), adds a hint of clarity while also sowing additional ambiguities. It states:

> In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice.[758]

This statement recognises that single-parent families are families but immediately undermines that by allowing states to indicate the extent to which they and their societies recognise and protect such families. Perhaps the HRC intends that once states provide this information, it will be better able to assess the extent to which each is meeting its Article 23 obligations to single-parent families? However, ambiguity arises from the location of this statement at the end of a paragraph discussing the concept of family in relativist terms. The paragraph in which this request is found begins by noting 'that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard

[757] See subchapter 2.3.2.

[758] HRI/GEN/Rev1 (n 276) [2].

definition.'[759] The HRC also emphasises that 'when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23.'[760] This opens up the possibility that the HRC would allow a state to choose not to recognise a particular type of family as 'family' and thereby escape its Article 23 obligations to such families. Such a relativist approach would, however, be contrary to the anti-discrimination tenets of ICESCR and the plain meaning of Article 23 read in light of its object and purpose (including the intentions of the drafters).

Unfortunately, the HRC does not apply an explicit equality and non-discrimination lens to its discussion of family types in General Comment 19. By missing the opportunity to remind states that all their obligations, including those relating to the family group, must be guaranteed without discrimination,[761] the HRC allows confusion to arise. This limitation may be partly explained by its time. Since 1990, when it was published, human rights bodies' understanding of non-discrimination and equality has developed substantially. The HRC's subsequent practice demonstrates that states are not permitted 'unbounded relativity'[762] in their conceptions of family, and that limiting the family to a marital conception is incompatible with states' human rights obligations.[763] The HRC deals with the difficulties of defining family by offering a non-prescriptive list of 'minimal requirements for the existence of a family … such as life together, economic

[759] ibid [2].

[760] ibid [2].

[761] ICCPR Article 2(1).

[762] Saul, Kinley and Mowbray (n 150) 729.

[763] ibid 730.

ties, a regular and intense relationship, etc.'[764] Moreover, the HRC's General Comments relate to the ICCPR and not to the ICESRC. Notwithstanding the interdependence of the two areas, they are distinctive in intent and have different histories of interpretation.

Once a non-discrimination and equalities lens is applied—as it must be, in keeping with the overarching application of ICESCR Articles 2(2) and 3—it becomes apparent that any attempt by a state to justify excluding outgroups, such as single-parent families from ICESCR Article 10 protections must be rejected. While human rights monitoring bodies cannot predetermine every type of family that could conceivably be entitled to protection and support, families—understood in their caring-vulnerable conception—must be covered by this provision without discrimination.

3.6.9 Effect of non-discrimination guarantee on state's obligations to single-parent families under Article 10(1)

As Sen argues, 'Equal consideration for all may demand very unequal treatment in favour of the disadvantaged.'[765] Insofar as societies and states have been predicated on the assumption that the labour of provisioning, raising and nurturing children is undertaken by two parents, social structures are organised to facilitate this to some extent at least. Where there is only one parent, she carries the responsibilities that society and the state expect of two. However, she is held to be deficient for not being able to bridge the gap between her family structure and the assumed societal norm. This deficit model creates state and social responses that provide support to single-parent families on the basis of a charitable response to their supposed failings, or as an actuarial risk-mitigation strategy.

[764] *Balaguer Santacana (on behalf of Balaguer Montalvo) v Spain, Merits* CCPR/C/51/D/417/1990, Communication No 417/1990 (1994) (HRC) 10.2. See also, Saul, Kinley and Mowbray (n 150) 731-32.

[765] Cited in Fredman, *Transformed*, (n 28) 178.

So pervasive is the myth of the autonomous, self-sufficient individual that, as Fineman observes:

> Even the targets of the imposition of independence are convinced of its appropriateness, as evidenced by the 'testimony' of mothers on welfare who mimic the rhetoric that condemns them as pathologically dependent. They accept the assertion that independence and self-sufficiency are inextricably tied to paid work.[766]

Boyd and others observe that single-mothers-by-choice frequently seek to distinguish themselves from other single mothers by stressing neoliberal virtues such as having secured a secure, well-paid career, savings and a house prior to embarking on pregnancy and parenthood.[767] As explained in subchapter 1.8, quantitative data concerning the economic, social and cultural status of single-parent families is limited and has, until recently, not been comparable across states. This weakness prevents a clear picture of the comparative status of single-parent families from being seen. The very paucity of data, however, is itself evidence of the lack of adequate protection for single-parent families. Looking at state level data, the ways in which single-parent families are discriminated across (mis)recognition, transformation and participation dimensions is striking. The types of disadvantage experienced by single-parent families extend beyond simple economic matters to include the denial of participation rights and rights to culture and leisure, as well as disproportionate negative exposure to criminal justice, youth justice, and care and protection systems.[768] The available information overwhelmingly suggests single-parent families suffer disproportionate levels of economic, social and cultural

[766] Fineman, *Autonomy* (n 35) 22.

[767] Boyd and others (n 8) 177-78.

[768] Featherstone (n 336) 37-40.

disadvantage, and provide *prima facie* evidence substantive discrimination throughout the world.

3.6.10 Obligations in relation to data, planning and monitoring

As discussed in subchapter 3.4.8, planning, monitoring and reporting on fulfilment of rights form part of states' obligations in relation to ICESCR. If states are to meet their immediate obligations to protect and assist single-parent families in a non-discriminatory manner, they must develop appropriate definitions and datasets that provide baselines to gauge the extent of rights violations and to enable progress to be monitored. The UN Population Division's *Principles and Recommendations for Population and Housing Censuses* provides a useful starting point.[769] States must collect quantitative data on the current economic, social and cultural position of single-parent families in their state. They must also consult with single-parent families about their needs, review state policies and legislation to ensure that they promote equality, and address cultural aspects of discrimination. Analytical frameworks derived from capabilities approaches that centre the voices of single-parent families and encompass assessment of misrecognition, maldistribution, transformation and participation harms should be developed to facilitate planning and monitoring.

States are likely to need encouragement and guidance from UN treaty bodies and others to gain the motivation and understanding to implement such frameworks. As I will elaborate in my final chapter, a simple means of providing this guidance could be through a General Comment from CESCR. Ideally, CESCR would work with CEDAW and CRC to produce a joint General Comment/General Recommendation to guide states on their

[769] ST/ESA/STAT/SERM/67/Rev3 (n 64).

obligations to single-parent families as group units including data, planning and monitoring.

3.6.11 Subchapter conclusion

In this subchapter, I have narrowed my focus from the obligations of states under ICESCR to home in on the specific obligation imposed by Article 10(1). Drawing on the principle of *pacta sunt servanda*, I argue that the provision cannot be dismissed as too broad, or merely aspirational. However, CESCR's limited, ad hoc commentary on Article 10(1) makes it difficult to elucidate the content of the right from CESCR practice. Moreover, scant attention has been paid to Article 10(1) in scholarly works. The notable exception is the chapter on Article 10 in Saul, Kinley and Mowbray's *Commentary*. Unfortunately, the usefulness of this chapter is limited by its focus on reflecting existing jurisprudence rather than positing an interpretation based on the customary rules of treaty interpretation as codified in VCLT Articles 31 to 33. In relation to Article 10(1), where CESCR commentary is sparse, Saul, Kinley and Mowbray rely on provisions of other conventions which, while referring to family, are not directly comparable.[770] As I demonstrated, this distorts the meaning of Article 10(1) by failing to adhere to the ordinary meaning of the text interpreted in its context and in light of its object and purpose. Relying on the intentions of the drafters as a supplementary means of interpretation, I argued that Article 10(1), correctly understood, does not have a merely residual effect, but rather that it serves as a dye colouring the effect of the other substantive provisions of ICESCR by requiring them to be read as applying to the family group unit, in addition to their application to individuals.

[770] Saul, Kinley and Mowbray (n 150) 721-853.

Thereafter, I examined the meaning of the term ‘widest possible’ in Article 10(1) and concluded that although the obligation on the state is not unbounded, the protection and assistance assured to families must nevertheless be maximal, full, great, and inclusive. I considered whether limitations other than resources might curtail the protection and assistance considered to be ‘possible’ under the provision. While acknowledging that this could be the case, I noted that neither the existence of social or political norms that militated against ensuring families received support nor negative attitudes toward single-parent families (or other types of families as outgroups) could form valid justifications for state failures to ensure families were accorded the widest possible protection and assistance. Next, I considered whether capabilities approaches can be applied to the rights of the family as a group unit. Noting that capabilities approaches are capable of diverse applications and have been employed in relation to collectives by others, I conclude that it is appropriate to employ them to assist with understanding families’ rights as protected by Article 10(1).

Turning to questions of parental responsibility, I observed that reading in limits to state obligations under Article 10(1) on the basis that such obligations interfere with parental responsibility and family autonomy would render it impossible to address adequately the unequal bargaining power women have in relationships. Notions of parental responsibility are frequently expressed in gender-neutral terms that serve to obscure the gendered realities of parenting. Moreover, appeals to parental responsibility and family autonomy fail to provide recourse for those families trapped in poverty, of whom single-parent families comprise a disproportionate number.

I next considered whether states could rely on ICESCR Article 4 to justify imposing limitations on the Article 10(1) rights of single-parent families. While a state might argue that such a limit fell within the Article 4 requirement that it be imposed

‘solely for the purpose of promoting the general welfare in a democratic society’ and was determined in law, I concluded that a limitation of this kind would not meet the requirement that it be compatible with the nature of the rights because families—understood in their caring-vulnerable conception—must be covered by this provision without discrimination.

I moved on to consider what states’ obligations to guarantee non-discrimination and equality in the enjoyment of rights mean for their obligations to single-parent families under Article 10(1). I observed that the predicating of social structures on the assumption that the labour of provisioning, raising and nurturing children is undertaken by two parents results in single parents and their families being viewed as deficient for not being able to bridge the gap between their family structures and the assumed societal norm. Gender-based inequalities in shouldering the costs of care provision add to this. State and societal responses rest on and reinforce deficit-based views of single-parent families resulting in the infliction of harm across the four dimensions of (mis)recognition, (mal)distribution, transformation and (non)participation. This gives rise to immediate obligations on states to address the discrimination experienced by single-parent families so that they can enjoy their Article 10(1) rights on a basis of equality.

To conclude subchapter 3.5, I outlined the data required for states to plan and monitor the implementation of Article 10(1) in relation to single-parent families on the basis of non-discrimination and equality. I emphasised the necessity of appropriately robust monitoring, including benchmarking and indicator development to hold states accountable, and foreshadowed my conclusion that a General Comment, ideally produced jointly by CESCR, CEDAW and CRC, offers the appropriate mechanism for guiding states on the content of their obligations to single-parent families under Article 10(1), how these may be fulfilled, and requirements for monitoring progress.

3.7 Chapter conclusion

This chapter has focused on the interpretation of ICESCR, specifically, the obligations of state parties. Beginning with an introduction to the status of economic, social and cultural rights, I touched on historical critiques of the concept, explaining counterarguments as well as subsequent developments that reduce the sway of such critiques. Next, I considered the evolving interpretive framework for economic, social and cultural rights and its implications for grappling with the complexity of these rights and the obligations they impose on states. In addition to the VDPA's recognition of human rights as universal, indivisible, interdependent, interrelated, and to be given equal emphasis, I drew attention to the policy design concept of 'wicked problems' as helpful for understanding states obligations in relation to economic, social and cultural rights.[771]

Thereafter I considered how poverty has been conceptualised as a matter of human rights. Here, I examined the contribution of capabilities approaches to CESCR's evolving understanding. After that, I summarised additional aspects of ICESCR interpretation, drawing on CESCR General Comments and the Maastricht Guidelines including the 'protect, respect, fulfil' framework.[772] I addressed concepts of the margin of appreciation, progressive realisation to the maximum available resources, minimum core obligations, violations of states obligations including through deliberate retrogressive measures, and measuring compliance. I use the example of HRMI to illustrate developments in monitoring tools.[773]

Next, I turned to states' obligations of equality and non-discrimination. I discussed the necessity of going beyond understanding such concepts as requiring mere

[771] A/CONF57/23 (n 33) [5]; Rittel and Webber (n 147).

[772] E/1991/23 (n 149) [4-7]; ICJ, 'Maastricht' (n 149) [6].

[773] Brook, Clay and Randolph (n 638).

formal equality and the importance of the obligations in relation to substantive equality. I utilised Fraser's notions of (mal)distribution harms and (mis)recognition harms, as well as Fredman's four-dimensional approach to elucidate what non-discrimination and equality protections entail.[774] Having adopted Fredman's dimensions of distribution, recognition, transformation, and participation as a model for understanding equality and non-discrimination, I suggested that the immediate obligations of states to address discrimination and inequality should be understood as requiring the immediate embarkation on a comprehensive plan, recognising that some dimensions of non-discrimination, such as the transformation of social structures take time to bring to fruition.

The consideration of state obligations under ICESCR generally in the preceding six sub-chapters laid the groundwork for the final substantive part of this chapter (sub-chapter 3.5), in which I homed in on states' obligations in relation to the Article 10(1) rights of the family to the widest possible protection and assistance, with particular reference to single-parent families. I analysed Saul, Kinley and Mowbray's chapter on Article 10 in their *Commentary* as the main scholarly source related to the provision's interpretation. I concluded that the chapter's usefulness is limited by its reliance on the jurisprudence on rights relating to the family emerging from authorities not focused on economic, social and cultural rights.

Turning to CESCR's observations on Article 10(1) since 2016, I argued that its references to Article 10 are not underpinned by a coherent framework for interpreting the provision. I noted that, in the context of Article 10(1), references to single-parent families are rare. In one instance, CESCR comes close to recommending a planned approach to

[774] Fraser, 'Social Justice' (n 477); Fredman, *Discrimination* (n 45) 25.

addressing an issue of single-parent families' rights by recommending that a state adopt and implement a national action plan on women-headed households as a matter of urgency and that such households be assured certain rights and protections.[775] Moreover, several other references to single-parent families (or related categories) were found in the Concluding Observations scanned. These expressed concerns and made recommendations about matters such as poverty faced by marginalised and disadvantaged groups including single-parent families but did not make links to Article 10 rights. I concluded that CESCR's jurisprudence on Article 10(1) is not sufficiently developed to serve as a basis for determining the content of the rights protected therein. It was, therefore, necessary to return to the ordinary meaning of the terms of Article 10(1) in their context, read in light of the provision's object and purpose. Relying on the *Travaux Préparatoires* as a supplementary means of interpretation, I determined that the purpose of Article 10(1) is not merely residual. Rather, it brings the family as a group unit (in its vulnerable-caring conception) into ICESCR as a rightsholder. This justifies my claim that the provision, correctly interpreted, serves as a dye washing over other substantive ICESCR provisions and requires them to be interpreted in such a way as to ensure families' enjoyment of economic, social and cultural rights, in addition to individuals'.

Next, I addressed the meaning of 'widest possible' in Article 10(1) to understand the extent of state obligations under the provision. I observed that the natural meaning of the phrase is expansive, only constrained by the limits of possibility. This reinforces the argument that the provisions' purpose cannot be seen as merely residual. I applied a capabilities approach to elucidate the nature of the protection and assistance to be accorded, building on my earlier discussion (at subchapter 3.3.3) of poverty as a matter of

[775] E/C12/LKA/CO/5 (n 541)[54].

human rights. For single-parent families, a multi-faceted understanding of poverty and capabilities is essential to address the multiple elements of disadvantage faced across the dimensions of misrecognition, maldistribution, (non)transformation and exclusion from participation.

I rounded out my investigation of state's obligations under Article 10(1) by considering whether parental responsibility arguments or the provision in ICESCR Article 4 for justifiable limitations on rights might afford ways for states to limit their obligations under Article 10(1) generally, or in relation to single-parent families in particular. I determined that they cannot: to permit states to avoid their obligations on either of these bases would rob Article 10(1) of its essential meaning and run counter to non-discrimination guarantees, including by making it impossible to address root causes of gender-based and child poverty effectively. I considered the effects of non-discrimination and equality guarantees on states' obligations to single-parent families before finishing the chapter with a brief comment on states' data, planning and monitoring obligations in relation to Article 10(1) and single-parent families.

My next chapter will delve into the practical application of the right in Article 10(1) in relation to single-parent families. A detailed analysis of the UK benefits case *R (DA)* is undertaken to illustrate the negative consequences of pursuing policies that affect single-parent families without regard for their economic, social and cultural rights under Article 10(1).[776] Rather than a focus on judicial interpretation, my interest is in the impacts of a failure by the state as a whole to fulfil its obligation to implement Article 10(1) in a way that guarantees non-discrimination. My particular focus is on the executive branch's exercise of its policymaking function. To explore the significance of Article

[776] *R (DA)* (n 53).

10(1) for state policymaking on matters relating to single-parent families' economic, social and cultural equality, I engage in a thought experiment which considers how a policymaker in a society similar to the UK might approach policymaking if they were aware of their obligations under Article 10(1) and intended to give effect to these in good faith.

My conclusion follows in Chapter 5 where I summarise the main points of my argument and consider strategies for advancing states' fulfilment of their obligations under Article 10(1), with particular reference to single-parent families. While it might be tempting to approach this from the point of view of developing states' understanding of and compliance with their Article 10(1) obligations generally before focusing on the rights of single-parent families as an outgroup, I shall argue that such an approach risks perpetuating a deficit model that positions single-parent families as 'other'. Instead, I propose that CESCR, ideally in conjunction with CEDAW and CRC, produces a General Comment that centres on states' obligations under Article 10(1) to single-parent families as a particularly marginalised and disadvantaged category. This approach has the advantage of requiring a focus on rights implementation in light of the dependency of children and derivative dependency of women as their usual primary caregivers, without the distraction of assumptions about the existence of a male household head on whom the rest of the family may be presumed to depend. The approach ensures that CESCR and other treaty bodies' exposition of the requirements imposed by Article 10(1) avoids unintentionally perpetuating the underpinnings of women's unequal bargaining power in their guidance to states.

4 Practical application of the right

4.1 Chapter introduction

In the first three chapters of this thesis, I introduced the overarching question my research seeks to answer, namely, does the UN human rights treaty system offer a valid and useful framework for the realisation of the economic, social and cultural rights of single-parent families and established the first five parts of my claim.[777] In Chapter 1, I fleshed out the broad terms of my claim. I also used illustrative examples to demonstrate the marginalisation and disadvantage experienced by single-parent families across diverse societies and regions in relation to Fredman's four dimensions of discrimination, namely (mis)recognition, (mal)distribution, (non)transformation and (exclusion from) participation.

In Chapter 2, I established that the correct conceptualisation of family for the purposes of ICESCR Article 10(1) is the vulnerable-caring family understood in a pluralistic sense and that single-parent families are families within the meaning of the provision. Drawing on vulnerability theory, I demonstrated that the marginalisation of single-parent families serves as a paradigmatic example of the consequences of failing to adequately consider and address the interplay of dependency and derivative dependency in relation to children and women. I explained that this contrasts with the fatal limitations that have beset attempts to address inequalities in women's and children's enjoyment of economic, social and cultural rights as separate, purely individual rights matters. I showed that Article 10(1) is correctly understood as a group right which allows realities of human vulnerability to be addressed in ways in which individual rights approaches, even those grounded in relational autonomy, do not. I concluded the chapter by

[777] Subchapter 1.2.

demonstrating that single-parent family status and membership of a single-parent family are analogous grounds under the non-discrimination and equality guarantees in ICESCR Articles 2(2) and 3.

In Chapter 3, I turned to the obligations Article 10(1) imposes on states. I determined that the correct way to interpret Article 10(1) is as a dye washing over all other substantive articles of ICESCR. Thus, in addition to states' obligations to individuals, Article 10(1) provides that states have positive duties to respect, protect and progressively fulfil the economic, social and cultural rights of families in a way which accords them the widest possible protection and assistance. I explained that states also have immediate obligations to ensure non-discrimination and equality in relation to Article 10(1) rights. I reviewed comments made by CESCR in Concluding Observations and elsewhere and found that Article 10(1) and the rights of single-parent families are mentioned, but only in an ad hoc way. CESCR has not produced a statement on states' obligations under Article 10(1) or on single-parent families' rights to non-discrimination and equality. Nevertheless, I found that the foundations of an approach can be gleaned from CESCR's statements on poverty as a matter of human rights, including the adoption of a capabilities approach.

In this chapter, I apply insights from the preceding material to assess the practical application of the right. To do this, I turn to *R (DA)*, a UKSC case challenging a tightening of the government's benefit caps policy.[778] In subchapter 4.2, I examine the case. My aim here is not to analyse the juridical approach. Rather, I seek to shed light on the way in which the reasoning of all branches of government was stymied by the absence of a lens that considered the widest possible protection and assistance that should

[778] *R (DA)* (n 53).

be accorded to single-parent families on the basis of non-discrimination and equality. In subchapter 4.3, I engage in a thought experiment. Here, I consider a counterfactual situation in which a policymaker is aware of the state's obligations under Article 10(1) to ensure the widest possible protection and assistance to families on the basis of equality and non-discrimination, and acts in good faith in accordance with these obligations. Again, it is the actions of the state *in toto*, and particularly its executive and legislative branches that concern me, not the juridical interpretation of Article 10(1) obligations in domestic courts.

Having used *R (DA)* to highlight the practical impacts of not implementing Article 10(1) and shown in my counterfactual thought experiment how the good faith implementation of the provision would support the realisation of single-parent families' economic, social and cultural rights, I move on to my fifth and final chapter. In this chapter, after summarising the arguments establishing single-parent families' rights under ICESCR Article 10(1), I shift to consider how the implementation of Article 10(1) might be advanced in order to realise these rights. The sixth part of my claim in subchapter 1.2 is addressed here. This is the claim that UN treaty bodies can and should require that states respect, protect and progressively fulfil the economic, social and cultural rights of single-parent families without discrimination, as well as offer guidance on implementation and monitoring progress, through a Joint General Comment/General Recommendation.

4.2 *R (DA)* – an illustration of the need to implement ICECSR Article 10(1) in relation to single-parent families

4.2.1 Subchapter introduction

The case of *R (DA)* [779] demonstrates the impacts of failing to implement or even be aware of single-parent families' rights and the state's obligations under ICECSR Article 10(1) at a domestic level. In this subchapter, I analyse *R (DA)* in detail. In the following subchapter, I undertake a thought experiment to imagine how a state committed to the implementation of its Article 10(1) obligations in good faith might approach the issues raised. I primarily focus on the arms of the state responsible for developing policy, setting budgets and legislating, rather than the judiciary. Analysis of the separation of powers, parliamentary sovereignty, the role of the ECHR in UK law or the incorporation of international human rights conventions in domestic law is beyond the ambit of this thesis. Rather, the judicial reasoning in *R (DA)* is considered for what it reveals about the normative assumptions of society and the state in the context in which it was decided.

R (DA) combined appeals to the UKSC against the decisions in two social security cases concerning the lawfulness of Welfare Reform and Work Act 2016 provisions relating to a revised benefit cap.[780] The appellants were single mothers and their young children (children under two years old in one case and children under five years old in the other) who claimed to have been unlawfully discriminated against by the revised benefit cap. The appellants argued that the provisions were unlawful under ECHR Article 8 (concerning the rights to respect for private and family life) and Article 14 (concerning the prohibition of discrimination), as well as Article 1 of Protocol 1 of the ECHR (concerning the protection of property). The basis for taking this action in a UK court was

[779] ibid.

[780] Welfare Reform and Work Act (c 7) 2016 (UK).

found in the Human Rights Act 1998 section 4. A breach of CRC Article 3(1) concerning the best interests of the child was also alleged.[781]

The seven-member bench found that the cap had pushed the complainants into poverty but the Court held by a majority of five to two that the government's acts were lawful because the policy was not manifestly without reasonable foundation (MWRF).[782] The tension between the fact that the cap had increased poverty for a protected class and the judges' assessment of the limits of their role in adjudicating on government social and economic decisions that have budgetary implications were key to the case. Different handling of this tension is central to the differences between the majority and dissenting judgments.[783]

ICESCR Article 10(1) does not feature in the judgments despite the facts of the case going directly to the question of whether the widest possible protection and assistance had been provided to families responsible for the care and education of dependent children. ICECSR has not been incorporated into UK law, unlike the ECHR. However, the different regard given to CRC shows that this is not a straightforward matter of international treaties falling outside the ambit of domestic consideration unless expressly incorporated by statute.[784] While it is beyond the scope of this thesis to go into these complexities, the facts and reasoning in *R (DA)* provide a detailed illustration of the lacuna in human rights protections when ICESCR Article 10(1) is ignored. The case also

[781] *R (DA)* (n 53)[10-16]] (Lord Wilson, writing the leading judgment); ECHR Protocol 1; Laura Lammasniemi, 'The benefit cap and the infliction of poverty' (2019) 41 Journal of Social Welfare and Family Law 368.

[782] *R (DA)* (n 53)[55-66 and 88] (Lord Wilson), [92-3 and 113-18] (Lord Carnwath), [125] (Lord Hodge).

[783] ibid [162-177] (Lord Kerr).

[784] ibid [178-91].

provides an opportunity to undertake a thought experiment as to what, if anything, would have been different if the provisions of Article 10(1) were adhered to by the state on a basis of non-discrimination.

4.2.2 The facts

The Welfare Reform and Work Act 2016 was part of an ongoing programme of austerity by the UK government. A benefit cap had been introduced by the Welfare Reform Act 2012 which set an annual limit to the value of welfare benefits a household could receive.[785] The government's rationale for that benefit cap was that 'encouragement to work did not equate to a requirement to work and that there had to be a limit to the amount of a household's benefits'.[786] At the 2015 general election, the Conservative Party Manifesto proposed reforming the cap and once re-elected, the Conservative government fulfilled its commitment by passing an act lowering the cap on how much households could receive in benefits.[787] There was considerable opposition to the new cap, and evidence about the likely negative effects of the benefit cap on single-parent families was presented to the government at many stages in the law-making process. Gingerbread (the English and Welsh single parents' charity) submitted to the Public Bill Committee that:

> Over 60% of people capped so far have been single parents; 70% of them have children under five and 34% have children under two … the younger the child is when the parent is capped, the harder it is for them to get into work. … [W]e really also need to be looking at the contradiction between the benefit cap and the conditionality policy that exists. … If you are capping up to 20,000 single parents who have children under two, there is no childcare support available for that group at present. There is also … a real shortage of childcare available, so there are really clear reasons why that group of single parents will not be able to go into work. [The government's] research, again, has shown that where those people

[785] WRA (n 780) s 96(1).

[786] *R (DA)* (n 53) [81].

[787] Lammasniemi (n 781) 368-9; DWP, 'Memorandum to the Joint Committee on Human Rights: the Welfare Reform and Work Bill' (2015) [3]; *R (DA)* (n 53) [7-8 and 81-6].

> who are capped do not find work, it is likely that 40,000 more children would be pushed into poverty.[788]

Nevertheless, the policy went ahead. The UK Department of Work and Pensions' Memorandum to the UK Parliament's Joint Committee on Human Rights asserts the Bill's compatibility with the ECHR.[789]

The government's rationale for the policy was multi-pronged and expressed in various ways in different settings.[790] Although there was not a single coherent rationale or intervention logic, it is possible to draw out key themes. Lord Wilson, writing the leading judgment in *R (DA)* with which Lords Carnwath, Reed, Hughes and Hodge concurred, observes that the government chose not to exempt lone parents of children under five from the cap, because, in its view 'encouragement to work did not equate to a requirement to work and that there had to be a limit to the amount of a household's benefits.'[791] The government also 'stressed the importance of the message that work pays and that households on benefits should not receive more than working households' and claimed that 'hard cases' should be addressed through discretionary hardship grants.[792] The disproportionate negative impact of the cap on single-parent households was justified by the government by envisaged benefits to the economic wellbeing of the country, the 'principle' that paid work was the surest route out of poverty, and the claim that studies showed worse outcomes for children whose parents are not in paid work.[793] Certain

[788] *R (DA)* (n 53) [83].

[789] DWP 'Memorandum' (n 787) [2].

[790] Steven Kennedy, 'Briefing Paper Number 07252, 16 July 2015: Welfare Reform and Work Bill' [Bill 51 of 2015-16], 2015) 45-64; DWP 'Memorandum' (n 787); DWP, 'Welfare Reform and Work Act: Impact Assessment for the benefit cap' (2016) 4.

[791] *R (DA)* (n 53) [81].

[792] ibid [85].

[793] ibid [81 – 86]; DWP, 'Memorandum' (n 787) [4-25]; DWP 'IA' (n 790) 7, 11-6.

benefits, such as the carer's allowance, were exempt from the cap. The cap was also removed for households in which adult members undertook required amounts of paid work. Coupled parents were exempt if they were in paid work for a combined 24 hours per week, provided at least one member of the couple undertook at least 16 hours of paid work per week. Single parents were exempt if they undertook at least 16 hours paid work per week.

Incentivisation of (paid) work was the government's primary aim. The government's Impact Assessment on the Bill had claimed '41% of those potentially subject to [the existing cap] would be more likely to work in order to escape it than those not potentially subject to it.'[794] Lord Wilson valiantly attempted to parse this statement and concluded that the government probably intended to say that:

> The number of those more likely to work in order to escape the cap is 41% larger than the already small group, namely only 11% of all capped households, who would have moved into work in any event. Translated into numbers, it means that only about one capped household out of 20 such households (ie 5%) was considered likely to move into work in order to escape it.[795]

If correct, this would mean that government policy was to reduce the income of 19 already financially vulnerable families in order that one family might receive what the government saw as the benefits of a life in which the single parent engaged in paid work. Furthermore, the government conceded before the UKSC that it had little statistical evidence to assess whether even this limited aim of incentivising paid work was being achieved.[796] In relation to its aim of fiscal savings, the government estimated it would

[794] DWP, 'IA' (n 790) 5.

[795] *R (DA)* (n 53) [23].

[796] ibid [23].

save £110m per year.[797] However, Lord Wilson found that actual savings in the first year were closer to £42m, amounting to 0.03 percent of government expenditure on working-age benefits and a minuscule proportion of its overall budget.[798] Thus, the policy did not make any significant contribution to achieving the government's fiscal aims.

The policy did, of course, achieve a limit to the amount of benefits a household could receive, although this was ameliorated in some instances by the existence of discretionary payments that households could apply for through local authorities. Government policy was to set 'a reasonable limit on the amount of benefits which a household could receive.'[799] How the reasonableness of any limit should be decided is not clear. Two possible options appear. First, statements about ensuring that households not in paid work do not receive more income than those in paid work imply that non-working households are judged to be less deserving than others and that reasonableness is in some way related to moral worth. Alternatively, the reasonableness of income could be assessed based on what was required to keep a household out of poverty. In relation to the first possibility, NGOs, trade unions and academics had argued that the austerity measures had 'amplified the vilification of welfare benefit recipients', particularly single mothers.[800] Thus, it appears that increasing austerity might increase stigma towards single parents in receipt of a benefit, thereby reducing perceptions of their deservingness of support and thus leading to a gradual reduction in the amounts society and state viewed as reasonable.

[797] ibid [81, 93, see also 153].

[798] ibid [32].

[799] ibid (n 53) [81and 93].

[800] Laura Lammasniemi, 'The Benefit Cap and the Complexity of Discrimination: R (SG and others) v Secretary of State for Work and Pensions' (2016) 24 Feminist Legal Studies 215.

In relation to whether it was reasonable to be expected to live on the amount of money available under the cap, the UKSC held that the cap inflicted poverty on those subject to it. As Lord Wilson reasoned,

> [S]ince the government cannot sensibly argue that the computation of welfare benefits is intended to provide a family with more than it needs, it follows that a reduction of those benefits will provide it with less than it needs.[801]

Even accepting that 'the concept of needs is to some extent elastic', Lord Wilson found that the government had not used any scale of needs to justify the lower cap and given that in a 2016 speech, the Prime Minister had acknowledged that benefits pushed '"people's incomes just above the poverty line"', it is logical that a subsequent substantial cut to benefits 'pulls their incomes well down below the poverty line.'[802] Thus, Lord Wilson concluded that 'the effect of the cut is to reduce a family well below the poverty line, judged by the generally accepted measure of less than 60% of median UK income equivalent to the size of the household.'[803] He cited '[s]triking evidence' of the serious negative effects that living in poverty even for a few years has on children's 'educational attainment, health, and happiness as well as … long-term adverse consequences' and noted the particular harm of poverty in early childhood.[804]

By August 2017, approximately 68,000 households had had their benefits cut. Of these, 72 percent were single-parent households. Single mothers headed an estimated 65 percent of the total. This equates to over 90 percent of the capped single-parent families being headed by single mothers. Most households affected by the cap were single-parent

[801] *R (DA)* (n 53) [33].

[802] ibid [33].

[803] ibid [33]

[804] ibid [34].

families with a child aged under five years old. A quarter of affected households were single-parent families with a child under the age of two (the two categories from which the complainants came).

Based on these numbers, Lord Wilson found the cap had a major impact on families with children aged under five (of whom those with an under 2-year-old were a significant subgroup). Those with more children were more likely to be capped, as the cap was applied to the household as a whole, not the individuals within it (although, as mentioned, different work requirements applied through which households with two adults or one adult could avoid the cap). Nearly three-quarters of capped households had three or more children.[805]

4.2.3 Discrimination

The UKSC had previously recognised that single mothers had been disproportionately affected by an earlier, less harsh benefit cap in *R (on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions*.[806] In *R (DA)*, the majority found that single parents of children under a certain age and their children under that age were members of protected categories for the purposes of discrimination law. It held that the claimants' status for the purposes of discrimination law is based on their position at the time. The fact that a person would not remain a single parent to a child under a specified age forever was not relevant.[807]

Following the *Thlimmenos* principle of treating unalike classes differently, Lord Wilson found that relevant questions were: whether the one-capped household out of

[805] ibid [22].

[806] *R (SG)* (n 449).

[807] *R (DA)* (n 53) [37-38].

twenty that was more likely to move into paid work due to the benefit cap was likely to be a two-parent or single-parent household; and, if it were a single-parent household, whether was it likely to contain a young child (under 5 or under 2).[808] Even given the assumption that a capped single-parent would receive £12,000 more per annum if she met the requirement of undertaking 16 hours of paid employment per week, Lord Wilson held that assessing the reasonableness of diverting single parents from caring for young children as well as the likelihood and practicality of such single parents being able to work the required hours were relevant to the question of discrimination. The availability of free childcare, tax credits to support childcare, discretionary benefits to assist those in need, and signals from the government about whether there was a child's age below which parents should not be diverted from caring for them were all held to be relevant considerations.[809]

In contrast, Lord Hodge (with whom Lord Hughes concurred) did not accept that there was anything sufficiently particular about single parents of children under a certain age to form a basis for treating them as a different class from others affected by the benefit cap. He referred to other variables such as 'the availability of part-time work, the proximity of family or friends who can provide child care, … the availability and funding of childcare facilities' and '[i]ll-health or other adverse circumstances of the parent or children in a large family [which] may militate against a lone parent's ability to work, regardless of the age of the youngest child.'[810] In his judgement, such intersectional realities of single-parent families' lives negated their ability to claim discrimination

[808] ibid [23(b) and 40-44]; *Thlimmenos* (n 557).

[809] *R (DA)* (n 53) [26-31].

[810] ibid [128].

successfully. He conceded that single-parent households are in a different situation from two-parent households for the purposes of setting minimum hours of paid work but held that the government had recognised this in setting 'a lower minimum number of hours of work per week' for single-parent households.[811] However, as I demonstrate in subchapter 4.3.8, this reduction does not begin to compensate for the total reduction in adult hours available to a single-parent family.

The identification of an appropriate comparator group was problematic for the judges. Lord Wilson quoted Lady Hale's observation in *AL (Serbia)* that seeking a precise comparator was '"an arid exercise"'[812] and held that in this case, such an approach was inappropriate because the complainants here were in a 'relatively different situation from those who have been treated similarly'.[813] He stressed that unlike others affected by the cap, the evidence showed that it is not in the interests of children under two, their primary caregivers or the family as a whole to require the primary caregiver to engage in paid work; that accessing affordable childcare presented difficulties; and that the effects of poverty on young children were disproportionate.[814]

Nevertheless, members of the UKSC spent considerable time considering the complainants' situation compared to various other categories of families. For example, Lord Carnwath compared the claimants to other types of families with no adult undertaking sufficient paid work and found insufficient differences between them.[815] As

[811] ibid [128].

[812] ibid [46], citing *AL (Serbia)* (n 549) [28 and 51].

[813] *R (DA)* (n 53) [51].

[814] ibid [51].

[815] ibid [119].

those other groups might also be in poverty, his view was that the claim of discrimination failed. Lady Hale argued that the comparison was between 'lone parents and their children and, on the other hand, dual parents and their children'[816] before turning to single parents with only older children as a comparator.[817] The inability of the judges to agree on the appropriate comparator serves as an ironic illustration of Lady Hale's point about the aridity of the search for a precise comparator and Lord Wilson's observation that such an approach was inappropriate in this case.

4.2.4 Does the infliction of poverty on single mothers of young children and those children *prima facie* breach Article 8 of the ECHR?

The Human Rights Act section 3 gives effect to ECHR rights and allows them to be adjudicated in domestic courts. It requires primary and subordinate legislation to be read insofar as possible in a way that is compatible with ECHR rights and empowers courts to make declarations of incompatibility. On the question of whether ECHR Article 8 concerning respect for private and family life, home and correspondence applied, Lord Wilson held that;

> It cannot seriously be disputed that the values underlying the right of all the appellants to respect for their family life include those of a home life underpinned by a degree of stability, practical as well as emotional, and thus by financial resources adequate to meet basic needs, in particular for accommodation, warmth, food and clothing.[818]

Given the documented negative consequences of the cap on single-parent families, he concluded, 'whatever their individual effect, provisions for a reduction of benefits to well below the poverty line will strike at family life.'[819]

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[816] ibid [135].

[817] ibid [141].

[818] *R (DA)* (n 53) [35].

[819] ibid [37].

In contrast, Lord Carnwath agreed with Sir Patrick Elias's decision in the lower court that while the '"very real hardships"' faced by the families as a result of the cap should be 'underestimated by no-one', all '"non-working"' households face these to a degree, and it is obvious that those with more children will '"typically suffer more"'.[820] Lord Carnwath did not consider the suffering of the children as individuals in these instances, only as members of the household group. This assessment is surprising given that the claimants included children under two years old and children under five years old. As the right in ECHR Article 8 attaches to individuals, Lord Carnwath's omission of consideration of the hardships suffered by these children at this point is confusing. Sir Patrick Elias's Court of Appeal decision, which Lord Carnwath adopts, treats the household group as if it were the rightsholder under ECHR Article 8 alongside parents as individuals who have children. This confusion perhaps reflects a difficulty in holding in mind each young child as a rightsholder separately from their family. However, in contrast to ICESCR Article 10(1), ECHR Article 8 does not provide for the family to hold rights as a group unit.

4.2.5 Appropriate scope of the adjudicators' jurisdiction

The case ultimately turned on the majority's assessment of the limitations of the Court's jurisdiction on matters of social security which have fiscal implications. In *R (SG),* the UKSC had held that although the benefit cap scheme was discriminatory, the Court would respect the legislature's policy choices 'in relation to general measures of economic or social strategy, including welfare benefits' as long as they were not MWRF.[821] The MWRF test stems from ECHR jurisprudence and displaces the 'normally

[820] ibid [119] citing *R (on the application of DA & ORS) v Secretary of State for Work & Pensions* [2018] EWCA Civ 504 [105].

[821] *R (DA)* (n 53) [93]; *R (SG)* (n 449) [4].

strict test for justification of sex discrimination' when it comes to state welfare benefits.[822] The rationale is that economic and social policy decisions are reserved for states' parliaments. In *R (SG),* the Court had held that the rationale for the benefit cap, namely 'achieving the legitimate aims of fiscal savings, incentivising work and imposing a reasonable limit on the amount of benefits which a household could receive' was not MWRF, given that the government had weighed the policy's 'differential impact on men and women' against its objectives prior to deciding to go ahead.[823] Other cases in the UK's highest courts had taken divergent views on whether the MWRF test was the correct way to apply the margin of appreciation in UK law.[824] In *R (DA),* Lord Wilson departed from his own position in previous cases to find that 'in relation to the government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without foundation.'[825] Driving the point home, he added, 'Let there be no future doubt about it.'[826] Nevertheless, other members of the Bench did have doubts as detailed in Lady Hale's and Lord Kerr's judgements.[827]

In Lord Wilson's view, determining whether the government's rationale was evidence-based or logically coherent was not the role of the Court. Rather, he held that the government must only put 'forward its reasons for having countenanced the adverse treatment', at which point it was up to the complainant to establish that 'the adverse

[822] *Humphreys v Her Majesty's Revenue and Customs Comrs* [2012] UKSC 18 [19].

[823] *R (SG)* (n 449) [69].

[824] *R (DA)* (n 53) [110-18] (Lord Carnwath) [125] (Lord Hodge); *Humphreys* (n 822) [17-19].

[825] *R (DA)* (n 53) [65].

[826] ibid [65].

[827] ibid [146-57] (Lady Hale), [162-77] (Lord Kerr).

treatment was manifestly without foundation'.[828] Under this approach, the fact that advocates provided evidence showing that the policy was unlikely to achieve the government's aims, would cause harm to single-parent families and would cause lasting damage to the children within them simply strengthened the government's position by allowing it to demonstrate that it was not ignorant of these matters when it made its decision. There was no obligation on the government to mount a reasoned rebuttal of such evidence. On the other hand, Lord Wilson then seems to walk back from the absolutist tenor of this stance. He states that his distinction about the burden of proof was 'more theoretical than real' because:

> The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable.[829]

In contrast, Lady Hale, in her minority judgment, felt the MWRF test applied differently. She agreed that cases about equality in the context of welfare benefits are difficult because it was 'an area, not principally of social policy, but of economic policy',[830] and that '[c]onstitutionally, economic policies are decided by those organs of government which are directly accountable to the people. The courts cannot make those decisions for them.'[831] Nevertheless, she argued,

> [T]hat does not mean the courts have no role to play. In a constitution which respects and protects fundamental rights, it is the role of the courts to protect individuals from unjustified discrimination in the enjoyment of those fundamental rights. There are no 'no go' areas.[832]

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[828] ibid [66].

[829] ibid [66].

[830] ibid [133].

[831] ibid [133].

[832] ibid [133].

Following the position she had taken in her dissenting judgment in *R (SG),* Lady Hale held that where there is indirect discrimination, 'it is the measure itself, rather than its discriminatory impact, which has to be justified.'[833] Lord Kerr, following the decision in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill*, found that the MWRF test 'has no place in the national court's consideration of whether a measure which interferes with a Convention right is proportionate' and furthermore, that 'at the domestic level, the margin of appreciation is not applicable.'[834]

Untangling the meaning and precise status of the MWRF test in UK or European law is beyond the scope of this thesis. My focus on rights found in ICESCR avoids the need to deal with the tensions within the concept of MWRF or its application because ICESCR does not use this standard. While ICESCR rights are often not directly justiciable, in many jurisdictions including the UK they have interpretive force. Furthermore, although UN treaty bodies cannot sanction states for non-compliance or to enforce their recommendations, observations and recommendations of these bodies have normative power. In this regard, the significance of treaty body jurisprudence has similarities to the significance of declarations of incompatibility with ECHR made by UK courts under section 4 of the Human Rights Act 1998 which are also non-binding and do not affect the validity, continuing operation or enforcement of the provision concerned.[835] In both contexts, the moral and reputational power of the adjudicators' statements carries weight and this normative influence helps shape future developments in state practice to a greater or lesser extent.

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[833] ibid [134].

[834] ibid [169] citing *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3 [54].

[835] HRA 1998 s4(6).

As explained in subchapter 3.4.3, the margin of appreciation is also a more marginal concept in UN treaty body settings than in regional jurisdictions. In the economic, social, and cultural rights sphere, UN treaty bodies must be able to make observations about matters pertaining to the state's budgetary decisions because many rights would lose much of their meaning if they were stripped of any connection to budgetary matters. Of course, UN treaty bodies must exercise caution when entering into such fields. States retain the right to determine the internal systems, laws and policies through which ESCR rights will be delivered, but CESCR, through its monitoring and recommendatory roles, has a duty to comment when the provisions of ICESCR are breached.[836]

4.2.6 CRC Article 3(1): the best interests of the child

The UKSC in *R (DA)* also considered the requirement in CRC Article 3(1) that in all actions concerning children, the best interests of the child must be a primary consideration. This consideration stems from the adoption of the finding of the ECtHR that, where relevant, provisions of other human rights treaties should inform the interpretation of the ECHR.[837] The UKSC held in *Zoumbas v Secretary of State for the Home Department* that, 'The best interests of a child are an integral part of the proportionality assessment under article 8 of the Convention.'[838]

In *R (SG)*, the failure to treat the best interests of the child as a primary consideration was held to be irrelevant because that case had been brought by single mothers on the basis of alleged gender discrimination in the application of ECHR Article

[836] ICJ, 'Maastricht' (n 149) [8].

[837] *R (DA)* (n 53) [67 and 71]; *Neulinger v Switzerland* (2010) 54 EHRR 1087 [131-2].

[838] *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74 [10].

8.[839] There it was held that a breach of the rights of the child under CRC Article 3 could not be regarded as a breach of their mothers' substantive rights under ECHR Article 8 in relation to respect for family life.[840] Rather, the rights of children and the rights of their single mothers were held to be separate. However, unlike *R (SG),* the complainants in *R (DA)* included young children in single-parent families as well as their mothers, and it was alleged that the children were discriminated against on the analogous grounds of being members of single-parent families. Moreover, Lord Wilson, in his leading judgment, saw the interests of the mothers and the child claimants in this case as indistinguishable. He held that if the government were in substantial breach of CRC Article 3(1), it would raise the possibility that the foundation of its policy 'might well be manifestly unreasonable.'[841] Speaking about the mothers, he stated:

> Their claim is as parents; so, without their children, it would not exist. Indeed, their claim is as lone parents, so responsibility for their children in effect rests solely upon them. And their claim is to defend furtherance of their family life from the effects of a cap on benefits specifically computed by reference to the needs of their children and themselves taken together.[842]

In this regard, he viewed Lady Hale's observation in *Beoku-Betts v Secretary of State for the Home Department* that '[t]he right to respect for the family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom family life is enjoyed'[843] as 'never more apt'.[844] For this reason, he held that a breach of CRC Article 3(1) would be relevant to the mothers' case as well as

[839] *R (SG)* (n 449) headnote; *R (DA)* (n 53) [73].

[840] *R (SG)* (n 449) [146].

[841] *R (DA)* (n 53) [78].

[842] ibid [77].

[843] *Beoku-Betts* (n 411) [4].

[844] *R (DA)* (n 53) [77].

the children's.[845] By articulating this, Lord Wilson implicitly acknowledged the significance of dependency and derivative dependency, although he did not use that language nor refer to theories of vulnerability or relational autonomy as explanatory frameworks for his position. In my thought experiment subchapter 4.3, I apply these ideas explicitly to the facts of *R (DA)*.

The UKSC had previously held that CRC General Comment 14 paragraph 6 provides authoritative guidance on the scope of the best interests of the child test in CRC Article 3(1).[846] In *R (DA)*, Lord Wilson gave weight to two aspects of that guidance:

> (a) a substantive right of the child to have his or her best interests assessed as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake; …
> and …
> (c) a rule of procedure that, whenever a decision is to be made that will affect an identified group of children, the decision-making process must include an evaluation of the possible impact of the decision on them.[847]

In relation to the latter, Lord Wilson noted: first, a government memo stating that the provision was compatible with ECHR rights because the disproportionate effect on single parents was outweighed by 'the interest of the economic wellbeing of the UK and of incentivising people to work';[848] second, the government's assurance that it had fully considered its CRC obligations and concluded that studies showed 'the best interests of children overall were promoted when their parents were in work' and that 'work remained the surest route out of poverty';[849] and third, the government had rejected

[845] ibid [77-78].

[846] *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47[36]; CRC, 'General comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)' (29/05/2013) CRC /C/GC/14 [6].

[847] *R (DA)* (n 53) [68(c)].

[848] ibid [82].

[849] ibid [82].

submissions and opposition arguments against the provision because it had a long-standing policy that people on benefits should not receive more than those in paid work, and in its view discretionary hardship grants and free childcare would mitigate the worst effects on families.[850] He commented that the Government's Equality Analysis had stated 'that it was not in the best interests of children to live in workless households' and referenced studies purportedly showing 'that children in such households exhibited greater behavioural problems from the age of seven and poorer academic attainment.'[851] He, therefore, concluded that the government 'did evaluate the likely impact of the revised cap on lone parents with young children and … assess their best interests at a primary level of its overall consideration'.[852]

In terms of the substantive right, Lord Wilson held that applying the cap to single-parent households with a child under five or two years old was not MWRF because the government had chosen not to exempt these single parents and 'encouragement to work did not equate to a requirement to work and that there had to be a limit to the amount of a household's benefits'.[853] His Lordship did not explain why there must be a limit to household benefits such that thousands were pushed into poverty, nor why such limits should be applied on a household basis rather than an individual human basis, despite the wide variations in household sizes across the state. Rather, he held that,

> The court must impose on itself the discipline not, from its limited perspective, to address whether the government's evaluation of the impact was questionable; nor whether its assessment of the best interests of young children was unbalanced in

[850] ibid [83 – 86].

[851] ibid [86].

[852] ibid [87].

[853] ibid [81].

> favour of perceived long-term advantages for them at the expense of obvious short-term privation.[854]

Thus, the Court's ability to assess whether the government had met its obligations in relation to the substantive right in CRC Article 3(1) was limited to assessing whether the best interests of the child had been assessed as a primary consideration. The Court was not permitted to assess whether the policy was in fact in the child's best interests. Nor was it able to consider the likelihood of the government's intended outcomes eventuating from its policy or to weigh the harm caused to the best interests of the affected children against likely positive outcomes for them. Lord Wilson also did not address whether it was legitimate to cause acknowledged harm to one group of children (those in the 19 out of 20 households that the government estimated would not be more likely to have their parent move into paid work and escape the cap) in order to benefit another group of children (the 1 in 20 households that the government envisaged successfully moving into paid work as a result of incentivisation by the cap). He simply held, '[b]y a narrow margin' that the government did not breach CRC Article 3(1) 'in either of the relevant dimensions of its concept of the best interests of a child.'[855]

4.2.7 Subchapter conclusion

Lord Wilson, writing the leading judgment, held that the belief that there are better outcomes for children who live in households in which an adult works 'may not represent the surest foundation for the similarity of treatment in relation to the cap; but it is a reasonable foundation'.[856] It is not clear how he assessed reasonableness. Was mere belief on the part of the government enough? Did the fact that the government persisted in its

[854] ibid [87].

[855] ibid [87].

[856] ibid [89].

belief despite the evidence presented by advocates and others as the legislation proceeded through Parliament tip the balance in its favour? The existence of discretionary hardship payments 'which are intended on a bespoke basis to address, and which on the evidence are just about adequate in addressing, particular hardship which the similarity of treatment may cause' factored into his decision that the imposition of the revised benefit cap was not MWRF, despite the discretionary assistance not being intended or able to ameliorate poverty for the vast bulk of these families.[857] He reached this conclusion despite having found 'sound reasons' for accepting the Child Poverty Action Group's evidence that 'the effect of the cap is to reduce a family well below the poverty line.'[858] There was no requirement for the government to support its decision through the use of robust evidence or credible intervention logic.

However, as we shall see in subchapter 4.3, a different calculus applies if we approach the facts from the point of view of a good faith policymaker seeking to ensure their state meets its obligations under international law and aware of its duty under ICESCR Article 10(1) to ensure the widest possible protection and assistance is provided to the family without discrimination, particularly while it is responsible for dependent children.

4.3 The good faith policymaker applies Article 10(1) to benefit cap policy decisions—a counterfactual thought experiment

4.3.1 Subchapter introduction

We saw in subchapter 4.2 that, despite finding that the benefit cap inflicted poverty on the affected single-parent families and their members and that poverty in young childhood

[857] ibid [31, 88, and 90].

[858] ibid [34].

stunts 'major aspects of … development in the long term as well as in the short term',[859] the UKSC held in *R (DA)* that UK government's imposition of its benefit cap on single-parent families with young children was not an unlawful under the ECHR as interpreted in domestic law. Lord Wilson, writing the leading judgment, notes in a postscript that the Work and Pensions Committee of the House of Commons published a report on the benefit cap shortly before the UKSC delivered its judgment in which:

> [T]he committee calls on the government urgently to conduct a full audit of the policy behind the benefit cap; to reconsider the limits at which benefits are capped; and in particular to disapply the cap to those who, by reference to the conditions attached to the receipt of income support, are not yet expected to look for work.[860]

He commented that this fact would have fortified the decision 'that institutional propriety militated against the grant of a declaration of incompatibility at this stage'[861] had such fortification been needed. This observation reminds us that the non-judicial branches of the state also have an important role in the law: a role that extends to fulfilling treaty obligations in good faith under international law.

UN human rights treaty bodies have roles in monitoring and guiding states on their implementation of treaty obligations, but ultimately, it is the state that has the right to make decisions about the means by which it chooses to fulfil these. Therefore, the relevant counterfactual to the situation which led to the claims in *R (DA)* is a state that is in all ways similar to the UK in the 2010s, except that the policymaker is aware of their obligations under ICESCR Article 10(1) and seeks to act in accordance with them on the basis of good faith. Such a policymaker would look to CESCR for guidance and would

[859] ibid [51].

[860] ibid [91]; Work and Pensions Committee of the House of Commons, 'The benefit cap: Twenty-Fourth Report of Session 2017–19', (2019) [22-34].

[861] *R (DA)* (n 53) [91].

aim to make policy that could be presented with pride in a monitoring report to CESCR. In this sub-chapter, I engage in a thought experiment, taking that fact situation as a starting point, in order to explore what would have been different if the state had taken an ICESCR Article 10(1) approach to determining its policy on benefit caps.

From the standpoint of international law, we are required to assume good faith on the part of treaty signatories, which includes assuming that states intend to uphold the obligations to which they agree (*pacta sunt servanda*). When they violate those obligations and this comes to the relevant treaty body's attention through, for example, the reporting process, it is the role of the treaty body to comment and make recommendations about the fulfilment of rights. Such recommendations frequently have budgetary implications. They may also express concern about a political manifesto commitment that is contrary to the state's treaty obligations and recommend that policies based on such commitments be reversed.

I have argued that Article 10(1) serves as a dye washing over the other substantive articles of ICESCR to ensure that the family as a group unit has entitlements to the widest possible protection and assistance in the operation of these rights, including the right to social security found in Article 9. CESCR, in General Comment 19, offers guidance to states on their obligations under Article 9. Requirements include not subjecting existing social security coverage to arbitrary or unreasonable restrictions and ensuring equal enjoyment of adequate protection from social risks and contingencies.[862] States are to provide family and child support that takes into account 'the resources and circumstances of the child and persons having responsibility for the maintenance of the child' and any other considerations relevant to the application, and which will ordinarily cover food,

[862] E/C12/GC/19 (n 536) [9].

housing, water, sanitation and other rights whether through the provision of cash benefits or social services.[863] Such support should be 'adequate in amount and duration in order that everyone may realize his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care, as contained in articles 10, 11 and 12', paying 'full respect' to human dignity and non-discrimination, and ensuring adequacy for beneficiaries to 'afford the goods and services they require to realize their Covenant rights.'[864] Furthermore, the General Comment stresses that:

> All persons should be covered by the social security system, especially individuals belonging to the most disadvantaged and marginalized groups, without discrimination on any of the grounds prohibited under article 2, paragraph 2, of the Covenant.[865]

The qualifying conditions for benefits should be 'reasonable, proportionate and transparent', and any 'withdrawal, reduction or suspension of benefits' must be based on reasonable grounds.[866]

General Comment 19 also stresses that the states' obligation to guarantee that the right to social security is enjoyed without discrimination and on a basis of equality refers to de facto, as well as de jure discrimination and both indirect and direct forms of discrimination.[867] States are required to give special attention to those 'who traditionally face difficulties in exercising this right, in particular women … [and] children'.[868] Under 'Gender equality, attention is drawn to the greater likelihood of women to live in poverty

[863] ibid [18].

[864] ibid [22].

[865] ibid [23].

[866] ibid [24].

[867] ibid [29].

[868] ibid [31].

than men and women's often sole responsibility for the care of children.[869] The immediacy of the obligation on states to guarantee that the right to social security with be exercised without discrimination and on a basis of gender equality is emphasised.[870]

CESCR has not yet developed advice on the intersection of Articles 9 and 10(1). The consequences of this are seen when one analyses CESCR's Concluding Observations on the UK's Sixth Periodic Report. Under the heading 'social security', CESCR expressed concerns about the detrimental effect of earlier benefit caps on the enjoyment of the rights in ICESCR Articles 9 and 11 and drew the UK's attention to the guidance provided in CESCR General Comment 19, including concern about adverse impacts on:

> [T]he enjoyment of the rights to social security and to an adequate standard of living by disadvantaged and marginalized individuals and groups including women, children, persons with disabilities, low-income families and families with two or more children.[871]

However, no mention of Article 10(1) is made. Nor is there specific reference to single-parent families in relation to social security. Given that the UK's benefits cap is effectively applied at the level of the 'household' (which is akin to the family), not the individual, it would have been appropriate to refer directly to Article 10(1). Paying attention to the duty of the state to ensure the widest possible protection and assistance is accorded to the family, particularly while it is responsible for the care and education of dependent children would have focused CESCR's observations. It would have helped CESCR to focus on the effects of the policy on single-parent families as the marginalised category most negatively affected by benefit cap policies. The significant implications of

[869] ibid [32].

[870] ibid [40].

[871] E/C12/GBR/CO/6 (n 541) [40].

the dependence of children and the derivative dependency of their primary caregivers could have been drawn out.

Elsewhere in the Concluding Observation, CESCR lists single-parent families among the populations that are more affected by and at increased risk of poverty. Confusingly, the much larger category 'families with children' is also included in the list without any distinction being drawn between the different experiences and levels of poverty faced by the two categories.[872]

Under the heading 'Austerity measures', CESCR expresses serious concerns 'about the disproportionate, adverse impact' of measures introduced in 2010 on 'the enjoyment of economic, social and cultural rights by disadvantaged and marginalized individuals and groups.'[873] It reminds the UK that, as stated in its 2012 open letter, austerity measures 'must be temporary, necessary, proportionate and not discriminatory, must not disproportionately affect the rights of disadvantaged and marginalized individuals and groups and respect the core content of rights.'[874] CESCR recommended that the UK undertake a comprehensive assessment of the cumulative impact of austerity measures on the enjoyment of rights by 'disadvantaged and marginalized individuals and groups, in particular women, children and persons with disabilities'.[875] Regrettably, neither families with children nor single-parent families are mentioned in this section. Again, a greater profile for Article 10(1) might have helped CESCR focus its analysis of the causes and consequences of violations, as well as the existence of family types at

[872] ibid [47].

[873] ibid [18].

[874] ibid [19] CESCR/48th/SP/MAB/SW2 (n 617) 2.

[875] E/C12/GBR/CO/6 (n 541) [19].

particular risk. The absence of reference to the state's obligations under Article 10(1), including duties of non-discrimination towards single-parent families in the realisation of the right, meant CESCR's concerns about the detrimental effect of benefit caps on rights enjoyment set out in its Concluding Observations lacked the coherence and precision that would be desirable.[876]

Taking the view that Article 10(1) is a dye colouring how the other substantive articles of ICESCR are to be read, the right to social security protected by Article 9 is to be read as inuring to the family group unit as well as to the individual. Furthermore, for the purposes of Article 10(1), the crosscutting non-discrimination and equality provisions in Articles 2 and 3 of ICESCR stressed by CESCR in General Comment 19 apply to the family group unit. This subchapter uses that lens as the starting point for the counterfactual thought experiment in which a good faith policymaker considers the introduction of a proposed benefit cap policy in a fact situation analogous to that found in *R (DA)*.

4.3.2 The appropriate standard for assessing whether the benefits cap policy complies with ICESCR obligations in international law

In both *R (DA)* and the earlier case of *R (SG)*, the UKSC found that the government was made aware of concerns about discriminatory effects of benefit caps. However, this was held to be evidence that the government's policy decisions were not MWRF because the domestic courts deferred to the government's right to make decisions based on its own analysis of the information before it. Thus, the efforts of advocates and researchers to raise these issues counted against the claimants' arguments rather than supporting them.[877] Lord Wilson insisted that the Court must not 'address whether the government's

[876] ibid [40].

[877] *R (DA)* (n 53); *R (SG)* (n 449).

evaluation of the impact was questionable; nor whether its assessment of the best interests of young children was unbalanced.'[878] Instead, he held, and the majority of the Court agreed, that these were matters for the elected government to determine. Lord Wilson's solution leaves the Court in a position of deference to the government without subjecting its evidence to scrutiny.

However, the stance of UN treaty bodies fulfilling their functions through the state monitoring report process (and the individual communications procedures where states have accepted these) is different. Here, the MWRF test does not apply. The related margin of appreciation concept has some relevance. As CESCR acknowledges in General Comment 9, in assessing whether a state has met its obligations under ICESCR, a margin of appreciation exists, requiring it to give leeway to states in determining 'the precise method by which covenant rights are given effect'. [879] Nevertheless, CESCR emphasises that the means chosen by the state must 'be appropriate in the sense of producing results which are consistent with the full discharge of its obligations.'[880] CESCR reserves for itself the role of determining whether a state has taken all appropriate measures to meet its obligations.[881] As explained in CESCR General Comment 19, states' enjoyment of a margin of discretion does not obviate their obligations to 'take whatever steps are necessary to ensure that everyone enjoys the right to social security, as soon as possible.'[882]

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[878] *R (DA)* (n 53) [87].

[879] CESCR, 'General Comment No 9: The domestic application of the Covenant' (adopted 3 December 1998) E/C12/1998/24 [5].

[880] ibid [5].

[881] E/1991/23 (n 149) [4].

[882] E/C12/GC/19 (n 536) [66]. My thought experiment assumes that our policymaker's authority extends to social and economic matters, but not to justice policy [77-80].

Moreover, it is for the state to demonstrate compliance with its obligations by showing that it has acted in good faith in taking such steps and guaranteeing that the right is enjoyed without discrimination and on the basis of gender equality.[883] Implementation should be reasonable and proportionate, comply with human rights and democratic principles, and be subject to adequate monitoring and accountability.[884] As with other rights, the specific legal obligations of the state are to respect, protect and progressively fulfil to the maximum extent of available resources.[885] Thus, the state must show that its approach is reasonable in light of all relevant factors. Reasonableness might be assessed by the application of logic (including mathematical modelling, where appropriate) to a problem definition and intervention logic. This logic would include an explanation of the trade-offs made and evidence of a reasoned response to opposing views. If retrogressive measures are required due to a crisis or time of austerity, they must be most carefully justified, and it must be shown that they do not have a disproportionate impact on the enjoyment of rights by the most marginalised members of society.[886]

As Fineman argues, international human rights documents 'overwhelmingly suggest that governments are responsible for countering and correcting for the natural imbalances and inequalities that result from the actions of market institutions.'[887] An overly deferential approach would deprive the UN treaty bodies of their ability to fulfil their monitoring functions and effectively strip economic, social and cultural rights of their legal status. It would concede the correctness of those who argued last century that

[883] ibid [62].

[884] ibid [63].

[885] ibid [43].

[886] ibid [42]; CESCR/48th/SP/MAB/SW2 (n 617) 2.

[887] Fineman, *Autonomy* (n 35) 180.

such rights were merely aspirational. That is not the approach CESCR has taken. Rather, as explained in Chapter 3, CESCR General Comments and jurisprudence have emphasised that economic, social and cultural rights are to be taken seriously.

CESCR General Comment 1 states that the obligation 'to take steps … by all appropriate means …' implies an obligation on states 'to work out and adopt a detailed plan of action for the progressive implementation' of each right in ICESCR.[888] CESCR's processes do not require that each policy decision that forms part of a violation be assessed in isolation. This approach contrasts with the MWRF test, which—in a situation in which a discriminated against class is forced into greater and greater poverty as a result of a series of incremental policy decisions—requires that each decision taken in isolation is shown to be manifestly unreasonable thereby increasing the difficulty of challenging incremental rights violations.

4.3.3 The counterfactual

In this section, I examine how a government in a similar situation to the UK government of the 2010s acting in good faith would determine whether imposing and then reducing household benefit caps violated its obligations under Article 10(1). The thought experiment focuses specifically on single-parent households: both those with young children (specifically those under 2 years old, and under 5 years old as in *R (DA)*) and also single-parent households more generally.

4.3.4 Non-discrimination and equality

The good-faith policymaker undertaking an Article 10(1) analysis would be aware that non-discrimination and equality are crosscutting obligations that apply to all provisions of

[888] E/1989/22 (n 625) [4].

ICESCR and are immediately operable.[889] In other words, the state cannot approach non-discrimination and equality as goals to be progressively realised or make them subject to resource constraints. CESCR emphasises that even in dire circumstances, 'vulnerable members of a society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.'[890] In relation to the benefit caps, the protection of single-parent families with young children as particularly vulnerable members of society could have been achieved through a targeted approach, as was argued by Gingerbread and others in submissions on the bill and by the claimants in *R (DA)*.[891] Moreover, a good faith consideration of non-discrimination and the need to protect vulnerable families would have gone wider to assess whether single-parent families in receipt of benefits who only had older children are also vulnerable. The evidence suggests they are. As a result, our policymaker might conclude that all single-parent families should be excluded from benefit caps. This would remove the bulk of people who would otherwise be affected by the caps from the regime. It is possible that noting that other vulnerable categories were excluded, for example, due to disability, the policymaker might conclude that introducing a benefit cap at all was not worth the effort. If that were the case, they would be free to return to the drawing board and develop a better policy. In terms of the government's overall spending, avoiding the lowering of benefit caps could have been achieved at a relatively low cost.[892]

[889] I use 'discrimination' to include both justified and unjustified discrimination. The justification test is in ICESCR Article 4.

[890] E/1991/23 (n 149) [12]. Note, 'vulnerable' has a different meaning here from its use in vulnerability theory and my conception of the vulnerable-caring family.

[891] *R (DA)* (n 53) [189].

[892] ibid [32 and 153].

Even if my caveat in subchapter 4.3.4 that the requirement of immediacy in relation to non-discrimination and equality will not always be fully achievable in practice applies, the deliberate introduction of measures which one acknowledges will increase inequality violates ICESCR. While international human rights, like other aspects of law, accepts the concept of human agency, it also accepts the insight of capabilities approaches which recognises that some individuals and families need greater resources to enjoy their rights. The combination of individual characteristics and societal structures privilege freedom for some and cement the unfreedoms of others. The UK government implicitly recognised this in two ways: first, by exempting some people, such as those with disabilities, from the benefit cap altogether, and second, by providing that those who fall into particular hardship could seek discretionary assistance through their local authority. It would be necessary to look at the specifics of the assistance available to assess whether the latter would be sufficient to address the discrimination suffered by those affected by the proposed benefit cap policy. The policymaker would need to ask: is the discretionary assistance available for sufficient lengths of time to meet families' needs, is the quantum grantable to each family sufficient, and are the total budgets allocated to local authorities sufficient to reach all families in hardship in their area? The members of the Court in *R (DA)* concluded that the answer was no on all counts. Given the finding of Lord Wilson in the leading judgment that the cap pushed single-parent families in receipt of benefits from a situation on the verge of poverty fully into a situation of poverty and hardship, discretionary hardship grants available on a short-term basis only to the sub-section of beneficiaries who were in the greatest hardship could not ameliorate the discriminatory effects of such a policy.

4.3.5 Non-discrimination in the context of group rights

As we have seen, ICESCR Article 10(1) is framed as a group right. Ironically, the UK government also viewed beneficiaries as group units for the purposes of its benefit cap policy. The term used was 'household', which in practice equates to the co-domiciled family group unit. However, the government's goal of 'imposing a reasonable limit on the amount of benefits which a household could receive'[893] takes no account of the differing needs of differing households. Despite Lord Wilson in *R (DA)* accepting the government's contention that 'there has to be a limit on a household's benefits',[894] it is not clear that rationing of social security had to be undertaken on a household basis. Such rationing is a policy choice that is common across many states. Nevertheless, the claims in *R (DA)* were grounded in alleged violations of individual rights, namely, ECHR Article 8, which covers the individual's right to respect for family life and CRC Article 3(1), which requires the best interests of the child to be treated as a primary consideration.

The UKSC attempted to untangle the interests of the individual claimant categories in various ways, none of which proved satisfactory.[895] Although the judgements did not use the term 'relational autonomy', that concept appears to be what they sought to express. The notion of relational autonomy aims to square Western liberal attachment to autonomy as an overriding value with realities of the interconnectedness of human lives, especially in the context of families and caregiving. The arguments of relational autonomy theories are relevant to claims grounded in ECHR Article 8, which

[893] ibid [93] citing *R (SG)* (n 449) headnote.

[894] *R (DA)* (n 53) [81].

[895] ibid [77] (Lord Wilson), [140-5] (Lady Hale).

sets out an individual right to respect for private and family life. They are less relevant to ICESCR Article 10(1) which is a group right.[896]

As I explained in subchapter 2.3, conservative thinking about the family confuses the identity and rights of the family unit with those of the family head. This misidentification invisibilises the rights and needs of dependent children and of their primary caregivers who experience derivative dependency by virtue of the fact that they refuse to ignore their children's needs. Ironically, a liberal individualist society's failure to appreciate the family as a group unit may make it harder to perceive the ways in which its government's policy disregards the economic, social and cultural rights of those individuals who are either children or primary caregivers. In contrast, ICESCR Article 10(1) provides a more direct approach by requiring that the family is accorded the widest possible support and assistance as a group unit. Thus, the group rights aspect of Article 10(1) adds a layer that centres familial interdependence to the otherwise individual right to social security found in Article 9.

Article 10(1) speaks to the reality acknowledged by Lord Wilson that the interests of single mothers and their young children in relation to benefit caps are so intermingled as to be indistinguishable.[897] In a single-parent family, there is no other adult to mitigate the intensity of the dependency of the child on their mother 24 hours, seven days a week, and every week of the year, or the consequent derivative dependency of the mother.[898] Furthermore, a government policy based on the household unit (in practice, the family group) should be assessed in terms of the rights of the family group unit. As I

[896] See subchapter 2.4 and supplementary materials (Part 1).

[897] *R (DA)* (n 53) [77].

[898] Relatively privileged single parents may avoid derivative financial dependency through wealth or employment income sufficient to outsource childcare and domestic work.

demonstrate in subchapter 2.3, the family is to be conceptualised in its vulnerable-caring sense, not in a marital-conservative or libertarian sense, as this is in accord with the plain meaning of the text in light of its context and purpose.

From the standpoint of the rights of the vulnerable-caring family, the diversity of family structures and needs is a reality that the policymaker must address insofar as reasonably possible when tailoring their policy. Although the Court in *R (DA)* was not asked to rule on whether the policy discriminated against large households, it is illogical to think that a household of ten people could survive on the same income as a much smaller household with otherwise similar characteristics. Lord Carnwath recognised this point as 'obvious'.[899] However, he did not take the next step of addressing the discriminatory nature of the failure to treat households of different sizes differently in the *Thlimmenos* sense of treating unalike categories as alike.[900] Instead, he used the observation of the unfairness of the policy to large households as a reason to discount the allegation that members of single-parent families had suffered discrimination. Nor did he consider the intersectional disadvantage faced by single-parent families with a large number of members.

In contrast to Lord Carnwath's approach, a state (including the executive, legislature and judiciary) acting in good faith to comply with its ICECSR obligations while considering introducing benefit caps (or lowering a cap) would not be able to dismiss '"very real hardships"' faced by affected single-parent families simply because

[899] *R (DA)* (n 53) [119], citing *R (DA) CA* [105].

[900] *Thlimmenos* (n 557).

‘“all non-working households’” face them ‘to a greater or lesser extent’.[901] The test is, rather, whether the state has ensured the widest possible protection and assistance is accorded to the family, particularly while it is responsible for the care and education of dependent children. In interpreting this, the law-abiding policymaker would have regard to CESCR’s guidance that ICESCR Article 9 requires that social security be adequate for the recipient’s family.[902] This necessitates consideration of family size.

Rather than comparing different family types that are subject to the cap, a better starting position would be to consider benefit receipt in relation to the substantive and formal discrimination faced by single-parent families in the state. Applying the insight that substantially worse outcomes experienced by an outgroup are *prima facie* evidence of discrimination, the policymaker would look at the over-representation of single-parent families among those affected by the benefit cap. A comparison between the estimated impact of the change in the socio-economic situations of single-parent family households and those of all households (with or without children) would provide an appropriate measure. Making this assessment requires the state to undertake an objective assessment of the best evidence from fields such as microeconomics, statistics, health, education and psychology as a complement to their legal analysis. Capabilities approaches, which I outlined in subchapter 3.3.3, allow us to conceptualise economic, social and cultural rights to freedom from poverty (understood in its widest sense) as rights of loving, having and being. These are the capabilities that the state is obliged to ensure in according the

[901] *R (DA)* (n 53) [119] (Lord Carnwath) citing *R (DA) CA* [105] (Elias J). While his Lordship saw this observation as straightforward, it is also inaccurate. A significant proportion of non-working households access comfortable incomes from trust funds, investments, pension plans, etc.

[902] E/C12/GC/19 (n 536) [22].

widest possible protection and assistance to the family, including the single-parent family.

Of course, approaching the proposed policy on the basis of group rights does not obviate the policymaker's obligation to also consider individual rights. The UKSC in *R (DA)* was right to consider the best interests of the child under CRC Article 3(1) to assist its interpretation of ECHR Article 8 concerning the individual rights of the appellants to a home and family life.[903] However, the judges' failure to consider the rights of the family as a group unit clouded their ability to deal with the essential interdependence of the complainants. Furthermore, looking only at individuals led to a focus on the single mothers and each one's youngest child in isolation from the overlapping interests of older siblings who were also affected.

4.3.6 Multiple axes of discrimination, intersectionality and the indivisibility of rights

Within any discriminated against category there will be some who are harmed more and some who are harmed less. Where a suspect category has significantly worse outcomes compared to the general population, this is *prima facie* evidence of discrimination. An intersectional analysis should be used to examine if the disproportionate effects are felt more strongly by those who fall into two or more suspect categories.[904] Developments in data science mean that the identification of significant statistical associations between various axes of discrimination and harm to rights enjoyment and wellbeing is increasingly possible.

In relation to the first UK benefit caps, Lammasniemi finds that single-parent families from black and Asian backgrounds and those living in London were

[903] *R (DA)* (n 53) [67-78].

[904] See subchapter 3.3.6.

disproportionally affected.[905] Lord Carnwath's observation in *R (DA)* that the benefit cap also disadvantages large families implies that 'large families' and 'single-parent families with young children' are mutually exclusive categories.[906] This is not true: it is possible for a large family to both be parented by a single adult and include an infant. The benefit cap will doubly hit such a family: greater parental duties will increase the barriers to undertaking the required hours of paid work, while the greater number of family members means that the capped benefit is spread extra thinly. Families from ethnic and religious minority or migrant backgrounds tend to be larger than the UK average. Single-parent families are also more likely to contain children with disabilities and high health needs than two-parent families.[907] Policies, legislation, and practice must address the multiplicative effects of intersecting axes of discrimination if they are to be meaningful to the most disadvantaged. The good-faith policymaker considering the introduction or lowering of benefit caps would be required to assess the proposal's lawfulness from the standpoint of the complex intersecting dimensions of group and individual non-discrimination rights.

In terms of both intersectional discrimination and interconnected rights, the good faith policymaker would have to ensure the policy met obligations under other human rights treaties to which their state was a party. At the UN level, this would include the best interests of the child requirement in CRC Article 3(1) (which was relevant in *Re (DA)* as an aspect of interpreting ECHR Article 8). Other relevant provisions of the CRC include Article 16(1), protecting the child against arbitrary or unlawful interference with

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[905] Lammasniemi, 'Complexity' (n 800) 220.

[906] *R (DA)* (n 53) [128].

[907] Families may escape the benefit cap if the parent is designated a 'carer'.

(among other things) their privacy and family; Article 26 concerning social security; and Article 27, which recognises 'the right of every child to [an adequate] standard of living' and requires states to take appropriate measures to assist parents … to implement this right', as well as to provide material assistance in cases of need, 'particularly with regard to nutrition, clothing and housing.' Among relevant CEDAW provisions, the policymaker would have particular regard to Article 1, which defines 'discrimination against women' as:

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or mollifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'[908]

Attention would also be paid to CEDAW Article 2 including the requirements 'to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions … act in conformity with this obligation' and to 'take all appropriate measures … to modify or abolish existing laws, regulation, customs or practices which constitute discrimination against women.'[909] Obligations to take all appropriate measures to eliminate discrimination in employment[910] and other areas of economic and social life[911] would also be addressed. In addition, obligations in relation to modifying social and cultural patterns of conduct of men and women under Article 5(a) would be relevant. However, it would be noted that the aims in Article 5(a) of eliminating prejudices and practices based on stereotypical gender roles are not advanced by treating

[908] CEDAW. CESCR has read CEDAW's interpretation of 'discrimination against women' as also providing the correct approach for ICESCR.

[909] ibid Article 2(d) & (g).

[910] ibid Article 11.

[911] ibid Article 13.

women who are marginalised as a result of gender-based prejudices or stereotypical roles as if such prejudice and stereotyping did not exist.

4.3.7 Balancing state budgets, and deliberately retrogressive measures

The government in *R (DA)* argued that a need to balance its budget was one of the reasons for its decision to lower the benefit cap. This is not, however, a legitimate justification for retrogressive steps under ICESCR. Unlike ECHR Article 8, assessment of compliance with ICESCR is not constrained by the requirement to avoid looking at a government's budgetary decisions.[912] Such a constraint would deprive ICESCR of much of its meaning and purpose. Rather, the Article 10(1) obligation on the state to ensure the widest possible protection and assistance is accorded to families, particularly while responsible for the care and education of dependent children, provides the correct test for measuring the quantum of any cap on benefit payments to families. How states meet their ICESCR requirements is for them to decide, but they are required to take steps to meet them progressively. Thus, it would be relevant to consider whether there were ways for the government to meet its need to balance the budget without impacting the most disadvantaged disproportionately. This could be done by looking at social spending across the board, but it would also entail consideration of whether spending in other areas could be reduced or the government's income raised through taxation or other measures. If retrogressive measures are undertaken in times of crisis or austerity, they must be very carefully justified, proportionate and temporary. A minimum level of enjoyment of core rights must be preserved for the most disadvantaged, and the negative effects of the

[912] E/1991/23 (n 149) [9]; ICJ, 'Maastricht' (n 149) [8].

measures must not disproportionately fall on those who are already marginalised or disadvantaged.[913]

Acknowledging the significant financial implications of the obligations on states in relation to social security, CESCR notes in General Comment 19, 'that the fundamental importance of social security for human dignity and the legal recognition of this right by States parties mean that the right should be given appropriate priority in law and policy'[914] Even if Lord Wilson were correct that there had to be a limit to the amount of a household's benefits',[915] such an assertion does not help us to determine what that level would be. Despite the allowance for states to progressively realise rights to the maximum extent of available resources, CESCR's guidance is clear that 'deliberately retrogressive measures' are *prima facie* violations[916] and that

> [A]ny deliberately retrogressive measures … would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the maximum available resources.[917]

A 'strong presumption' exists that any 'retrogressive measures taken in relation to the right to social security are prohibited under the Covenant.'[918] CESCR explains:

> If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the

[913] CESCR/48th/SP/MAB/SW2 (n 617) 2.

[914] E/C12/GC/19 (n 536) [41].

[915] *R (DA)* (n 53) [81].

[916] E/C12/GC/19 (n 536) [64].

[917] E/1991/23 (n 149) [9].

[918] E/C12/GC/19 (n 536) [42].

> rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party.[919]

To avoid violating ICESCR, the state must demonstrate the reasonableness of its justification for introducing retrogressive measures. This requirement includes comprehensively examining alternatives, ensuring genuine participation by those most affected, avoiding discrimination, assessing the ongoing impact on the realisation of the right, ensuring that rights realisation would not fall below minimum core levels, and providing for independent national-level review of the measures.[920]

The government in *Re (DA)* did not claim that it lacked the resources to continue to support families at previous levels. Rather, it argued that it had made a policy decision to prioritise other goals. In contrast, a state acting in good faith to uphold its ICESCR obligations would be forced to conclude that changing budgetary priorities did not justify the retrogressive effects of the proposal in relation to ICESCR rights. In addition, evidence of the minimal projected impact of the change on the government's coffers would undermine any government claim of budgetary necessity. The test is whether the capped payment offers the widest possible protection and assistance to families on a basis of non-discrimination and equality, given all relevant circumstances. If a wealthy state took retrograde steps – found by its highest court to reduce families to well below the poverty line with severe negative effects on child wellbeing and development[921] – it would fail this test.

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[919] ibid [42].

[920] ibid [42].

[921] *R (DA)* (n 53) [33].

4.3.7.1 Incentivisation of paid work and improving outcomes for children

A further plank of the UK government's rationale for introducing benefit caps and later lowering them revolved around a desire to incentivise paid work. CESCR General Comment 19 recognises that benefits for families are crucial for realising children's rights to protection under Articles 9 and 10. It requires that social security decisions respect human dignity and that any qualifying conditions for benefits must be proportionate.[922] Furthermore, it requires the state to ensure that benefits are adequate for everyone to realise their 'rights to family protection and assistance [and] an adequate standard of living'[923] without discrimination on prohibited grounds. How would the government policymaker who sought to ensure the state complied with its obligations under Article 10(1) decide if a work-incentivisation rationale was legitimate in light of this guidance? The capabilities approaches I discussed in subchapter 3.3.3 allow assessments to be made about the impact of policy on the dignity of affected families and the individuals within them.

If there were good evidence to show both that a significant proportion of affected families would take on paid work as a result of the cap and that moving into paid work would have a beneficial effect on the wellbeing of single-parent families with young children affected by the cap, then the policymaker might argue that the benefit cap was assisting these families. Given that the policymaker would be required to assess these questions prior to implementing the change, such assessments would necessarily be best estimates based on modelling derived from research evidence and data. It is the nature of wicked problems that they are not amenable to experimental proof prior to implementation. Early indicators of effectiveness need to be devised prior to

[922] E/C12/GC/19 (n 536) [18-24].

[923] ibid [22].

implementation to allow the accuracy of estimates and assumptions to be evaluated at an early stage and policies adapted or reversed if necessary. The policymaker may not need to determine that all affected single parents will move into paid work to avoid the cap, nor that all of their families will have beneficial outcomes from this. However, if estimates based on the best available research data and modelling indicate that anything less than a significant majority of benefit-reliant single-parent families will be better off as a result of the policy, it could not be reasonably argued that the measure was a step towards rights realisation. Moreover, it is possible that the ethical problems with increasing hardship for whatever proportion of single-parent families on benefits could not meet benefit cap requirements would render such caps unlawful. This would be particularly likely to be true if those least likely to escape the cap were from families suffering multiple intersecting forms of discrimination. Lammasnieni's research indicates that this was the case in relation to the UK benefit caps.[924] It would be incumbent upon the government to introduce targeted measures or exemptions to ensure that such vulnerable families were not pushed into poverty.

On the matter of whether there are better long-term outcomes for children who live in households in which an adult is engaged in paid work, in *R (DA)* Lord Wilson observed that the complainants did not substantially challenge the government's position[925] which was:

> [T]hat it was not in the best interests of children to live in workless households and referred to studies which concluded that children in such households exhibit greater behavioural problems from age seven and poorer academic attainment.[926]

[924] Lammasniemi, 'Complexity' (n 800) 220; Lammasniemi, 'Infliction' (n 781) 369.

[925] *R (DA)* (n 53) [89].

[926] ibid [86].

However, that does not mean that the government's position was correct. Its interpretation of the evidence on which it based this claim is open to challenge. For example, the Department for Work and Pensions' *Impact Assessment for the Benefit Cap* states, 'Children can have their life chances and opportunities damaged as a result of living in households where no-one has worked for years and where no-one considers work is an option.'[927] As evidence for this assertion, it claims that 'Growing up in a workless household is associated with poorer academic attainment and a higher risk of being not in education, employment and training (NEET) in late adolescence.'[928] To support this proposition, a Department of Education research report entitled *Intergenerational Transmission of Worklessness: Evidence from the Millennium Cohort Study and Longitudinal Study of Young People in England* is cited.[929] That report, however, states that:

> The evidence presented in this report … gives limited support to a policy agenda targeted only at getting workless parents back into work. It was not parental worklessness per se that caused poorer outcomes in childhood and adolescence but rather the complex needs and numerous socio-economic risks faced by workless families.[930]

Although the data considered in the report showed 'strong two way associations between parental worklessness and early cognitive, academic and behavioural development of young children', once interlinked risks (including poverty, parental and family characteristics, non-home-ownership, and English-language status) are adjusted for the

[927] DWP, 'IA' (n 790) 7.

[928] ibid 7.

[929] Ingrid Schoon and others, *Intergenerational transmission of worklessness: Evidence from the Millennium Cohort and the Longitudinal Study of Young People In England: Research Report DFE-RR234* (Dept for Education 2012).

[930] ibid 11.

association becomes 'much weaker'.[931] Furthermore, once potential protective factors 'such as having positive school experiences, e.g. whether the child liked school; parental expectations of their children, and school characteristics' were taken into account, '*the relationship between parental worklessness and some academic and cognitive outcomes … became statistically insignificant.*'[932] Findings indicating that children in workless families were 'more likely to be bullied, to bully others, and to be unhappy at school' were 'not due to the worklessness itself but rather attributable to other characteristics of the household, such as lone parenthood or parental health (i.e. the interlinked risk factors).'[933] Among older children, statistically significant associations between household worklessness and 'most teen academic outcomes became non significant'[934] once interlinked risks were taken into account. Associations between parental worklessness and teens' intentions to not remain in education past the compulsory school age vanished once interlinked risk factors were controlled for, as did associations between the worklessness of parents and psycho-social difficulties among young people over the compulsory schooling age.[935] The researchers observed that such findings highlighted 'the importance of taking into account multiple risks instead of focusing on parental worklessness as a single risk factor in isolation.' [936] Although they found 'some evidence of an intergenerational transmission of worklessness', they concluded that:

> [T]his result must come with the caveat that it may be the unobserved characteristics of parents who become workless or of their adolescent children

[931] ibid 6.

[932] ibid 7, emphasis added.

[933] ibid 7.

[934] ibid 7

[935] ibid 9.

[936] ibid 8.

> that explain this result and we have not necessarily proved a causal inter-generational relationship.[937]

Other research supports the view that the purported benefits to children of single parents' engagement in paid work are not as clear-cut as political and media messaging would imply. To assess the lawfulness of introducing benefit caps, government policymaking centred on Article 10(1) rights of the family to the widest possible assistance and support should start with a comprehensive review of the literature focused on situations analogous to those of the families affected by the proposal, and a gap analysis to reveal holes in the evidence base. Evidence for the proposition that paid work of the type available to most single parents (that is, generally low-paid and with few prospects for career advancement) is the best option for single-parent families would be found to be mixed. Low-wage work often leaves single parents time-poor and exhausted without shifting their families out of poverty.[938] Transport, childcare and other in-work costs can consume much of the additional income acquired. Meanwhile, the parent is not available to attend parent-teacher meetings, take children to health appointments or out-of-school activities, or supervise homework. Young children may be placed in poor-quality or unsafe child-minding situations. They may have to attend school or childcare when they are ill. Some studies have found that older children are more vulnerable to truancy and involvement from the youth justice sector if their single parent is in paid work.[939] Attachments may be disrupted due to a lack of quality time with a parent, a point raised by Lady Hale in *R(DA)*.[940] For children with additional difficulties, such as those with experience

[937] ibid 8.

[938] See subchapter 1.8.2.

[939] Featherstone (n 336) 39-40.

[940] *R (DA)* (n 53) [141-4].

(including witnessing) of family violence, the absence of a stable caregiver with time to devote to them may be particularly damaging.

While a stable, fulfilling job which has family-friendly work hours and offers training and opportunities for career advancement may be preferable to not undertaking paid work, the majority of jobs available to single parents in receipt of benefits are not of this nature.[941] Precarious roles, zero-hour contracts and minimum-wage jobs with no training or promotion opportunities are more likely to be the norm. Even the purported benefits of socialisation while at work may not exist for many workers, such as warehouse pickers, call centre workers and those employed in noisy industrial environments. Some jobs may offer opportunities for social contact outside work hours through team outings and like, but time- and resource-poverty means that most isolated single mothers are excluded from these. Running to catch the bus from work to nursery, wrangling strollers onto public transport, dragging tired children home and starting a 'second shift' of food preparation, homework help, bathing, bedtimes and cleaning are more likely to feature as after work activities than heading out on the town with the team. Thus, an analysis rooted in Article 10(1), which assessed the evidence both for and against the proposition that paid work is best for these families, may well find that it is not.

In *R (DA),* Lord Wilson stated that 'encouragement to work did not equate to a requirement to work and that there had to be a limit to the amount of a household's benefits'.[942] This is both a non-sequitur and an example of assumptions stated without evidence. In contrast, a policymaker assessing whether the benefit cap was lawful under

[941] ibid [145].

[942] ibid 81.

ICESCR would have to consider the evidence for each part of the proposition and whether there was a logical connection between the two parts. First, evidence would be needed to show that reducing a family's already very low income was, in fact, an 'encouragement to work'. According to *The Concise Oxford English Dictionary*, 'encourage' means to 'give support, confidence, or hope to'.[943] These are not the emotions that most families experience when their income is cut to well below the poverty level. A subsense of the word 'encourage' is to 'help or stimulate the development of',[944] which may be closer to what the government intended to achieve. Nevertheless, a considerable body of research exists demonstrating that poverty and economic stress impede decision-making, create health problems, and reduce people's agency to act in the interests of themselves and their families, all of which could be expected to reduce the likelihood of successful transitions to paid work.[945] Poverty also makes employment harder to obtain and sustain as needs such as haircuts, clothes, reliable transport and, of course, childcare may be unmet.

An analysis based on ICESCR Article10(1) would also have to confront whether it is acceptable to trade-off the economic and social wellbeing of those single-parent families in which the parent does take up paid work as a result of the government's 'encouragement' (assuming these benefits can be shown to exist) against the poverty enforced on the single-parent families in which the parent does not manage to perform the required hours of paid work. The evidence points to the second group being far larger, but beyond that, there is a philosophical problem of whether it is justifiable to inflict

[943] Pearsall (ed), (n 54) 469.

[944] ibid 469.

[945] Anandi Mani and others, 'Poverty Impedes Cognitive Function' (2013) 341 Science (American Association for the Advancement of Science) 976; Anuj K. Shah and others, 'Money in the Mental Lives of the Poor' (2018) 36 Social Cognition 4, 15-6.

significant harm on one person or family in order to benefit others. It is pertinent to remember that utility maximisation is not an acceptable substitute for equality. CESCR does not allow increased violation of the rights of the most marginalised families in order to better fulfil the rights of slightly less marginalised families.[946] Under Article 10(1), therefore, even if it could be shown that a majority of single-parent families would be better off as a result of the introduction of benefit caps, the punitive reduction in benefits for those families that were unable (for whatever reason) to make this transition could not be justified. Nor can any improvements in the state coffers or the wellbeing of the families, in general, justify discriminatory targeting of the most marginalised for reductions in the fulfilment of their rights.

In this section, I have outlined matters that a policymaker acting in good faith in relation to their ICESCR obligations would consider in an evidence-based analysis of whether the incentivisation of paid work was a reasonable goal in the context of single-parent families' Article 9 and 10(1) rights. The next step would be to consider the proposed policy in light of children's needs for care and nurturing in light of the state's Article 10(1) commitment to accord the family as a vulnerable-caring unit the widest possible protection in undertaking this role.

4.3.8 Children's need for care and nurture

The care that children require goes beyond material provisioning and safety to include love, warmth, attachment, nurturing and education. CRC General Comment 7 observes that 'young children are best understood as social actors whose survival, well-being and development are dependent on and built around close relationships' and that '[t]hese

[946] CESCR/48th/SP/MAB/SW2 (n 617) 2.

relationships are normally with a small number of key people'.[947] The weighty role of the family in relation to children's care, nurture and development sits behind the inclusion of Article 10(1) in ICESCR. The primary parental responsibility for the upbringing and development of the child, to be undertaken with the best interests of the child at the basic concern, is acknowledged in CRC Article 18(1). However, to protect and assist the family, as required by ICESCR Article 10(1), it must be reasonably practicable for the parent to perform their children-rearing responsibilities. CRC Article 18(2) requires states to 'render appropriate assistance to parents' in this regard. The same provision also provides that states 'shall ensure the development of institutions, facilities and services for the care of children.'

Furthermore, CRC Article 27 requires the state, in accordance with national conditions and within its means, to take appropriate measures to assist parents to provide their children with 'a standard of living adequate for the child's physical, mental, spiritual, moral and social development' as well as providing material support programmes in cases of need. In General Comment 7, CRC expresses concern that 'insufficient account is taken of the resources, skills and personal commitment required of parents and others responsible for young children.'[948] A particular concern is mentioned about this with regard to societies 'with a high incidence of young, single parents.'[949] CRC stresses that recognising the interdependence of the realisation of rights of children and the resources and wellbeing of their parents 'is a sound starting point for

[947] CRC, 'General comment No 7 (2005): Implementing Child Rights in Early Childhood' (adopted 20/09/2006) CRC/C/GC/7/Rev1 [8].

[948] ibid [20].

[949] ibid [20].

planning assistance and services to parents'.[950] In relation to standards of living and social security, CRC observes that 'Growing up in relative poverty undermines children's well-being, social inclusion and self-esteem and reduces opportunities for learning and development.'[951] CRC urges states to 'implement systematic strategies to reduce poverty in early childhood as well as combat its negative effects on children's well-being', using '[a]ll possible means .. to assure to young children a basic standard of living consistent with rights.'[952]

The need for accessible, quality childcare is also recognised in international treaties, the comments of UN treaty bodies, domestic case law, and many expert and government reports as an essential component of securing women's equal employment rights .[953] Availability of childcare is a key component of making employment accessible for mothers in general and single mothers in particular. Nevertheless, childcare is not a panacea for the failure of societal and labour market structures to accommodate children's dependency and the derivative dependency of their primary caregivers as integral aspects of the human condition. It was argued in *R (DA)* that the government's decision not to provide free childcare for those under three years old implied an acceptance that such settings are often inappropriate for children of this age.[954] The UK does not mandate preschool attendance; instead, it leaves decisions in this area to parents. This aligns with the approach endorsed by the CRC in its General Comments 7 based on

[950] ibid [20].

[951] ibid [26].

[952] ibid [26].

[953] See particularly, CEDAW Article 11(2)(c).

[954] *R (DA)* (n 53) [28].

the ‘well established’ principle ‘that parents … are children’s first educators’.[955] Child development studies demonstrate that children vary in the times at which they are ready to cope with different aspects of life. The primary responsibility of a parent to make decisions for their child, acknowledged in domestic UK and international law, reflects an acceptance that parents, while imperfect, have the greatest knowledge of their individual children and the greatest interest in their flourishing.[956]

In relation to a benefit cap of the kind at issue in *R (DA)*, two-parent beneficiary families would be able to structure their working hours to meet the work-test requirements (and thus avoid the benefit cap) while also choosing not to use childcare. In these families, it would be possible for a parent to be available for hands-on parenting at all times. In contrast, a single parent undertaking paid work must assign hands-on care of young children to someone else. Thus, single parents are deprived of an equal ability to fulfil their responsibility to make decisions about childcare with the best interests of their child as their basic concern.[957] A good faith policymaker would have to consider why this is and whether the reasons are justifiable. In particular, they would have to consider whether stigma underlies the different approaches to single parent’s rights and responsibilities for parental decision-making. If single mothers in receipt of benefits are widely viewed as deficient in their decision-making or suspect in their morality, the public and politicians may support state coercion directed at them that would not be tolerated if directed at two-parent families.

[955] CRC/C/GC/7/Rev1 [29].

[956] ibid [15, 16, 18, 20 and 29]; Eekelaar, 'Forward' (n 203) v; CRC Article18(1).

[957] CRC Article 18(1).

As discussed in subchapter 3.3.7, misrecognition harms, including the stigmatisation of outgroups, are a dimension of discrimination. Implementing a policy rooted in stigma would violate single-parent families' non-discrimination rights under ICECSR Articles 2 and 10(1). Our good-faith policymaker should bear this in mind when considering whether the policy could be justified under ICESCR Article 4 which allows that ICESCR rights be limited 'only in so far as this may be compatible with the nature of these rights *and* solely for the purpose of promoting the general welfare in a democratic society.' The policymaker might wonder if a democratic mandate for a policy, as demonstrated by voters in a general election returning to power a political party that widely promoted its intention to implement the policy in question (as was the case in *R (DA)*) justified its implementation as 'promoting general welfare in a democratic society.' An argument could be made that not implementing the policy would undermine democracy, and this, in turn, could not serve the general welfare. However, the protection of minorities and those who are denied the right to vote (including children) requires that their rights to non-discrimination withstand assaults from electoral majorities. To hold otherwise would not meet Article 4's requirement of compatibility with the nature of ICESCR rights.

A non-discrimination approach based on a caring-vulnerable conception of family would require consideration of whether the imposition of the cap on single-parent families was discriminatory in its effects on the time parents and children have for caring and nurturing interactions. Based on Article 10(1), a family-centred policy on benefit caps would start with a calculation of hours available for the family to have an adult focused primarily on hands-on parenting rather than arbitrarily determining the number of hours of paid employment that must be accomplished by one- and two-parent families. As far as I am aware, there has been no modelling of the impact of the benefit cap on the

number of hours available to families for hands-on parenting. However, some simple calculations are revealing, as Figure 1 shows.

Figure 1: Estimated allocation of adult hours required by two-parent and single-parent families with young children to meet work-test requirements, and maximum number of hours remaining for focused hands-on parenting

	Two-parent family			***Single-parent family***		
	Hours/adult	Units	Total hours	Hours/adult	Units	Total hours
Total adult hours	168	2	336	168	1	168
Paid work	24	1	24	16	1	16
Sleep[1]	56	2	112	56	1	56
Incidental to paid work[2]	1.5	4	6	1.5	3	4.5
Own time[3]	7	2	14	7	1	7
Home duties[4]	14	1	14	14	1	14
Allocated[5]			**170**			**97.5**
Available for focussed hands-on parenting			**166**			**70.5**

[1] Allows for 8 hours sleep per night for each adult.
[2] includes commuting, childcare pick-ups and required unpaid workplace breaks, based on a 6 hour workday.
[3] Allows for 1 hour a day for each adult.
[4] Allows for 2 hours per day for a family and includes meal preparation, cleaning, household shopping, and home maintenance and administration.
[5] Ie, not available for focused hands-on parenting.

The eight-hour-day movement spread across Anglo states in the nineteenth century. It was popularised in refrains apportioning a workingman's time over a five-day working week to eight hours work, eight hours sleep, and eight hours 'for what you will'.[958] The ditties did not specify time for childcare, as the movement was based on the

[958] Herbert Roth, 'Parnell, Samuel Duncan' in *Dictionary of New Zealand Biography* (1990) https://teara.govt.nz/en/biographies/1p7/parnell-samuel-duncan accessed 17/2/2022.

ideal male worker who, if he had children, was assumed to have a wife undertaking the bulk of childcare work. In countries like New Zealand and Australia, the 'what you will' time would have included garden work, religious observances, and maybe physical recreation. During these times, a family-oriented workingman may also have taken some responsibility for childcare. However, 'what you will' would also include time for intimate partner relationships, socialising outside the family, self-education and solitude. My apportioning of time for families avoiding the benefit cap is more meagre in its allocation of free time to adults than the nineteenth-century eight-hour-day campaign was in allocating free time to the working man. My focus is on the *maximum* available hours for focused hands-on parenting. Therefore, I allocate only one hour per day per adult for personal recreation, during which hands-on parenting is not prioritised. It may be hoped that parents are able to take more time than this for their own needs, but my model does not assume so. Nor can this one hour per day be read as child-free time: for a single-parent on a low income formal and informal childcare must usually go to enabling workforce participation.[959]

The table provides modelled estimates which do not account for every possible contingency. For example, some parents may face longer commutes, especially if they are required to deliver a number of children to different schools and childcare facilities. There are innumerable possible permutations in the other fields as well: some adults need more or less than eight hours of sleep, whereas parents of young children may not get eight hours of sleep regardless of need; days and times of work vary; and people spend varying amounts of time on shopping, cleaning, food preparation and home

[959] A single-mother with a stable shared-care arrangement with the other parent of their children will have the benefit of more childfree time, provided the other parent reliably bears the full load of childcare and responsibility during their allocated time.

administration. Nevertheless, if a parent has less than one hour per day for their own needs, it may be assumed that they are at risk of very high-stress levels and danger to their mental health.

The calculations in Figure 1 are revealing for what they say about the parental care available in each type of family. In a two-parent family which engages in sufficient paid work to avoid the benefit cap, children have up to 166 hours per week during which they experience the security of a hands-on parent available to care for and nurture them. Children in a single-parent family have a maximum of only 70.5 hours of focused hands-on parental care: 58 percent fewer hours than their peers in a similarly placed two-parent family. Meanwhile, an adult in a two-parent family is required to work on average 12 hours per week to avoid the benefit cap whereas the adult in a single-parent family has to work 16 hours – one-third more. Thus, to avoid the benefit cap, the single-parent family is required to undertake more hours of paid work per adult, despite the family starting with fewer adult hours in which to undertake the totality of adult responsibilities for family functioning. The policymaker seeking to comply with the state's Article 10(1) obligations would be hard-pressed to justify this distinction.

Would it make a difference if our policymaker reduced the hours a single parent was required to undertake paid work to the same as the mean adult in a two-parent family? As Figure 2 shows, this would enable children in the single-parent family to benefit from a maximum of 76 hours per week of focussed parenting: 54 percent less time than their peers in a similarly placed two-parent family. Despite the seeming introduction to formal equality in terms of the paid employment burden on single and coupled parents, the substantive results would remain discriminatory in terms of single-parent families' Article 10(1) rights.

Figure 2: Estimated allocation of adult hours required by two-parent and single-parent families with young children to meet work-test requirements if these were set at the mean requirement imposed on an adult in a two-parent family, and maximum number of hours remaining for focused hands-on parenting

	Two-parent family			***Single-parent family***		
	Hours/adult	Units	Total hours	Hours/adult	Units	Total hours
Total adult hours	168	2	336	168	1	168
Paid work	12	2	24	12	1	12
Sleep[1]	56	2	112	56	1	56
Incidental to paid work[2]	1.5	4	6	1.5	2	3
Own time[3]	7	2	14	7	1	7
Home duties[4]	14	1	14	14	1	14
Allocated[5]			**170**			**92**
Available for focussed hands-on parenting			**166**			**76**

[1] *Allows for 8 hours sleep per night for each adult.*
[2] *includes commuting, childcare pick-ups and required unpaid workplace breaks, based on a 6 hour workday.*
[3] *Allows for 1 hour a day for each adult.*
[4] *Allows for 2 hours per day for a family and includes meal preparation, cleaning, household shopping, and home maintenance and administration.*
[5] *Ie, not available for focused hands-on parenting.*

The policymaker would have to look at removing the benefit cap altogether from single-parent families to avoid increasing discrimination against single-parent families. The regulations governing the benefit cap in *R (DA)* enable two-parent families to choose that one parent not engage in any paid work at all, thus enabling a primary caregiver in a couple to focus entirely on hands-on parenting. To avoid the cap, a two-parent family is required to 'undertake work for at least 24 hours each week, provided that one of them

does so for at least 16 of those hours.'[960] Removing the requirement that single parents engage in paid work as a condition of exemption from the benefit cap would mean that they, like primary caregivers in two-parent families, could choose to prioritise hands-on parenting over paid work. Under that scenario, as Figure 3 shows, the maximum hands-on parenting hours the children in the single-parent family could benefit from jumps to 91.

Figure 3: Estimated allocation of adult hours required by two-parent and single-parent families with young children if the ability to choose not to engage in paid work, that is available to primary caregivers in two-parent families was extended to primary caregivers in single-parent families, and maximum number of hours remaining for focused hands-on parenting

	Two-parent family			***Single-parent family***		
	Hours/adult	Units	Total hours	Hours/adult	Units	Total hours
Total adult hours	168	2	336	168	1	168
Paid work by non-primary caregiver	24	1	24	N/A[6]	N/A[6]	N/A[6]
Paid work by primary caregiver	0	1	0	0	1	0
Sleep[1]	56	2	112	56	1	56
Incidental to paid work[2]	1.5	4	6	0	0	0
Own time[3]	7	2	14	7	1	7
Home duties[4]	14	1	14	14	1	14
Allocated[5]			**170**			**77**
Available for focussed hands-on parenting			**166**			**91**

[1] Allows for 8 hours sleep per night for each adult.
[2] Includes commuting, childcare pick-ups and required unpaid workplace breaks, based on a 6 hour workday.
[3] Allows for 1 hour a day for each adult.
[4] Allows for 2 hours per day for a family and includes meal preparation, cleaning, household shopping, and home maintenance and administration.
[5] Ie, not available for focused hands-on parenting.
[6] Not applicable.

[960] *R (DA)* (n 53) [6]. The ability to avoid the benefit cap through engaging in paid work is expressed in terms of households' eligibility for the Working Tax Credit under separate regulations. Whether adults are engaged in parenting and the needs of any children in their care are irrelevant to the calculation.

With 45 percent less time available for hands-on care and nurturing than that available to a two-parent family subject to the benefit cap, the single-parent family is still disadvantaged, suggesting that additional support for these families would be justified under the state's commitment to accord the widest possible protection and assistance in a non-discriminatory manner. Nevertheless, by removing the single-parent families from the households to be covered by the proposed benefit cap, our policymaker could breathe a sigh of relief that at least they have not discriminated against the most marginalised families through their introduction of a retrogressive policy, and thus have avoided a clear violation of ICESCR Article 9 read in light of Article 10(1).

However, might the policymaker not say that the work-test is not seeking to align the requirements for hours worked by single parents in receipt of a benefit with those of two-parent families in receipt of a benefit? Rather, they might argue, the policy is about balancing the responsibilities of families on benefits with those in which an adult works full-time. Figure 4 helps us analyse the validity of that claim by considering the maximum adult hours available for hands-on parenting in two-parent families whose main income is from paid work. For families in which both parents work 40 hours per week, the maximum weekly adult hours available for hands-on parenting is 101 hours, 43 percent more than the maximum time available to single-parent families who are subject to the benefit cap. It is also 11 percent greater than the maximum time that would be available to single-parent families if they were not subject to benefit caps, which reinforces the argument that additional supports for single-parent families in receipt of a benefit would be needed to the state to fully meet its Article 10(1) obligation to accord the widest possible protection and assistance to families in a non-discriminatory manner.

Figure 4: Estimated allocation of adult hours required by two-parent families with young children in which both parents work fulltime, and in which one works fulltime and the other halftime, and maximum number of hours remaining for focused hands-on parenting

	Two-parent family both work fulltime			***Two-parent family one works fulltime and one halftime***		
	Hours/adult	Units	Total hours	Hours/adult	Units	Total hours
Total adult hours	168	2	336	168	2	336
Paid work	40	2	80	40	1.5	60
Sleep[1]	56	2	112	56	2	112
Incidental to paid work[2]	1.5	10	15	1.5	8	12
Own time[3]	7	2	14	7	2	14
Home duties[4]	14	1	14	14	1	14
Allocated[5]			**235**			**212**
Available for focussed hands-on parenting			**101**			**124**

[1] *Allows for 8 hours sleep per night for each adult.*
[2] *includes commuting, childcare pick-ups and required unpaid workplace break.*
[3] *Allows for 1 hour a day for each adult.*
[4] *Allows for 2 hours per day for a family and includes meal preparation, cleaning, household shopping, and home maintenance and administration*.
[5] *Ie, not available for focused hands-on parenting.*

Moreover, the comparison is misleading on two counts. First, the two-parent family working a total of 80 hours per week will have a higher income allowing it to access greater conveniences and outsource more household labour. For example, such a family may be more likely to use a car for childcare drop-offs and pick-ups or commuting to work; they may make greater use of delivery services and pre-prepared meals; they will have greater choices of childcare location and quality; and they may also be able to afford an occasional babysitter for a night out together. Second, the average UK family with preschoolers does not have two parents each working 40 paid hours per week. It is

common for one parent (typically the mother) to work reduced paid hours for a period while young children are in the house. For this reason, in Figure 4 I also model the maximum available hours for hands-on parenting in a two-parent family working 1.5 fulltime equivalent paid jobs (or sixty hours per week). Calculated on this basis, two-parent families in paid work would have a maximum of 124 adult hours each week available for hands-on parenting. This is 53.5 more hours (76 percent greater time) than the maximum available to a single-parent family that complies with the benefit cap and 33 more hours (36 percent greater time) more than the maximum available to a single-parent family in receipt of a benefit in the absence of benefit cap work-test requirements.

For the sake of completeness, I also model the maximum hours of hands-on parenting available to single-parent families in which the parent works fulltime.[961] As Figure 5 shows, these families have a maximum of 43.5 hours of hands-on parenting time available. This equates to 26 percent of the hours available to a two-parent family that met the work requirements to avoid the benefit cap, 43 percent of the hours available to a two-parent family in which both parents worked fulltime, and 35 percent of the hours available to a more typical two-parent family with young children in which one parent works fulltime and the other halftime. Such simple modelling should cause the policymaker to reassess the proposition that seeking to incentivise paid work through negative stimulus might be a rational way of assisting single-parent families or their individual members.

Furthermore, the findings of the modelling would demonstrate the failure of this state's structures, laws, policies, and social norms in protecting and assisting single-parent families whether or not the parent is engaged in the paid workforce. It would

[961] Calculated at 40 hours/week.

highlight to our good faith policymaker that the state's obligations to fulfil Article 10(1) in a non-discriminatory manner go beyond rejection of the imposition of benefit caps.

Figure 5: Estimated allocation of adult hours required by two-parent and single-parent families with young children in which all parents work fulltime, and maximum number of hours remaining for focused hands-on parenting

	Two-parent family			***Single-parent family***		
	Hours/adult	Units	Total hours	Hours/adult	Units	Total hours
Total adult hours	168	2	336	168	1	168
Paid work	40	2	80	40	1	40
Sleep[1]	56	2	112	56	1	56
Incidental to paid work[2]	1.5	10	15	1.5	5	7.5
Own time[3]	7	2	14	7	1	7
Home duties[4]	14	1	14	14	1	14
Allocated[5]			**235**			**124.5**
Available for focussed hands-on parenting			**101**			**43.5**

[1] *Allows for 8 hours sleep per night for each adult.*
[2] *includes commuting, childcare pick-ups and required unpaid workplace breaks.*
[3] *Allows for 1 hour a day for each adult.*
[4] *Allows for 2 hours per day for a family and includes meal preparation, cleaning, household shopping, and home maintenance and administration.*
[5] *Ie, not available for focused hands-on parenting.*

The good faith policymaker would become aware of the need to identify and address substantive inequalities in single-parent families' enjoyment of Article 10(1) rights across the totality of their distributive, recognition, transformative and participative dimensions. In this regard, they might consider ICESCR Article 7 rights to favourable conditions of work, including 'a decent standard of living for themselves and their families', equal pay and conditions for women and men, and rights to rest and leisure. Read in terms of Article 10(1) and from a position of non-discrimination, Article 7

requires that those single mothers who are engaged in the paid workforce are able to enjoy favourable work conditions, a decent standard of living for themselves and their families, leisure time with their families and realistic opportunities for rest. The good faith policymaker would realise that, having signed up to these obligations, it is incumbent upon the state to find means to fulfil them.

4.3.9 Subchapter conclusion

In this subchapter, I engaged in a thought experiment that assumed that a state was considering whether to implement a benefit cap policy. The factual situation was identical to that considered by the UKSC in *R (DA)* but for one difference. The counterfactual I posited was that the policymaker responsible for this decision was fully aware of the significance of ICESCR Article 10(1) as a dye colouring the application of all other substantive articles of ICESCR and was committed to ensuring in good faith that the state's policy complied with international human rights obligations, as legally required.

I focused on this fictional policymaker as the manifestation of a state apparatus with control over whether international human rights obligations are complied with in good faith in the particular policy area. In a real state, to make a significant policy decision, turn it into law, and implement it requires a much larger cast. My fictional policymaker simplified matters by omitting the political, personality or competency-driven aspects of policymaking. I focused on the policymaker rather than a judicial figure because the UK, like many jurisdictions, has not incorporated ICESCR into domestic law. Moreover, the latitude of the judicial branch of a state to overturn or even comment on the actions of the legislature varies greatly between jurisdictions. In contrast, policymakers have a role in ensuring that their decisions accord with the state's obligation to respect, protect and progressively fulfil ICESCR rights on a basis of equality and non-discrimination in good faith, based on the adage *pacta sunt servanda*.

I discussed the right to social security in terms of the guidance provided by CESCR General Comment 19. Noting that the General Comment mentions Article 10(1) and assuming that my interpretation of Article 10(1) as a dye that colours how the other substantive articles of ICESCR are to be read is correct, I argued that the right to social security attaches to the family group as well as to the individual. Applying the crosscutting guarantees of non-discrimination and equality to this reading, I concluded that the single-parent family, as an outgroup, is entitled to protection from discrimination in its enjoyment of social security rights.

In terms of the appropriate standard to be applied to an assessment of whether a benefits cap work-test policy complies with ICESCR obligations in international law, I noted that the MWRF test is inapplicable. CESCR allows for a margin of appreciation in the methods states adopt to comply with their ICESCR obligations, but the onus is on the state to show that it does comply. Moreover, CESCR reserves for itself the role of making the final determination of whether a state has taken all appropriate measures to meet its obligations.[962] I observed that CESCR General Comment 1 had clarified that the obligation to use all appropriate means to progressively achieve full rights realisation implies an obligation on states 'to work out and adopt a detailed plan of action for the progressive implementation' of each right in ICESCR.[963] Furthermore, I noted the general presumption against retrogressive measures and that where such measures are required due to a crisis or time of austerity, they must be most carefully justified, shown not to disproportionately impact the enjoyment of rights by the most marginalised members of

[962] E/1991/23 (n 149) [4].

[963] E/1989/22 (n 625) [4].

society, and the rights of marginalised and discriminated against groups to at least minimum levels of rights realisation must be protected.

Applying these requirements to the good faith policymaker's process of decision-making in relation to a potential tightening of benefit caps, I concluded that the immediate requirements to guarantee non-discrimination and equality in the enjoyment of rights would lead them to determine that single-parent families should be excluded from benefit caps given that the cap would push single-parent families in receipt of benefits into poverty.[964] I explained that Article 10(1) is significant because it allows the interrelationship of single mothers and their children to be centred, focusing on the significance of the dependence of children and the derivative dependence of their mothers. As vulnerable-caring families, Article 10(1) provides that they should be accorded the widest possible care and protection. Ironically, the good faith policymaker might observe that benefit cap policies also deal with people as groups rather than as individuals. However, in capping the maximum benefit receivable by a household regardless of how many individuals it contains, such policies do not follow the requirement of treating different categories differently. Lord Hodge touched on this in *R (DA)* when he held that single-parent families were not discriminated against by the benefit cap because large families were also particularly badly affected by it. However, a policymaker seeking to act in accordance with ICESCR obligations ought to conclude that such a policy would substantively discriminate against both single-parent families and large families. Further, the substantively discriminatory effect of the policy would be multiplied for large single-parent families who faced both axes of discrimination.

[964] *R (DA)* (n 53) [33].

Moreover, because such families are more likely to belong to Black or South Asian ethnic minorities, the policy would also be suspect of the grounds of racial discrimination.[965]

In addition to the rights of the family group, the good faith policymaker would consider obligations to individual members of single-parent families under ICESCR Article 9 and CEDAW as well as directly considering the state's CRC obligations (in contrast to the judicial consideration in *R (DA)* which dealt with CRC Article 3(1) indirectly as an aid to the interpretation of ECHR Article 8).

I examined the validity of the state's arguments for imposing a tightened benefit cap from an ICESCR perspective. I observed that the state did not claim that it lacked the resources to continue to support families at previous levels, and therefore, the strong presumption against retrogressive measures would apply. Evidence of the minimal projected impact of the change on the government's coffers[966] further confirms that an argument for tightening the cap based on budgetary considerations could not meet the Article 10(1) requirement of ensuring the widest possible protection and assistance to families on a basis on non-discrimination and equality, given all relevant circumstances.

Next, I considered whether the objectives of incentivising paid work and improving outcomes for children might justify the application of the benefit cap work-test to single-parent families as lawful in relation to Article 10(1). I concluded that, in contrast to the position in UK domestic law, the good faith policymaker seeking to act lawfully under international human rights law would be required to consider the question based on analysis of robust evidence, utilising approaches such as data modelling and intervention logics. I noted Lord Wilson's statement that the claimants did not mount a serious

[965] Lammasniemi, 'Complexity' (n 800) 220.

[966] *R (DA)* (n 53) [32].

challenge to the government's claim that it is in the best interests of children for members of their households to be engaged in (paid) work.[967] A feature of adversarial legal systems is that judges can only reach decisions based on the arguments presented to them. Counsel make strategic decisions about what lines of argument to persue. However, the good faith policymaker would look at available evidence dispassionately and could commission additional research if the evidence was inconclusive. I observed in relation to the UK benefit caps work-test, that the government's own research showed that the evidence for parental workforce engagement having a positive effect on indicators of child wellbeing and achievement was weak once interlinked risk factors had been controlled for.[968] In addition, I argued that ICESCR did not allow for measures to be taken that would have a regressive effect on the rights realisation of a significant proportion of a marginalised or disadvantaged category, even if there was a reasonable belief that the measure would improve the rights realisation of some members of that category.

Having addressed why the good faith policymaker would have to reject the justifications of the policy set out in *R (DA)* as incompatible with the state's international human rights obligations, I completed the subchapter with an examination of how an assessment of policy related to benefit caps and related measures might be carried out in line with ICESCR Article 10(1). I focused on the children's need for care and nurturance and the role of the family within this as part of the provision's underpinnings. On this basis, I suggested that rather than centring the number of hours paid work to be undertaken by adult family members, the policymaker should begin by assessing the

[967] ibid [89].

[968] Schoon and others (n 929).

maximum number of focused hands-on parenting hours available to a family in different scenarios. Such consideration would need to allow for parents to also undertake other functions necessary for family functioning such as travel, cooking and household maintenance, sleep and a minimal amount of personal time. I undertook rudimentary modelling based on this stance towards the family as a functional-caring unit.

My modelling revealed that the maximum number of focused hands-on parenting hours available to a single-parent family that complied with the work requirements to avoid the benefit cap was 70.5, which equated to 42 percent of the time available to a two-parent family. By exempting single-parent families from the benefit cap, the policymaker would enable single-parent families to have a maximum of 91 hours available for hands-on parenting or 55 percent of the time available to a two-parent family that met the work requirements for avoiding the cap. This would be equivalent to 90 percent of the time available to a two-parent family in which both parents worked fulltime or 73 percent of the time available to a two-parent family in which one parent worked fulltime and the other worked halftime (a closer approximation of typical work patterns in households containing young children in the UK). As such, the good faith policymaker could conclude that exempting single-parent families from the benefit cap would avoid *prima facie* unlawful discriminatory retrogressive measures against single-parent families as a marginalised outgroup.

Furthermore, findings of the modelling—including the estimation that a single-parent family in which the parent worked fulltime would have, as a maximum, a mere 43.5 hours available for focused hands-on parenting—would alert the good faith policymaker to a wider failure of the state to meet its ICESCR Article 10(1) obligation to ensure the widest possible protection and assistance was accorded to families without discrimination against single-parent families in their enjoyment of the right.

4.4 Chapter conclusion

This chapter has explored the UK benefit cap case of *R (DA)* as an example of a situation in which the economic, social and cultural rights of single-parent families were violated through a state's deliberately retrogressive measures. The case ultimately turned on the majority's assessment of the limits of domestic courts' jurisdiction to scrutinise government decision-making on matters of social security which have fiscal implications. However, the fact situation and reasoning of the full bench of the UKSC provide fertile material for assessing the impacts of failing to implement or even be aware of single-parent families' rights and the state's obligations under ICECSR Article 10(1) in a particular jurisdiction.

Building on my conclusion in subchapter 3.5, that ICESCR Article 10(1) is a dye that colours the application of all other articles, I argued that international human rights law requires that the UK consider ICESCR Articles 9 (concerning the right to social security) and 11 (which provides for the right to an adequate standard of living for oneself and one's family) in light of the obligation to accord the widest possible protection and assistance to the family. Adding Articles 2 and 3 rights to non-discrimination and equality, and accepting (as the UKSC did) that single-parent family membership is an analogous ground and that the interests of the single parent and her child are indistinguishable in this context, the state was required to assess whether the benefit cap protected and assisted such families, was neutral toward them, or was a retrogressive step in terms of such families' substantive rights to non-discrimination and equality.[969]

[969] E/C12/GC/19 (n 536) [29-31].

The effectiveness of an Article 10(1) approach is, of course, dependent on the state acting in good faith to fulfil its obligations. In its Concluding Observations on the UK's Sixth Periodic Report, CESCR urged the UK to take steps to make all ICESCR rights justiciable at a domestic level and to adopt the Optional Protocol allowing individual communications to be made to CESCR in relation to alleged rights violations.[970] Without these steps, the impact of an Article 10(1) analysis, as with an approach based on any other aspect of ICESCR, remains normative, reputational and juridically interpretive.

Nevertheless, awareness of Article 10(1) could make a significant difference in six ways. First, a government, which is assumed to choose to act in accordance with its international obligations, has an obligation to ensure its policy is compliant. This was the basis for my thought experiment in subchapter 4.3 in which a good faith policymaker was aware of their state's obligations under ICESCR Article 10(1) and took them seriously. Second, if a state persisted with a benefit caps policy similar to those implemented in the UK, CESCR would be better prepared to make observations and recommendations in relation to its disproportionate impact on the realisation of single-parent families' rights than it appears to have been in 2016.[971] Third, complainants could have raised Article 10(1), including guidance from the UN and experts on the subject, to assist domestic and regional courts in their interpretation of law. The ECtHR's and UKSC 's adoption as authoritative of CRC General Comment 14 provides an example of guidance from a UN treaty body being read into regional and domestic human rights law.[972] Although treaty

[970] E/C12/GBR/CO/6 (n 541) [5-6].

[971] ibid [18-9].

[972] *Mathieson* (n 846) [36].

bodies' General Comments and General Recommendations often do not receive this level of judicial endorsement, they may be referred to as aids to judicial interpretation in certain jurisdictions that have not directly incorporated the provisions they explain. Had the Court in *R (DA)* had such tools at its disposal, its members might have had more confidence to reject logical non-sequiturs, untested evidence, or unsubstantiated assumptions about what is reasonable or beneficial for single-parent families. Fourth, those affected by such a cap and their supporters would be able to bring the alleged violations of Article 10(1) to the attention of the CECSCR via the civil society shadow report process. Fifth, in states that had ratified the Optional Protocol to ICESCR, those affected by the cap would have a reference point on which to base a communication to CESCR in relation to the violation of their rights.[973] Finally, where ICESCR has been incorporated into domestic law, awareness of the significance of Article 10(1), particularly in relation to states' non-discrimination obligations to single-parent families as outgroups, could facilitate domestic legal challenges to policies of this nature in terms of their discriminatory impact on single-parent families economic, social and cultural rights enjoyment.

The judgments in *R (DA)* illustrate how even the best legal minds struggle to analyse alleged violations of single-parent families' economic, social and cultural rights. The deference given to the government's decision-making in matters of social and economic policy by the majority of the UKSC under their application of the MWRF test was said to be in recognition of the appropriate division of powers. In addition, the complexity of weighing evidence in this area was held to require that the judiciary keep in its own lane and not attempt to substitute its assessment in place of the

[973] ICESCR OP (n 484).

government's.[974] However, the experience of CESCR in responding to communications under the Optional Protocol to ICESCR demonstrates that it is not impossible for an adjudicator to weigh evidence and make findings in relation to alleged violations of economic, social and cultural rights, including allegations of discrimination in the enjoyment of rights to social security.[975] Guidance from CESCR on the content of the right in ICESCR Article 10(1) and the analogous status of single-parent families as a globally marginalised and discriminated against outgroup might assist judges in determining appropriate criteria for weighing the evidence in cases where allegations of discrimination in relation to social security or other rights with significant budgetary implications are in play. Even in a jurisdiction applying the MWRF test to such issues, guidance from an esteemed treaty body could assist in determining what constitutes a reasonable foundation for a policy.

In terms of Fredman's schema of dimensions of substantive discrimination, which I discussed in subchapter 3.3.7, the fact situation in *R (DA)* provides an illustration of distributive discrimination against single-parent families in the enjoyment of their ICESCR Article 10(1) rights.[976] However, other dimensions of Fredman's schema are also implicated. Both the implicit assumption that the caregiving work of single mothers is less valuable than that of coupled mothers (which appears to underpin the differences in the number of hours that are protected from the paid-work requirements in the policy) and the political payoffs that may be gained by making manifesto commitments to limit benefits for single-parent families are examples of the (mis)recognition dimension at

[974] *R (DA)* (n 53) [87].

[975] Eg *Trujillo Calero* (n 441) .

[976] Fredman, *Discrimination* (n 45) 25.

work. In addition to relying on stigma to gain legitimacy in a majoritarian democracy, the benefit cap further fuels stigma in three main ways. First, it sets conditions for escaping the worst financial poverty that most benefit-reliant single parents with young children cannot meet, thus reinforcing the association of single-parent familyhood with economic failure. Second, it further normalises the view that single-parent families' levels of benefit dependency are the result of deficiencies in single mothers' desire or ability to be productive members of the paid workforce, upon which the national GDP is based. Third, those single parents who do comply with the conditions of the benefit cap are likely to have such little time left for care of themselves and their children that their health, functioning and time available for care and nurturing are jeopardised. Unlike the small proportion of single-parent families who manage to access sufficient financial or other resources to ameliorate many of the stresses of time poverty, benefit-reliant single-parent families—even those engaged in 16 hours per week of paid work—are poor and do not have discretionary income to make life easier. They may, therefore, appear deficient in their functioning. For example, parental non-engagement with schools and healthcare services; children left unsupervised; a lack of parental guidance for children's social, moral or academic development; failure to integrate into the community; a chaotic home environment; and poor household maintenance have all, at times, been considered evidence of deficits in single-parent families' functioning.

My thought experiment in subchapter 4.3 touched on the transformative dimension of substantive (non)discrimination through its consideration of the dimension's inverse expression as systemic and structural discrimination. The root causes of the disproportionate number of single-parent families in poverty are attributable to forces beyond social security legislation. As explained in subchapter 2.2, the autonomy myth obscures the truth of human vulnerability and dependency and thus invisibilises the

reality that the burdens of responding to vulnerability fall more heavily on some than others. Relegated to the private family sphere, the derivative dependency created by caregiving remains hidden. Resources begrudgingly provided by charity or welfare systems are seen as top-ups that are necessitated by private family failure (frequently referred to as breakdown). Systemic and structural contributors to single-parent families' disparate experience of poverty are often not recognised or are responded to with tinkering that fails to make transformative change. Meanwhile, labour markets remain unamenable to providing single-parents opportunities to earn a wage sufficient to support a family; quality childcare remains insufficiently accessible; appropriate, affordable quality housing is not readily available in locations suitable for accessing educational, employment, social and provisioning opportunities; transport systems are designed without consideration of single-parent families' needs; and safe public spaces in which children are able to play unsupervised are lacking. Furthermore, deep-rooted intersecting systems of oppression such as racism, ablism and classism result in single-parent families experiencing disproportionate levels of intersectional discrimination. Finally, the interests of the patriarchy are served by being able to point to the stigmatisation, resource poverty and time poverty faced by single-parent families as a warning to other women. This last dimension has particular potency as a means of reducing the intra-relationship bargaining power of mothers in heterosexual two-parent families.

In considering the human rights implications of proposed benefit caps, our individual good faith policymaker may not be able to analyse, let alone transform, the range of systemic and structural aspects of discrimination against single-parent families. Nevertheless, an exercise such as the rudimentary modelling I presented of the maximum number of focused hands-on parenting hours available to one-parent families in comparison to two-parent families under various scenarios would alert the policymaker to

the need for transformative action to guarantee the rights of single-parent families on a basis of equality with two-parent families. Further modelling would be required to compare single-parent families' enjoyment of Article 10(1) rights to those of families in general, including families with no dependent children. Guidance from CESCR on implementing Article 10(1) in a non-discriminatory manner with respect to single-parent families would direct the policymaker to set up systems to collect the necessary data for transformative decision-making and develop a plan of action.

Finally, substantive participative discrimination against single-parent families is so pervasive that it was not remarked upon by the judges in *R (DA)*. Even Gingerbread, the major organisation campaigning for single-parent families in the UK, is 'the leading charity working with single parent families', rather than an organisation representative of single-parent families.[977] My own thought experiment did not include an explicit participative dimension, and yet to act in good faith compliance with ICESCR Article 10(1), the policymaker considering benefit caps would have had to include genuine participation by single-parent families in their decision-making. To do so would have necessitated overcoming barriers to participation including time poverty, childcare responsibilities, stigma and exhaustion.

Although this analysis has focused on a particular social security policy in a specific state, examples of violations of single-parent families' economic, social and cultural rights also abound in other states. The ubiquity of such violations transcends distinctions between high-, middle- and low-income states; legal structures such as common law, civil law, religious law, and customary law; types of government; and

[977] Gingerbread, 'About Gingerbread' (2017) <https://www.gingerbread.org.uk/what-we-do/about-gingerbread/> accessed 14/04/2022.

economic systems. The range of violations goes beyond social security to include poverty (in a capabilities approach sense), homelessness, access to health care, poor health outcomes, stigmatisation amounting to hate and ostracization, discrimination in education and employment, coerced family separation, disparate treatment by criminal justice systems, and exclusion from participation in social interactions, civic and political life, and recreation.

State obligations under Article 10(1) go beyond merely avoiding retrogressive measures that disproportionately affect the most marginalised. They require the progressive implementation of the right to the maximum extent of available resources and the immediate rectification of discrimination in its realisation. My thought experiment in subchapter 4.3 suggests some considerations regarding the application of Article 10(1) to single-parent families in relation to which states could benefit from guidance from treaty bodies. The fifth and final chapter of this thesis considers how such guidance could most usefully be provided. However, first, my main findings in relation to the research question posed at the start of this thesis and my six-part hypothesis are summarised.

5 Conclusion

5.1 Chapter introduction

At the start of this thesis, I posed an overarching question:

> Does the UN human rights treaty system offer a valid and useful framework for the realisation of the economic, social and cultural rights of single-parent families?

In this final Chapter, I summarise my research findings that lead me to answer the question affirmatively. I assess the first five-parts of the six-part hypothesis laid out in subchapter 1.2 against the arguments made in the thesis thus far. These five-parts are:

1. Single-parent families are families under international human rights law and, therefore, have rights under ICESCR Article 10(1) which provides that the family as a group unit is entitled to 'the widest possible protection and assistance', particularly while 'responsible for the care and education of dependent children'.
2. The customary principles of treaty interpretation, as codified in VCLT Articles 31-33, must be applied to the interpretation of ICESCR Article 10(1). These principles require the provision to be interpreted in good faith, in accordance with the ordinary meaning of the text in its context and in light of its object and purpose. On this basis, the best interpretation of Article 10(1) is as providing a dye which colours the interpretation of other substantive provisions of ICESCR by applying them to the family as a group unit, not merely as individuals. Article 10(1) thus enables international human rights law to address realities of human vulnerability which are not adequately protected as purely individual rights, including the dependency of children and derivative dependency of women as their usual primary caregivers.
3. States have positive duties to respect, protect and progressively fulfil economic, social and cultural rights to the maximum extent of their available resources. In

addition, states have immediate obligations to address discrimination and inequality in the enjoyment of these rights.

4. Single-parent family status is protected by the non-discrimination guarantee in ICESCR Article 2(2) by analogy with the stated grounds. Single-parent families are universally disadvantaged in the realisation of their economic, social and cultural rights, and the on-going failure of states to address this constitutes unlawful discrimination under ICESCR.
5. Moreover, attempting to address inequalities in women's and children's enjoyment of economic, social and cultural rights as purely individual rights matters and separate from each other suffers fatal limitations. In this regard, the marginalisation of single-parent families serves as a paradigmatic example of the consequences of failing to adequately consider and address the interplay of dependency and derivative dependency in relation to children and women. It thus illustrates the essential importance of requiring states to respect, protect and fulfil their Article 10(1) obligations on a basis of equality and non-discrimination as a key aspect of eliminating all forms of discrimination against women and realising the rights of the child.

Thereafter, I address the sixth and final part of my hypothesis, namely that:

6. UN treaty bodies should require that states respect, protect, and progressively fulfil the economic, social, and cultural rights of single-parent families without discrimination, guide states in meeting this obligation, and monitor progress. A Joint General Comment/General Recommendation issued by CESCR, CEDAW and CRC would be a powerful step in this direction. Such action would provide a protective canopy under which norms of single-parent families' economic, social and cultural rights realisation may begin to germinate on the ground.

In subchapter 5.3, I outline potential strategies for advancing the realisation of the economic, social and cultural rights of single-parent families and consider the strengths and weaknesses of each. Having determined that a joint General Comment/General Recommendation issued by CESCR, CRC and CEDAW is likely to offer the best approach (on its own or in combination with other strategies), in subchapter 5.4 I analyse two potential approaches to a General Comment/General Recommendation and provide a high level sketch of matters that might be included in its content. A concluding summary completes the chapter and the thesis. Supplementary material on group rights and a detailed outline for a possible General Comment/General Recommendation are provided after the end of the thesis.

5.2 Summary of findings

This thesis addresses the question of whether the UN human rights treaty system offers a valid and useful framework for the realisation of the economic, social and cultural rights of single-parent families. While it might be possible to answer this in the affirmative via various routes, I tested a six-part hypothesis which, if shown to be accurate, would confirm that the UN human rights treaty system does offer such a framework grounded in ICESCR Article 10(1). In my first four chapters, I investigated the hypothesis in various ways. Chapter 1 introduced the question, claim, my motivations and approach to the research, the empirical rationale for the focus on single-parent families, and doctrinal approach to human rights treaty interpretation. Chapter 2 delved into the question of the single-parent family as a rightsholder under Article 10(1). In Chapter 3, I turned my attention to the content of the right in Article 10(1), examining what it is a right *to* and what obligations it imposes on states. This set the stage for me to consider, in Chapter 4, the practical application of the right, which I did through a case study and associated

thought experiment based on the UKSC case of *R (DA)*.[978] Now, in subchapter 5.2, I assess whether my research findings substantiate the first five parts of my hypothesis.

5.2.1 Part 1 of the hypothesis: Single-parent families are ICESCR Article 10(1) rightsholders

In subchapter 1.7, I explained that I use the phrase 'single-parent family' to mean a family containing dependent children and headed by one adult. This term overlaps substantially with 'single parent household' as used by the UN Population Division but is not identical to it.[979] Chapter 2 investigated the identity of the rightsholder in ICESCR Article 10(1). Based on the principles of treaty interpretation, I determined that the plain meaning of the text is that the right is held by the family group unit.[980] Modern Western theorising on vulnerability and dependency and neuroscience, along with conceptions of the self and interdependence in East Asian and Indigenous world views, support the drafters' conclusions that there is something about the family that is not adequately recognised with only an individual rights approach.[981] I adopted participatory and social ontological conceptions of group rights as tools for appreciating the nature of the group right in Article 10(1).[982]

I investigated the content of the word 'family' in ICESCR Article 10(1) by describing four possible conceptions of the term: conservative-marital, libertarian-contractual, pluralist, and vulnerable-caring. Only some of these conceptions include

[978] *R (DA)* (n 53).

[979] ST/ESA/STAT/SERM/67/Rev3 (n 64) [18-19].

[980] E/CN4/AC1/SR/38 (n 2); A/C3/SR144 (n 398).

[981] Fineman, 'Vulnerability' (n 198); Herring, *Relational Self* (n 35); Siegel (n 152); Chang (n 247); Ikeda (n 37); Mikaere, 'Seeing' (n 193); Ruru (n 36).

[982] Gould (n 43); Réaume (n 402) 142-5.

single-parent families. Furthermore, only some are reconcilable with the notion of the family as a rightsholder under the international human rights framework. Applying the general principles of treaty interpretation, I found that the conception of family that is compatible with the term's use in ICESCR Article 10(1) is the caring-vulnerable family viewed expansively to accommodate a plurality of family forms.[983] I also found that the drafters of Article 10(1) and its parallel provision Article 16 of the UDHR explicitly rejected arguments that the rights therein be restricted to 'the family based on marriage'. Indeed single-parent families and their members were highlighted as being in particular need of rights protection due to their marginalisation. Thus, the drafters emphasised that references to 'family' must include single-parent families.[984] As a result of these findings, it must be concluded that the single-parent family is a rightsholder under ICESCR Article 10(1).

5.2.2 Part 2 of the hypothesis: ICESCR Article 10(1) acts a dye colouring ICESCR

The claim that ICESCR Article 10(1) is correctly interpreted as a dye colouring all other substantive provisions of ICESCR is investigated in subchapter 3.5. Like Craven, I reject the possibility that the inclusion of the word 'should' in the text means that it imposes nothing more than a moral obligation on states.[985] Principles of treaty interpretation require that all treaty provisions be taken to have legal content and that states party must perform their obligations under them in good faith.[986] Therefore, I seek to establish the content of Article 10(1) through an investigation of scholarly and CESCR writings on the

[983] Subchapter 2.3.5.

[984] E/CN4/AC1/SR/38 (n 2); E/CN4/SR58 (n 2); A/3525 (n 305); A/C3/SR732 (n 310); UNGA (3rd Committee), A/C3/SR735 (n 307).

[985] Craven (n 645) 135.

[986]VCLT Article 26; Craven (n 645) 135.

topic. However, I find that the explosion of scholarly and activist theorising about the family in the years since the provision was drafted has not been accompanied by a parallel movement to define the content of the family's Article 10(1) right to the widest possible protection and assistance. This, I observe, hampers the task of teasing out the provision's practical meaning.

I turn to Saul, Kinley and Mowbray's *Commentary* on ICESCR for insights but discover that in the absence of CESCR commentary and cases that are directly on point, they base their analysis on references to the family in other international and regional human rights conventions.[987] I discover that attempting to apply jurisprudence on these provisions to ICESCR Article 10(1) is unsatisfactory because it does not account for the different purposes of the instruments in question: most are not concerned with economic, social or cultural rights. Moreover, Saul, Kinley and Mowbray fail to square their claims that the state's role in relation to the family is 'subsidiary' and the function of Article 10(1) 'residual' with their acknowledgement that Article 10(1) contains a textual requirement that the protection and assistance accorded to the family be 'the widest possible'.[988]

Examining CESCR's statements on Article 10(1), I find that it has not provided guidance on the right's content through a General Comment. Moreover, its engagements with states through the review process do not demonstrate a consistent stance on the content of the right.[989] Where single-parent families are mentioned in CESRC's Concluding Observations, it is often as one of a list of marginalised or disadvantaged

[987] Saul, Kinley and Mowbray (n 150) 721-853.

[988] ibid 772 and 783-4.

[989] ibid 733-8 and 780-4; subchapter 3.5.3.

categories at risk of poverty and is typically disconnected from any mention of Article 10(1). Worryingly some past CESCR mentions of single-parent family poverty are framed in a stigmatising deficit-based manner, although this was not found in the more recent Concluding Observations sampled.[990] However, even in the instance of Mongolia's 2022 report which included considerable data and commentary suggestive of an acknowledgement of obligations to single-parent families under Article 10(1), CESCR did not comment on this in its Concluding Observations.[991]

In the absence of authoritative guidance on the content of the right in Article 10(1), I undertook an analysis of the provision's meaning based on the ordinary meaning of its terms, in their context and in light of the provision's object and purpose, and used the preparatory work of the treaty and the circumstances of its conclusion as supplementary means of interpretation.[992] The Preamble of ICESCR recognises the inherent dignity of the human being as the source of inalienable and equal rights and freedoms. The purpose of ICESCR includes the establishment of binding legal obligations on states to create conditions whereby everyone may enjoy their economic, social and cultural rights, thus supporting 'the ideal of free humans enjoying freedom from fear and want'.[993] I determined that the purpose of Article 10(1) is to ensure that not only individual rights are protected but also the rights of the family group, particularly while it is responsible for the care and education of dependent children. The fundamental role of the caring-vulnerable family in attending to the dignity of people as embodied

[990] Saul, Kinley and Mowbray (n 150) 733-8.

[991] E/C12/MNG/CO/5 (n 691); E/C12/MNG/5 (n 701).

[992] Subchapters 3.5.4; VCLT Articles 31(1) and 32.

[993] Marco Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Routledge 2013) 9.

beings has costs which are not shared equally across society. Therefore, Article 10(1) requires that the family be accorded protection and assistance. The scope of protection and assistance is not elucidated in the provision, but the text states that it must be expansive: 'the widest possible'.[994] The drafters intended to ensure that the rights provided in ICESCR attached to the family group as a rightsholder, not merely to individuals. This can be achieved through reading Article 10(1) as a dye that washes over the other substantive provisions of ICESCR, requiring them to be read as applying to the family in addition to the individual. The approach is not unique: a precedent exists in the way in which equality and non-discrimination requirements of human rights treaties are read as dyes, colouring the interpretation of human rights conventions as a whole.

Another way to understand this is through the insights provided by capabilities approaches, which have been adopted by CESCR and other UN treaty bodies.[995] Capabilities approaches enable a conception of rights as interconnected and an understanding of rightsholders as having agency in the sense of selecting the things that they have reason to value in accordance with their innate dignity.[996] For a family, the widest possible protection and assistance would be that which enables them the substantive freedom to thrive and survive as a caring-vulnerable group unit while also providing the freedom for members to exercise their individual agency. Treating Article 10(1) as a dye that colours other ICESCR rights enables the components of the family's rights to be analysed as discrete parts for implementation and measurement. However, it

[994] Subchapter 3.5.5.

[995] Eg E/C12/2001/10 (n 514) [7].

[996] Sen, *Development* (n 105) 72-87.

does not detract from the interdependence of these parts as a whole. As a dye washing over ICESCR's substantive provisions, all parts of the colour remain connected.

5.2.3 Part 3 of the hypothesis: States' positive duties under Article 10(1)

The state's obligations under ICESCR generally and Article 10(1) in particular, formed the subject of Chapter 3 of my thesis. I briefly considered historic arguments that economic, social and cultural rights are not 'real rights' in a legal sense. I explained the historic conditions that gave rise to such arguments and their eventual downfall.[997] I also elucidate why such arguments must be rejected from the perspective of doctrinal logic based on the principle of *pacta sunt servanda* (agreements must be kept), without which public international law loses its meaning. I noted the consensus expressed in the VDPA that the international community must treat human rights globally 'in a fair and equal manner, on the same footing, and with equal emphasis.'[998] Furthermore, I observed that many of the complexities that have been argued to pertain to the implementation of economic, social and cultural rights also arise in relation to civil and political rights. Both types of rights impose positive, as well as negative duties on the state.[999]

Next, I investigated the interpretive framework for economic, social and cultural rights. I found that CESCR takes an evolutionary approach to the interpretation of state obligations, grounded in ICESCR's object and purpose. This has included going beyond narrow single-article interpretation to adopt an interconnected interpretive framework. ICESCR. I argue that this is appropriate in light of the direction provided by the VDPA and also necessary to deal with the conundrum posed by states being obligated to protect,

[997] Subchapter 3.2.

[998] A/CONF57/23 (n 33) [5].

[999] Subchapter 3.3.2.

respect and progressively fulfil economic, social and cultural rights when their realisation involves finding solutions to wicked problems. Wicked problems are, by their nature, multi-causal, contested, incapable of solutions using mechanistic tools of policy and programme design or legislation, and intrinsically interlinked with other problems through interconnecting socio-political systems.[1000] They require the deployment of mitigation strategies that are not fully testable because of their human quality and the minimal opportunities for trial and error.

Having substantiated part 2 of my hypothesis—that ICESCR Article 10(1) is a dye that washes over all other substantive provisions of ICESCR—I conclude that states' obligations under Article 10(1) are to protect, respect and progressively fulfil the obligations in ICECSR, *in toto* with respect to families, particularly those responsible for dependent children. The obligations are to be considered as interlinked, following the evolutionary approach to treaty interpretation. Capabilities approaches offer appropriate frameworks to understand this. In this light, I considered the evolution of CESCR's approach to poverty as a multidimensional phenomenon in which multiple rights violations reinforce each other to deprive people of their freedoms and capabilities.[1001] Article 10(1) obliges states to address poverty (in an expansive sense) as a source of unfreedom or rights deprivation for families to ensure that they are accorded the widest possible protection and assistance particularly while responsible for dependent children.

A margin of appreciation applies to *how* states choose to fulfil their ICESCR obligations. Moreover, Article 2 allows states to take a progressive approach to achieving the full realisation of ICESCR rights. However, this does not mean that states can be

[1000] Austin Center for Design (n 503); subchapter 3.3.2.

[1001] E/C12/2001/10 (n 514).

laggardly. They must take steps to the maximum extent of available resources, including planning, implementing low-cost initiatives, and respecting and protecting rights. CESCR has stressed that a state's budgetary and taxation choices, as well as its actions to address corruption, are open to review in determining whether it has taken advantage of its maximum available resources in taking the necessary steps. A minimum core of realisation for each right is required.[1002] There is a strong presumption against retrogressive measures, even in times of crisis or austerity. Such measures must be very carefully justified, not reduce rights realisation below the minimum core, and not disproportionately affect marginalised or disadvantaged groups.[1003] A state that is unable to meet its obligations, for example, due to resource or technical constraints, is obliged to ask for international assistance.

Importantly, states have immediate obligations to ensure substantive non-discrimination and equality in the enjoyment of rights.[1004] Fredman's four-dimensional framework is helpful for analysing the state's obligations in relation to distributive, recognition, transformative and participative aspects of equality and non-discrimination. In planning to fulfil its Article 10(1) obligations, a state should consider the extent to which families are enjoying their economic, social and cultural rights and, at the same time, create a plan of action to meet its immediate obligations to guarantee non-discrimination and equality in the enjoyment of Article 10(1) rights. Both parts of this exercise contain comparative dimensions.

[1002] E/1991/23 (n 149) [10].

[1003] CESCR/48th/SP/MAB/SW2 (n 617) 2.

[1004] E/C12/GC/20 (n 405) [7].

Strictly speaking, the rightsholder in Article 10(1) is not limited to families with dependent children. The family, understood in its vulnerable-caring conception can extend to an adult couple, an 'able' adult and their disabled sibling, or potentially other units. A pluralistic conception that recognises cultural diversity in the identification of family further expands these parameters. However, Article 10(1) states that the family while responsible for dependent children is to be *particularly* accorded the widest possible protection and assistance. Therefore, it would be reasonable for the state to look at the realisation of the rights of families with dependent children compared to all individuals or all households. The precise units of measurement would depend on the characteristics of each state.

To the extent that income or wealth were part of this assessment, it is important that the state does not assume that some categories of human (children) require less economic resources than others (adults) merely because of a characteristic such as age. This type of assumption is based on the underlying patriarchal assumption that the time and effort of women in caring for children has no value. In subchapter 2.2, I drew attention to the ways in which the autonomy myth obscures dependency and derivative dependency and how this forms part of the structural underpinnings of discrimination against women and children. Moreover, the state should listen to the voices of families—making sure that this includes *prima facie* disadvantaged and marginalised families and that the voices are not simply the voices of patriarchal family heads—to identify areas of rights realisation of most concern to them. Undertaking this exercise is a technical task. The depth brought to it will depend on the state's resources, competing demands, and access to technical assistance. Definitional questions, data limitations and strongly held political, social, cultural and religious views present challenges. However, an initial

iteration of benchmarks will allow the state to identify areas in which it must take action to protect, respect and progressively realise rights.

Each state needs to assess the level of enjoyment of rights experienced by marginalised and disadvantaged families to make a plan of action to meet its immediate obligations to guarantee non-discrimination and equality in the enjoyment of Article 10(1) rights. ICESCR Article 2(2) provides a non-exhaustive list of prohibited grounds of discrimination, which is elaborated on in CESCR General Comments and jurisprudence, and in scholarly writings. The appropriate comparator is all families in the state, whether or not they contain dependent children.

There is an immediate obligation on the state to ensure substantive non-discrimination across all four dimensions. For example, suppose a suspect category of family experienced disproportionate levels of poverty and material hardship. In that case, action should be taken by the state to address distributive discrimination in the realisation of rights to social security, employment, and living standards (including food, clothing and housing).[1005] Achieving non-discrimination also requires the state to address misrecognition, make structural or transformative changes, and ensure that members of the discriminated against category can participate in decision-making. Strategies to address substantive discrimination in rights realisation may vary depending on the right in question. However it is likely that all four dimensions will be engaged in relation to each right. For example, the realisation of rights to health, education, participation in cultural life, and enjoyment of the benefits of scientific progress[1006] are all contingent on addressing distributive, recognition, transformative and participative inequalities.

[1005] ICESCR Articles 6, 7, 9 and 11.

[1006] ibid Articles 12, 13 and 15.

In addition to immediate obligations to ensure non-discrimination and equality, states also must respect, protect and progressively fulfil (to the maximum extent of available resources) families' rights to the widest possible protection and assistance. As Article 10(1) serves as a dye colouring the interpretation of all other ICESCR rights, states' obligations extend to ensuring that these rights are respected, protected and fulfilled in relation to the family, not just the individual.

5.2.4 Part 4 of the hypothesis: Single-parent family status as an analogous ground

In Chapter 2.5, I established that single-parent family status is an analogous ground in terms of the non-discrimination guarantee in ICESCR Article 2(2). Not only do single-parent families experience disproportionate poverty and other harms associated with marginalised status, but their experience of these is not purely attributable to their membership of a more general group such as being of lower socioeconomic status or being families with young children. Rather, there are unique characteristics of discrimination against single-parent families which are common across diverse societies. These include socio-legal-economic structures which penalise dependency and make inadequate provision for the support of those whose caring labour renders them derivatively dependent, instead preferring to assume that such support must come from within the private family through an economically active member who is less constrained by caring duties (stereotypically the patriarch). Stigmatising social, cultural and religious norms directed at single-parent families in general, as well as against particular types of single-parent families, represent (mis)recognition specific to single-parent family status.

In subchapter 1.8, I laid out the rationale for focusing on single-parent families as a uniquely marginalised category. I provided illustrative examples of substantive discrimination against single-parents. In relation to maldistribution, I detailed how in the

USA, 41 percent of single-mother families live below the poverty line, two out of three single-mother households are food insecure, and 33.5 percent of families in which a single-mother is in paid work are in poverty.[1007] In relation to misrecognition, I described the historical roots of the stigmatisation of single-parent families in Europe (including the UK),[1008] as well as the example of stigma against never-married mothers and their children in Sri Lanka.[1009] I used the example of New Zealand to illustrate the structural (non-transformative) dimension of discrimination against single-parent families, drawing attention to the multi-faceted disadvantages experienced by single-parent families in relation to income, health, loneliness and housing, all of which are strongly linked to low overall life satisfaction.[1010] Finally, I described the ostracism of single-parent families in South Korea as an illustration of participative marginalisation.[1011]

It has been beyond the scope of this thesis to catalogue all types of economic, social and cultural marginalisation and disadvantage experienced by single-parent families. However, many more examples can be readily found. In addition, discrimination in civil and political rights realisation also has economic, social and cultural consequences for single-parent families. For example, in the United Arab Emirates (UAE) hospitals continue to refuse to issue birth certificates for born to single women children despite recent criminal law reform. Without birth certificates, these children cannot receive medical care, attend school or travel. Furthermore, a parent can be sentenced to two years imprisonment for failing to document their child. Petitioning the

[1007] Casey and Maldonado (n 78).

[1008] Teichman (n 87); Brunet (n 91).

[1009] Jordal, Wijewardena and Olsson (n 93).

[1010] Stats NZ (n 106).

[1011] Babe (n 109); So (n 109).

Family Court for a birth certificate is expensive, difficult and requires testimony in front of a judge. Most UAE residents are foreign nationals who experience rights violations across multiple areas. Many unmarried single mothers want to return to their home countries with their babies, but without documentation, they cannot.[1012] In several other states, unmarried women who give birth are criminalised and may face sentences ranging from imprisonment to lashings or execution.[1013] Without basic liberty and security from state-sanctioned violence, the economic, social and cultural rights of unmarried mothers and their children remain illusory.

In China, single-parent families remain largely unrecognised despite the Marriage Law guaranteeing equal rights to children born outside marriage. Faced with a declining population, many family planning restrictions have been eased.[1014] Birth permits ceased to be restricted to married couples in 2016.[1015] However, most regional authorities provide maternity insurance and related benefits only to married women.[1016] Moreover children born to single mothers are denied hukou (household permits) in some

[1012] ____, 'After UAE Law Change, Out-of-Wedlock Babies Still in Shadows' *Voice of America - Middle East* (13 December 2021) <https://www.voanews.com/a/after-uae-law-change-out-of-wedlock-babies-still-in-shadows-/6351934.html#:~:text=Although%20unwed%20mothers%20no%20longer,a%20maze%20of%20red%20tape.&text=In%20the%20UAE%2C%20hospitals%20issue%20birth%20certificates%20only%20to%20married%20parents.> accessed 17/2/2022.

[1013] Asra Q Nomani, 'She Shouldn't Be Stoned to Death. None of Us Should' The Washington Post <https://www.washingtonpost.com/archive/opinions/2003/06/01/she-shouldnt-be-stoned-to-death-none-of-us-should/01e0315d-e2b8-431c-b02d-04f64ce431a7/> accessed 17/02/2022; Maya Oppenheim, 'Saudi women abandon their babies on the street if they give birth while unmarried' The Independent <https://www.businessinsider.com/saudi-women-abandon-babies-on-street-if-they-give-birth-unmarried-2019-4?r=AU&IR=T> accessed 15/04/2019.

[1014] Wang (n 66).

[1015] Cherie Chan, 'China's unmarried women struggle to overcome barriers to having babies' Deutsche Welle <https://www.dw.com/en/chinas-unmarried-women-struggle-to-overcome-barriers-to-having-babies/a-36488553> accessed 17/2/2022.

[1016] Wang (n 66).

provinces.[1017] Without hukou, travel and access to health and education services are impossible.

Returning to the social security regimes, provisions relating to single parents may include discriminatory intrusions into privacy and personal life. For example, New Zealand's social welfare legislation requires recipients to declare if they are 'in a relationship in the nature of marriage,' a notoriously ambiguous phrase based on outdated assumptions about new partners taking over providing for families.[1018] The provision denies single parents in receipt of benefits opportunities for dating and adult company that are afforded to others. It also renders single-parents vulnerable to blackmail and exploitation from those who might report them to authorities.[1019] Meanwhile, benefit fraud, which is disproportionately associated with single-mothers, attracts significantly harsher sentences in relation to the amounts defrauded than white-collar fraud, including tax evasion, which is more typically a male crime.[1020] In the UK, the youth justice system has been shown to penalise single mothers for their children's behaviour without placing similar levels of responsibility on children's fathers.[1021] The consequences of discriminatory justice system sanctions of single-mothers fall on their families as a whole.

[1017] Emily Feng, 'In China, Kids Of Unwed Mothers May Be Barred From Public Health Care, Education' NPR <https://www.npr.org/2019/11/06/775388226/in-china-kids-of-unwed-mothers-may-be-barred-from-public-health-care-education> accessed 17/2/2022.

[1018] Social Security Act s 8.

[1019] As was the case in *Ruka* (n 52).

[1020] Lisa Marriott, 'Unpaid tax and overpaid welfare: a comparison of the debt recovery approaches in New Zealand' (2014) 20 NZ Journal of Taxation Law and Policy 46.

[1021] Kaganas (n 352) 64-8.

Such wide-ranging examples serve to illustrate the ubiquity of disadvantage and marginalisation suffered by single-parent families and justify the inclusion of single-parent family status as an analogous ground under ICESCR Article 2(2). Furthermore, as mentioned in subchapter 3.5.3, CESCR lists single-parent families and their members among the groups whose rights' realisation states are asked to pay particular attention to in several recent Lists of Issues and Concluding Observations. Although it has not spelt out its reasoning in this regard, such inclusion indicates that CESCR accepts that single-parent family status is an analogous ground under ICESCR Article 2(2). The UKSC in *R (DA)* came to a similar conclusion.[1022]

5.2.5 Part 5 of the hypothesis: A paradigmatic example of the failure to adequately address the interplay of dependency and derivative dependency in relation to women's and children's rights

In the introduction to this thesis, I mentioned a 'lightbulb' moment in which I realised that the ongoing marginalised status of single-parent families might not be purely an unfortunate result of the impartial workings of an invisible hand but might also serve the patriarchy by curtailing women's bargaining power within traditional heterosexual marriages by lowering the BATNA available to them. My investigation of autonomy, dependency and vulnerability in Chapter 2.2 revealed specific limitations of conceptions of human dignity and rights premised on the individual as an autonomous rational agent. I found that vulnerability theory shows us that our embodied nature renders all humans vulnerable and dependent. I agreed with Fineman that the universality and inevitability of dependency require that it be a 'collective concern, requiring collective response', yet paradoxically, society has channelled the work of tending to dependency 'in such a way

[1022] *R (DA)* (n 53) [37-8].

that only some of its members bear the burden of this work.'[1023] Caring for others generates derivative dependency.[1024] Children are archetypal dependents, and mothers, as their usual primary caregivers, are archetypal derivative dependents. The private family is designated as the container for dependency in which care is carried out. However, its function in providing the background conditions that allow the public spheres (here referring to both civic-governmental spheres and commercial private enterprise) to operate is invisibilised.[1025] Within marital-conservative families, children (as dependents) and women (as derivative dependents) are expected to rely on the family head for material resources: the self-interested rational man in the public sphere is assumed to transform into a benevolent provider in the private family sphere.

Despite enormous changes to gender roles, including women's increasing labour market participation, this paradigm for dealing with dependency has not been overturned. Philosophers', policymakers' and public commentators' tendency to elide concepts of individual autonomy and family autonomy make it particularly difficult to untangle the ways in which confining responsibility for children's typical dependency and the associated derivative dependency of women as their usual primary caregivers to the private family undermine the realisation of both children's and women's rights. Thus, in addition to the need to consider the rights of single-parent families as a marginalised outgroup, my research shows that such an approach is significant as a paradigmatic example of the consequences of a failure to address the interplay of dependency and derivative dependency in relation to children's and women's rights more generally.

[1023] Fineman, *Autonomy* (n 35) 263.

[1024] ibid 34-6.

[1025] ibid xv-xxii, 208-30.

Given the limited improvements observable from—and unintended consequences of—states' and international governmental organisations' reliance on calls for greater male involvement in childcare and greater provision of formal childcare as solutions to those aspects of women's inequality related to care responsibilities, it is timely to take a fresh look at how our paradigms of care provision and support for dependency and derivative dependency may curtail advancement towards equality. By focusing on the realisation of single-parent families' rights, my work provides clarity in considering the problem and identifying the need for solutions that do not rest on the willingness of a male breadwinner to contribute.

5.2.6 Subchapter conclusion

In this subchapter, I summarised the findings of my research in relation to the first five parts of my six-part hypothesis. I concluded that each part of the hypothesis was substantiated. In other words, I have demonstrated that single-parent families as group units are rightsholders for the purposes of ICESCR Article 10(1) and that the provision acts as a dye washing over the rights in ICESCR as a whole, requiring it to be read as applying to the family as a vulnerable-caring group, not merely to individuals. The state has consequent obligations to respect, protect and progressively fulfil the right under Article 10(1) and has immediate obligations to ensure substantive non-discrimination and equality in the enjoyment of this right, including for single-parent families as an analogous category. Moreover, the marginalisation of single-parent families serves as a paradigmatic example of the failure to address dependency and derivative dependency as key considerations in efforts to eliminate all forms of discrimination against women and children. Thus, action to rectify discrimination against single-parent families also has positive implications for women and children generally.

However, I have not yet answered my overarching research question: does the UN human rights treaty system offer a valid and useful framework for the realisation of the economic, social and cultural rights of single-parent families? To do that requires an examination of the sixth part of my hypothesis, which posits that UN treaty bodies can and should require states to respect, protect and progressively fulfil the economic, social and cultural rights of single-parent families without discrimination and that a Joint General Comment/General Recommendation would be a powerful step in this direction. I now turn to that task.

5.3 Towards the realisation of the right

5.3.1 Subchapter introduction

For a human rights framework to be useful, it must be capable of creating change in the lives of marginalised people on the ground.[1026] A pyramid of enforcement has been empirically shown to be effective in progressing the realisation of human rights.[1027] Such pyramids have persuasion, education and advice at their base. Most regulatory action is focused here. It aims to trigger deliberation that will lead to action, backed up by the presence of enforcement mechanisms which become more severe as the apex of the pyramid is reached.[1028] However, the UN human rights treaty system does not contain mechanisms for coercive enforcement. Moreover, relatively few states provide for direct domestic adjudication and enforcement of states' ICESCR, CEDAW or CRC obligations. Some others provide for domestic proceedings to take UN human rights treaty obligations into account in the interpretation of domestic law. However, the impetus for states to meet their obligations rests largely on the normative force of the UN international law

[1026] Relis (n 27) 511.

[1027] Fredman, *Transformed* (n 28) 157.

[1028] ibid 158.

system, coupled with the reputational risks (domestically and internationally) of being the subject of unfavourable comments from UN treaty bodies during periodic reviews or in response to individual communications.

The widespread lack of coercive enforcement provisions leads some to style positive economic, social and cultural requirements as 'soft law' which risks 'becoming purely political with no normative dimension.'[1029] A more hopeful analysis, however, views the norms embodied by international human rights law as a consensus on which all parties have agreed. So understood, international human rights meet the requirements of Rawls' political conception of justice as an overlapping consensus to which all rational and reasonable citizens (or, in the case of international law, states) can agree. The principle of *pacta sunt servanda* emphasises that all agree to honour treaty commitments on the basis of mutual reciprocity. The wide acceptance of the three component instruments of IBOR, as well as CRC and CEDAW, strengthens the legitimacy of a global normative system that serves the structural function of reflecting and promoting societies' and states' collective conceptions of justice.

If that is the case, how can UN international human rights apparatus be harnessed to motivate states to meet their obligations to respect, protect and progressively fulfil the economic, social and cultural rights of single-parent families? The struggles of other marginalised groups provide some inspiration. For example, the UN human rights system has offered an international normative layer that has facilitated advancement in localised struggles for rights realisation for both indigenous peoples and LGBTQI+ people.

[1029] ibid 160.

5.3.2 HRC Special Procedures

The HRC can appoint a Special Rapporteur, Independent Expert or Working Group as a Special Procedure 'to report and advise on human rights from a thematic or country-specific perspective.'[1030] The permissible scope for such appointments covers all human rights, including economic, social and cultural rights. Given the gaps in the information available on violations of single-parent families' economic, social and cultural rights, the appointment of a Special Procedure to investigate and advise on this thematic issue has merit. Special Procedures mandate holders are independent experts able to undertake country visits (with a specific or standing invitation from the country concerned). Among their wide powers, they can receive information, act on alleged violations of a structural nature by issuing communications to states, convene expert consultations, engage in advocacy and public awareness raising, provide technical cooperation, develop human rights standards and guidelines, and organise panels during sessions of the HRC.[1031] Special Procedures have proved significant in shifting understanding and action on extreme poverty and human rights, the right to health, and protection against violence and discrimination based on sexual orientation and gender identity.[1032] Campbell advocates an initiative akin to a Special Rapporteur be taken to develop a comprehensive framework for addressing the web of 'violations of political, civil, economic, social and cultural rights' experienced by women in poverty and the multi-faceted role of gender-based

[1030] OHCHR, 'Special Procedures of the Human Rights Council' <https://www.ohchr.org/en/special-procedures-human-rights-council/special-procedures-human-rights-council> accessed 24/03/2023

[1031] ibid.

[1032] Eg, A/HRC/26/28 (n 640); E/CN4/2004/49 (n 640); OHCHR, 'Protection against violence and discrimination based on sexual orientation and gender identity, Mandate of the UN Independent Expert, Work Programme 1 January 2021 – 31 December 2023; Version 12a, 1 November 2020, for consultation' (1 November 2020) .

poverty in obstructing the enjoyment of rights.[1033] A similar approach to address the lack of recognition of economic, social, and cultural rights for single-parent families would also have merit.

However, the instigation of Special Procedures sits within mandate of the HRC, an inter-governmental body whose 47 members are elected by the UNGA based on a set distribution of seats between regions.[1034] This century, Russia has spearheaded moves in the HRC to gain traction for a conservative patriarchal marital heterosexual understanding of the family under the guise of 'traditional values'.[1035] This led, in 2009, to the HRC adopting a resolution on 'Promoting human rights and fundamental freedoms through a better understanding of traditional values of human kind' and calling on the Office of the High Commissioner on Human Rights to convene a workshop on these values.[1036] While the HRC resolutions did not define the term 'family', the term was understood by proponents of 'traditional' values to be a coded reference to the heterosexual marital patriarchal family.[1037] Resolutions aimed to protect the superior position of this family type in the face of growing pressure from LGBTQI+ and women's rights movements, and to strip ideas of equality within families from international human

[1033] Campbell, *Women* (n 935) 79.

[1034] HRC, 'Membership of the Human Rights Council' <https://www.ohchr.org/en/hr-bodies/hrc/membership> accessed 28/03/2023

[1035] Hilary Charlesworth, 'Culture and Tradition In the International Human Rights System' in George J Andreopoulos and Henry F Carey (eds), *Justice and World Order: Reassessing Richard Falk's Scholarship and Advocacy* (2022) 52-5.

[1036] HRC, 'Res 12/21 A/HRC/RES12/21 Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind' (12 October 2009); HRC, 'Summary of the Human Rights Council Panel Discussion on the Protection of the Family: Report of the Office of the United Nations High Commissioner for Human Rights' (Dec 22 2014) A/HRC/28/40; Charlesworth (n 1036) 52-3.

[1037] Charlesworth (n 1036) 55.

rights consideration. Debate on the topic became highly polarised.[1038] Such a political context suggests that reliance on the HRC to appoint a special procedure on single-parent families' economic, social and cultural rights realisation would be naive. On the other hand, if such a procedure were adopted, much-needed data might be gathered and analysis undertaken.

5.3.3 Individual communications to UN treaty bodies

In contrast to the HRC, UN human rights treaty bodies such as CESCR, CEDAW and CRC consist of experts. Although nominated by states, members are officially independent in the performance of their roles. Optional Protocols to ICESCR, CEDAW and CRC provide individual communication mechanisms under which an individual or collective who has exhausted all domestic remedies may make a communication to the relevant treaty body in relation to an alleged violation of their rights under the treaty.[1039] Civil society organisations often provide legal and other support for such communications where the action has the strategic potential to further the development of international law on an issue.[1040] Use of individual communications procedures could provide a useful avenue for action by civil society advocates to raise issues of single-parent families' economic, social and cultural rights violations in a state that was party to the necessary optional protocol. Such action would need to be carefully considered as an

[1038] ibid 54-6.

[1039] ICESCR OP (n 484); Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 6 October 1999, entered into force 22 December 2000) UNTS v2131 83; Optional Protocol to the Convention on the Rights of the Child on a communications procedure (adopted 19 December 2011, entered into force 14 April 2014) A/HRC/RES/17/18 2011.

[1040] Eg, *Flamer-Caldera v Sri Lanka* 2022 (CEDAW).

unfavourable response to an individual communication can set back progress towards the realisation of the rights claimed.[1041]

Recent communications to CESCR feature a predominance of communications related to evictions. *Moreno Romero v Spain* (2018) and *Diaz v Spain* (2019) were brought by single parents on behalf of themselves and their children under ICESCR Article 11(1) and do not mention Article 10(1).[1042] Although the communication in *Diaz* makes allegations of discrimination, these are in relation to their treatment as undocumented migrants.[1043] No allegations are raised of discrimination on the grounds of single-parent family status.

However, in *Ben Djazia and Bellili v Spain* (2019) concerning Article 11(1) rights of a couple and their minor children, CESCR recognised that the state had to interpret the right to housing in terms of all other human rights obligations. In the context of eviction, CESCR found that there was a particular obligation under Article 10(1) to 'provide the family with the widest possible protection' in providing alternative accommodation to the maximum of their available resources, which protected the 'family unit' especially when the family is 'responsible for the care and education of dependent children'. [1044] By offering the family accommodation that required Mr Ben Djazia to live separately from Ms Bellili and their children without offering any explanation of why this was necessary, the state had violated this duty.[1045]

[1041] Eg, *Joslin and Ors v New Zealand* 07/30/2002 CCPR/C/75/D/902/1999 (HRC).

[1042] *Moreno Romero v Spain* E/C12/69/D/48/2018 (CESCR); *Díaz v Spain* E/C12/73/D/134/2019 (CESCR).

[1043] *Díaz* (n 1042) [7.4-7.6].

[1044] *Ben Djazia* (n 724) [15.5].

[1045] ibid [17.7].

Moreover, in *Trujillo Calero v Ecuador*, CESCR accepted arguments that the state's social security regimes indirectly discriminated against a woman 'who dedicated part of her life to unpaid domestic work'.[1046] Furthermore, in *Walters v Belgium*, CESCR expanded on the required approach of states when considering the 'possibility of a disproportionate impact' of regulatory policies on 'certain groups in vulnerable situations.'[1047] In such instances, CESCR found that a 'double obligation' is imposed on 'any State party that chooses such a regulatory framework', as follows:

> Firstly, the State party must establish a mechanism to monitor the impact of the application of the legal framework on the most vulnerable and marginalized groups in order to introduce the necessary adjustments to avoid a disproportionate impact that could imply a violation of the right … for a specific group…. Second, the policy must include mechanisms and flexibility to ensure that the application of the legal framework does not have a disproportionate impact in certain cases.[1048]

This communication concerned discrimination on the basis of older age and low income in access to housing. However, CESCR's views are expressed in general terms, indicating their potential applicability to other situations. Collectively, these communications suggest that in the right circumstances, an individual communication from a single-parent family alleging discrimination in their enjoyment of Article 10(1) rights to the widest possible protection and assistance may be successful.

It might also be possible for a divorced or separated single-mother to bring a communication to CEDAW alleging, for example, that her state had not taken 'all appropriate measures to eliminate discrimination in all matters relating to marriage and

[1046] *Trujillo Calero* (n 441) [19.1].

[1047] *Walters v Belgium* E/C12/70/D/61/2018 (2021) (CESCR) [12.3].

[1048] ibid [12.3].

family relations' including marriage dissolution.[1049] CEDAW General Recommendation 29 could be particularly relied upon in this regard.[1050] In such a case, CEDAW is likely to be open to considering the bests interests of the children of the single-mother, as well as the mother herself, given that the paramountcy or primordial status of the interests of the children is recognised in CEDAW.[1051] However, General Recommendation 29 does not address discrimination against never-married single-mothers and a communication that relied on it might risk further entrenching stigma and discrimination towards them and their families.

5.3.4 Domestic and regional litigation

Some jurisdictions, such as South Africa, have incorporated ICESCR into their domestic law. Where this is the case, it may be possible to undertake strategic litigation to enforce single-parent families' Article 10(1) rights in domestic courts. Assessing how this might be done and analysing the likely outcomes is outside of the scope of this thesis, as is assessment of the potential of regional human rights mechanisms for advancing the realisation of single-parent families' economic, social and cultural rights.

As discussed in relation to *R (DA),* some jurisdictions in which UN human rights treaties are not directly incorporated nevertheless have regard to provisions of such treaties in certain circumstances.[1052] Nevertheless, it seems unlikely that ICESCR Article 10(1), a much less well-recognised provision would be read into a domestic or regional

[1049] CEDAW Article 16(c).

[1050] CEDAW/C/GC/29 (n 5).

[1051] CEDAW Article 5(b), 16(d),(f). For how CEDAW has treated the best interests of the children, see *JI v Finland* (n 718) [8.7, 8.8 and 10(a)(i)].

[1052] *R (DA)* (n 53) [67 and 71]; subchapter 4.2.

court's consideration of the law without a significant increase to its profile and parallel guidance on its content.

5.3.5 General Comments and General Recommendations

The practice of issuing General Comments (or, in the case of CEDAW, General Recommendations) developed as a means for UN treaty bodies to guide states on their obligations under the treaty in question. They are 'seen as authoritative interpretations of the treaties' and are developed from extensive review of periodic reports, examination of individual communications, and protected discussions including consultation with civil society and states.[1053] CESCR's General Comments have proved helpful in clarifying ambiguous provisions and 'providing the international community with analytical interpretations of the normative content of economic, social and cultural rights.'[1054] Increasingly, treaty bodies use General Comments to advance states' understanding of their obligations and encourage action towards rights realisation in relation to difficult interpretation and policy issues. Over time, greater consistency has occurred in how such guidance is structured. In addition to clarifying the content of particular rights and reminding states of their non-discrimination and equality obligations, General Comments frequently encourage states to develop national plans with benchmarks and measurable indicators of progress to enable progressive realisation of rights to be monitored by treaty bodies and others. As we saw in *R (DA)*, General Comments have been used by domestic courts to assist with assessing state's human rights compliance.[1055]

[1053] Nigel Rodley, 'International Human Rights Law' in Malcolm D Evans (ed), *International Law* (4 edn, OUP 2014) 810.

[1054] Odello and Seatzu (n 993) 195.

[1055] Eg *R (DA)* (n 53) [68].

In this thesis, I demonstrated that the significance and content of the right in ICESCR Article 10(1) is poorly understood. For single-parent families, as a marginalised category, this means that there is not a clear normative statement of their rights to be accorded the widest possible protection and assistance on a basis of equality and non-discrimination. However, states' attention has not been drawn to their Article 10(1) obligations. Authoritative guidance from CESCR is therefore needed.

CESCR receives state reports and individual communications which touch on the violation of single-parent families' rights. Several of its Concluding Observations mention the marginalised and disadvantaged status of single-parent families and make recommendations urging states to address this. However, CESCR has not yet provided an explanation of the doctrinal basis for requiring states to take such action, nor developed consistent guidance of the type of steps required. A General Comment providing the international community with an analytical interpretation of the normative content of Article 10(1) with particular regard to guarantees of equality and non-discrimination for single-parent families would address this gap.

UN treaty bodies have at times issued joint General Comments/General Recommendations on matters of common interest and consensus. Examples include the Joint General Recommendation/General Comment issued by CEDAW and CRC on harmful practices and the Joint General Comment from the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and CRC on the general principles regarding the human rights of children in the context of international migration.[1056] Issuance of a Joint General Comment/General Recommendation reduces

[1056] CEDAW and CRC, 'Joint general recommendation/general comment No 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices' (14 Novermber 2014) CEDAW/C/GC/31-CRC/C/GC/18; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and CRC, 'Joint general comment 3

both the risk of repetition and the risk of ambiguity or contradictions emerging from different treaty bodies taking divergent approaches. The approach also reduces the burden on states, some of which are very small and have a scarcity of bureaucratic resources to come to grips with multiple interrelated documents.

5.3.6 Subchapter conclusion

The UN international human rights framework offers several possible pathways for pursing the realisation of single-parent families' economic, social and cultural rights. This subchapter has suggested that fruitful avenues may include seeking a Special Procedure to investigate the violations of single-parent families rights, making use of individual communications procedures, and pursuing the development of a General Comment/General Recommendation on the promotion, protection and fulfilment of the economic, social and cultural rights of single-parent families.

In the final substantive subchapter of this thesis, I consider a potential Joint General Comment/General Recommendation on the economic, social and cultural rights of single-parent families, which I assess to be the most advantageous way forward.

5.4 A Joint General Comment/General Recommendation on the economic, social and cultural rights of single-parent families and their members

5.4.1 Subchapter introduction

A tripartite approach to drafting a Joint General Comment/General Recommendation involving CRC and CEDAW as well as CESCR would offer a powerful opportunity to address the significance of realising the economic, social and cultural rights of single-

(2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' (16 November 2017) CMW/C/GC/3-CRC/C/GC/22.

parent families for the elimination of all forms of discrimination against women and the realisation of the rights of the child, as well as for the vulnerable caring family as a group unit.

This final subchapter of my thesis first considers approaches that a Joint General Comment/General Recommendation might take. Here, I conclude that centring single-parent families' Article 10(1) rights realisation is preferable to adopting a broader comment on Article 10(1). Next, I discuss the possible format such a Joint General Comment/General Recommendation, before finally considering specific matters it should address. I focus primarily on obligations under ICESCR Article 10(1). Should the CEDAW and CRC committees agree to the development of a Joint General Comment/General Recommendation, further work would be needed to ensure that the relevant provisions of those treaties are reflected fully. If it is not feasible to gain the agreement of all three treaty bodies to a joint text, the suggested approach is adaptable to a joint General Comment/General Recommendation issued by CESCR and one of the other treaty bodies or to a General Comment issued solely by CECSCR. Inevitably, the drafting process would involve many iterations with input from academics and NGOs, in addition to the treaty bodies and their secretariats. The matters I highlight are simply a possible starting point for that process. Space precludes the inclusion of a detailed outline of a Joint General Comment/General Recommendation in this thesis. However, a detailed outline is suggested in Part 2 of my Supplementary Material.

5.4.2 Choice of approach

If CESCR were to work with CRC and CEDAW to issue a Joint General Comment/General Recommendation to guide states on their obligations to promote, protect and fulfil the economic, social and cultural rights of single-parent families under CESCR Article 10(1), one of two approaches could be taken. A Joint General

Comment/General Recommendation on the promotion, protection and fulfilment of Article 10(1) rights of families generally be drafted, within which states' non-discrimination and equality obligations in relation to marginalised family types could be stressed at all relevant points. Alternatively, a Joint General Comment/General Recommendation could focus solely on states' obligations to address discrimination against single-parent families in the promotion, protection and fulfilment of their Article 10(1) rights (although potentially alluding to the wider significance of the right in relation to states' obligations to families generally).

The former is the more obvious approach, however the latter preferred for five reasons. First, treaty bodies must focus their limited attention and resources on the most pressing human rights issues. As demonstrated in subchapter 1.8, there is strong *prima facie* evidence that single-parent families are universally discriminated against in the enjoyment of their economic, social and cultural rights across low, middle and high-income states regardless of geographic region or political-religious-cultural-legal and socio-economic systems. The impacts of this discrimination are harsh.

Second, a Joint General Comment/General Recommendation regarding states' Article 10(1) obligations to families generally would require treaty bodies to make assumptions—explicitly or implicitly—about what is meant by 'family'. As demonstrated in subchapter 2.3, the term 'family' is both contested and multi-faceted. Despite developments in family theory since the drafting of the IBOR, the struggles of those drafters provide a salutary illustration of the difficulties in reaching a bounded definition, even in the face of wide agreement on the importance of the concept. There is a risk that, faced with such difficulties, today's treaty bodies would become stuck in an ideological

impasse, as has happened with the HRC's efforts to address the role of the family.[1057] The treaty bodies might seek to avoid such impasses by not setting out a theoretical understanding of the meaning of 'family', but to do so would curtail their ability to provide clarity to states on obligations. A General Comment/General Recommendation concerning the rights of families that left the parameters of the term 'family' too open-ended would allow states, communities and commentators to conceptualise 'family' as narrowly or widely they chose, thereby depriving the General Comment/General Recommendation of much of its power to give guidance on non-discrimination and equality. Thus, the effectiveness of the guidance in relation to the rights of family types seen as illegitimate or undesirable—including single-parent families—would be undermined.

Third, even if states understood such a General Comment/General Recommendation to set out obligations in relation to all families including single-parent families and other stigmatised families, tacking the requirements for the promotion, protection and fulfilment of single-parent families' rights onto sections guiding states' obligations in relation to the rights of families generally risks reinforcing a 'deficit model' in which heterosexual marital families are centred as the norm, and single-parent families (along with other marginalised groups) as understood as 'other'.

Fourth and conversely, a General Comment/General Recommendation focused on single-parent families as the rightsholders would offer the treaty bodies a way to anchor their guidance to strategies that serve the needs of this paradigmatic example of a family type in which the dependency of children and derivative dependency of women as their usual primary caregivers is not obscured by the presence of a, typically male, provider.

[1057] Subchapter 5.3.2.

As such, the focus is squarely on the unit whose protection and assistance the drafters of Article 10(1) were most concerned with ensuring, namely, the vulnerable-caring functional group unit at the heart of social reproduction. Analysis of the *Travaux Préparatoires* shows that the drafters of Article 10(1) and its parallel provisions, UDHR Article 16(3) and ICCPR Article 23(1), intended these provisions to protect single-parent families and their members whom they recognised to be among those most vulnerable to rights abuses.[1058]

Fifth, by centring single-parent families, treaty bodies would be required to guide states in consideration of the systemic reforms that might be required to transform societal structures in order to give effect to these families' economic, social and cultural rights, including directing states' attention to the extent to which the care and nurture of dependent children (and therefore the social reproduction of society) creates derivative dependency for their carers (predominantly mothers), and the implications of this for eliminating all forms of discrimination against women.

The focus on single-parent families would not preclude the General Comment/General Recommendation from observing ways in which undertaking the transformation necessary for the promotion, protection and fulfilment of single-parent families' rights might also assist states in eliminating discrimination against women, realising the rights of the child, and promoting the realisation of the economic, social and cultural rights of families generally.

[1058] Subchapter 2.3.5.

5.4.3 Format

Although there is no set format for a General Comment/General Recommendation, over time, they have begun showing evidence of greater consistency and coherence in their approaches, which should be followed.

5.4.4 Specific matters to address

Given the absence of guidance that CECSR has given on Article 10(1), a Joint General Comment /General Recommendation should set out basic principles for states on their obligations under this article and explain these with reference to concrete issues faced by single-parent families. Nevertheless, the treaty bodies must avoid being unduly prescriptive as to *how* states should meet their obligations. As the achievements of other marginalised people illustrate, it is possible to guide states in implementing their obligations while also allowing for diverse non-discriminatory cultural, social and political approaches.

In addition to explaining their reasons for issuing this guidance, the three treaty bodies should elucidate the obligations of state parties under Article 10(1), interpreted as a dye that washes over all other economic, social and cultural rights. A capabilities approach should be adopted to understand the right in Article 10(1) as a right of the vulnerable caring family to the widest possible protection and assistance to ensure its capabilities to achieve the things that it has reason to value.[1059]

Guidance on the realisation of the Article 10(1) rights of single-parent families should be grounded in states' substantive non-discrimination and equality obligations. The four-dimensional approach provides a suitable framework to use.[1060] Specific

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[1059] Sen, *Development* (n 105) 72-87. See subchapter 3.5.6.

[1060] Fredman, *Discrimination* (n 45) 25.

obligations should be discussed in relation to distributive equality in the realisation of the right to an adequate standard of living, workers' rights, social security, housing, health and education. Reference to the recognition dimension is important to draw attention to the unlawfulness of stigmatising approaches to single-parent families. In addition, rights to participation in cultural and civic life, and to rest, leisure and play should be covered.

The Joint General Comment/General Recommendation should draw out connections between Article 10(1) and CEDAW and CRC rights. It should also stress the interconnection of civil and political matters with single-parent families' economic, social and cultural rights. States should be guided on the need for a non-stigmatising national policy and plan, developed with input from single-parent families. In line with the wicked nature of the problem of realising single-parent families' economic, social and cultural rights without discrimination, the need for robust planning and monitoring should be stressed. Attention should be drawn to the importance of benchmarks and indicators, as well as the opportunities for international cooperation and assistance.

5.4.5 Subchapter conclusion

This subchapter recommends that CESCR, CRC and CEDAW produce a Joint General Comment/General Recommendation on states' obligations to address discrimination against single-parent families in the promotion, protection and fulfilment of their Article 10(1) rights. Such an approach centres single-parent families as globally discriminated against in their enjoyment of economic, social and cultural rights. In addition, it directs guidance towards the protection and assistance needs of the vulnerable caring family, including the need to address the derivative dependency that providing care entails, and the implications of this for the elimination of discrimination against women (as the typical primary caregivers worldwide).

The Joint General Comment/General Recommendation should elucidate the obligations of state parties under Article 10(1), interpreted as a dye that washes over all other economic, social and cultural rights. A capabilities approach and the four-dimensional conception of substantive non-discrimination and equality should be adopted, and planning and monitoring emphasised.

5.5 Thesis conclusion

In this thesis I examined whether the UN human rights treaty system offers a valid and useful framework for the realisation of the economic, social and cultural rights of single-parent families from multiple angles. I illustrated the need for economic, social and cultural rights realisation for single-parent families based on examples from various jurisdictions and available demographic data. I examined the conceptualisation of single-parent families as rightsholders in terms of the legitimacy of the claim that they are 'families' for the purpose of ICESCR Article 10(1) and the validity of the claim that families are holders of group rights.

To investigate the contribution of ICESCR Article 10(1) as a provision that accords the family rights to protection and support, separate from and additional to the individual rights of family members I drew on the ideas of vulnerability theorists and East Asian and indigenous philosophers. I relied on the *Travaux Préparatoires* to IBOR to reveal the intentions of the drafters in including Article 10(1) and its parallel provision, UDHR Article 16. After considering four possible conceptions of the family, I concluded that 'family' in Article 10(1) refers to the vulnerable-caring family, understood as encompassing a plurality of family forms. Thus, I found that Article 10(1) establishes that the family—as a vulnerable-caring group unit in which dependency is attended to and consequential derivative dependency occurs—has a right to protection and assistance.

Turning to the question of the content of this right, I argued that the provision should be understood as a dye colouring the interpretation of all other substantive ICESCR rights by requiring them to be read as applying to the family group unit, in addition to the individual. Article 10(1), therefore, places obligations on the state to respect, protect and progressively fulfil ICESCR rights in relation to the family, particularly while it is responsible for the care and education of dependent children.

Turning to the non-discrimination and equality provisions of ICESCR, I found that these provisions are to be understood as guarantees of substantive non-discrimination in the enjoyment of rights. The four dimensions of non-discrimination (recognition, distribution, transformation and participation) provided the model for analysing states' obligations towards single-parent families as outgroups protected by the guarantee of non-discrimination in ICESCR Article 2(2). Despite economic, social and cultural rights generally being subject to progressive implementation by states to the maximum extent of their available resources, the obligation on states to ensure equality and non-discrimination in the enjoyment of rights is an immediate one. This means that states party to ICESCR must ensure that single-parent families enjoy their Article 10(1) rights to the widest possible assistance and protection on a basis of equality with other families now, not as something to be progressively realised at a future date.

My analysis of the facts and judgments in *R (DA)* demonstrated how a state might violate single-parent families' rights to non-discrimination in the realisation of their ICESCR Article 10(1) rights through taking regressive measures that had a disproportionate impact in pushing such families into poverty.[1061] I used the fact situation in *R (DA)* as the basis for a thought experiment examining how a good-faith policymaker

[1061] *R (DA)* (n 53).

who was aware of their obligations under Article 10(1) might approach their decision-making in relation to a similar policy proposal. This enabled me to establish that a state implementing its obligations under Article 10(1) in good faith and a non-discriminatory manner would not pursue policies such as those found in *R (DA)*. Rather, it would fulfil its immediate obligation to address the marginalisation of single-parent families.

Finally, I considered whether the UN human rights system, which lacks coercive enforcement mechanisms, nevertheless offers opportunities for normative change that could reasonably be expected to contribute to improvements in the realisation of economic, social and cultural rights of single-parent families. I concluded that it does. Specifically, a Joint General Comment/General Recommendation issued by CESCR, CEDAW and CRC would provide authoritative guidance to states on their obligations under Article 10(1). Directing such a General Comment/General Recommendation to states' specific obligations to ensure single-parent families' equal enjoyment of Article 10(1) rights on a basis of substantive non-discrimination would give the guidance greatest immediacy, and most directly address single-parent families' economic, social and cultural marginalisation. It would reduce the risk of CESCR commenting on Article 10(1) in a way that reified the two-parent family and presented the single-parent family as deficient. In addition, by focusing on families that typically contain only women and children—two extremely large categories that experience stubbornly entrenched, disproportionate poverty and economic, social and cultural rights violations—such a General Comment/General Recommendation would be able to draw attention to the consequences of failing to address the interplay of dependency and derivative dependency in relation to women's and children's rights, and provide guidance on the need for systemic transformation.

I highlighted key matters that a Joint General Comment/General Recommendation should address to guide states on their obligations to address discrimination against single-parent families in the promotion, protection and fulfilment of their Article 10(1) rights (a suggested draft outline for such a Joint General Comment/General Recommendation is provided as Part 2 of the Supplementary Materials to this thesis). The joint issuance of such guidance by CESCR, CEDAW and CRC would constitute a powerful step toward establishing a protective canopy at the international level that could facilitate norms of single-parent families' economic, social, and cultural rights germinating and taking root at local levels. Ultimately, the success of such an approach would be measured by the extent of changes for single-parent families on the ground.

SUPPLEMENTARY MATERIALS –

PART 1: GROUP RIGHTS

1. Introduction

My thesis takes the reference to a 'group unit' in ICESCR Article 10(1) at face value. As a result, I understand the right in this provision as a group right. Nevertheless, the concept of group rights continues to raise questions for some. Therefore, I thought it pertinent to provide supplementary material concerning the validity and effect of interpreting Article 10(1) as a group right. Here, I analyse the intentions of the drafters of the International Bill of Rights and explain participatory. I discuss developments in attachment theory and understanding of the importance of family bonds. Then I consider social ontological concepts of group rights, as an approaches which I argue gives effect to the intent of the provision. Finally, I briefly examine liberal critiques of group rights, particularly those which stem from feminist concerns, and explain why I do not find them convincing as reasons to reject the clear language and intent of Article 10(1).

2. Understanding the intentions of the drafters through a participatory view of the family as a rights-holding group

The discussions of the drafters of UDHR show an appreciation, albeit somewhat inchoate, that participation in a family offers profound goods that cannot readily be found elsewhere and that these should be protected as rights.[1062] Their understanding accords with the participatory approach to group rights advanced by Réaume who argues that there are some participatory goods that one only gets in a group—and that groups, rather than individuals, must hold rights to those goods.[1063] A simple example of a participatory

[1062] E/CN4/SR13 (n 164); E/CN4/SR14 (n 398); E/CN4/AC1/SR/38 (n 2).

[1063] Réaume (n 402).

right is the right to one's language. The right to speak one's language only to oneself is not much use. Therefore, the participatory group aspect of this right has been established in various jurisdictions, including in the Canadian linguistic minority cases.[1064] The right to practice the communal dimensions of one's religion is another example (most religions have a communal aspect). Such a participatory rights approach also works for families. When international human rights law talks about the family as 'the natural and fundamental group unit of society', it indicates a recognition that there are some profound goods which generally can only be found through participation in a family group unit.[1065]

The place and meaning of the family as a subject or object of rights was one of the most hotly debated aspects of the drafting process, in part because of the provision's departure from an individual rights perspective. For example, when Lebeau, the Belgium delegate to the Commission on Human Rights, argued that the four family rights proposed in a submission by the Catholic Welfare Association of the United States, should be included,[1066] Cassin, the French delegate, objected. Although he '[a]cknowledged that man could in fact be considered either as an individual, or in respect of his relations with other human groups,' at this early stage of the drafting process he argued, 'this Commission must make man, the human person, the centre of the Declaration'.[1067] However, when at a later session, Malik, the Lebanese delegate, argued for the primacy of individual rights, Cassin joined the British delegate, Dukes, in

[1064] ibid; eg *Mahe v Alberta* (n 403).

[1065] This statement should not be taken to indicate that these goods require a particular form of family to manifest. I have argued that 'family' in international human rights terms is best understand as the functional family defined by relationships of care. While not every family provides equal communal goods, the form of the family does not determine the extent of the communal goods it can provide, if it receives its rightful support from society and the state.

[1066] E/CN4/SR13 (n 164).

[1067] ibid.

responding that there could not be complete individual liberty 'in any modern community' as the human is a 'social being'.[1068]

When Roosevelt suggested deleting the whole of what eventually became Article 16, Cassin argued that '[H]e did not think it was possible to disregard human groups and to consider each person only as an individual.'[1069] He continued, 'the subject of the family could not be passed over in silence' and that after many articles devoted solely to the individual, this article was important in connecting the individual with the family.[1070] Malik, who had previously argued against group rights, now also spoke forcefully in support, insisting that:

> The family was the cradle of all human rights and liberties. It was in the family that everyone learned to know his rights and duties and it would be inexplicable if everything were mentioned except the family's right to existence.[1071]

Elsewhere, Malik and Lebeau stated that it was critical that the family be included as the fundamental unit of society.[1072] Santa Cruz, the Chilean delegate, summarised how different articles protected different family rights, including social security and moral and spiritual rights,[1073] and insisted on the fundamental importance of the article on the family.[1074] At the UNGA Third Committee, Count Carton de Wiart of Belgium also welcomed the assignment of appropriate importance to 'the institution of the family'.[1075]

[1068] E/CN4/SR14 (n 398).

[1069] E/CN4/AC1/SR/38 (n 2).

[1070] Ibid.

[1071] ibid.

[1072] E/CN4/SR58 (n 2).

[1073] E/CN4/AC1/SR/38 (n 2).

[1074] A/C3/SR144 (n 398).

[1075] UNGA (3rd Commitee), 'Summary Record of the 91st Meeting' (2 October 1948) A/C3/SR91.

Nor was support for the rights of the family as a group confined to the Western bloc. In fact, delegates from the Soviet bloc were some of the most ardently in favour. For example, Pavel, the delegate from the USSR, argued:

> Unless it was explicitly stated that it was for the State and society to protect the family, which was a natural unit of society and the fate of which might determine the fate of a nation, a family in need of protection would not know where to turn.[1076]

Kalinkwska, the Polish delegate, agreed that the provision was needed because 'There were countless cases in which the family needed the protection of society and the State'.[1077] While equality between the sexes was an important consideration for Soviet bloc delegates, so was the family as a group that supported the raising and nurturing of children.[1078]

In its initial work on a draft International Bill of Rights (which later became split into the UDHR, the ICCPR and ICESCR), the Commission considered an analysis of the written states' constitutions, as well as draft international human rights declarations prepared by others they would have come across various approaches to the family as a rightsholder, as well as individuals' rights in relation to family. Many state constitutions referred to by the Commission contained articles on the family. For example, Article 51 of the Constitution of Costa Rica stated:

> The State will work for the greatest wellbeing of Costa-Ricans, protecting in a special way the family, the basis of the Nation; assuring aid to mothers, children, the aged, and the destitute ill, and organizing and stimulating production and the most adequate distribution of wealth.[1079]

[1076] A/C3/SR124' (n 360). See also E/CN4/AC1/SR/38 (n 2).

[1077] E/CN4/SR13' (n 164).

[1078] ibid.

[1079] E/CN4/AC1/3/Add1 (n 298).

The line between group and individual rights was often unclear in the documents the Commission referred to as models. For example, the Draft Declaration of the International Rights and Duties of Man's article on the right to freedom in family relations included individual rights, as well as reference to 'adequate standards of child welfare within the family circle' and the desirability of individual home ownership 'as a means of fostering better family relations'.[1080] These latter two align with Réaume's participatory approach to the family as a group unit.

3. Attachment theory and family bonds

Subsequent scientific advances have confirmed the drafters' sense of the importance of the family as a participatory group. In relation to dependent children, there is stark evidence that healthy development is facilitated by the process of attachment which familial bonding provides and that this aspect of child development is nigh impossible to replicate in institutional settings.[1081] Other members of a family group also receive participatory benefits from their group membership. Parents and other adults in families with dependent children benefit from goods ranging from the oxytocin released by bonding with a baby to a sense of continuity and purpose to the hope of having someone to provide for them in old age. However, the presence of dependent children is not a necessary condition for receiving participatory goods as a member of a family group. Members of adult-only families also experience essential goods due to their participation

[1080] Inter-American Juridical Committee, 'Draft Declaration of the International Rights and Duties of Man' (8 January 1947) E/CN4/2 Article 10.

[1081] Siegel (n 152).

in the family alongside other family members. Such goods are an essential human need as relational beings.[1082]

4. A social ontological conception

The intentions of the drafters and modern understanding of the neuroscientific basis for attachment theory suggest that a conception of group rights as neither inherent in the reified group nor reducible to the individual rights of group members taken collectively is needed. Rather, it is the group consisting of interdependent individuals in-relationship that has rights. Gould has developed a social ontological concept of group rights as rights of individuals-in-relation. I adopt this as the best means for conceptualising the definition and place of the family's group rights within international human rights law.[1083]

Social ontology concerns 'the nature and properties of the social world [and] … analyzing the various entities … that arise from social interaction'.[1084] A particular concern is the analysis of social groups.[1085] Gould argues that groups as rights holders are neither a mere aggregate of their members nor are they reified entities above their members. Rather, groups are constructed entities. That is, they come into being by virtue of actual relations among their constituent individual members but are not reducible to the individuals distributively, taken apart from these relations.'[1086] In her formulation,

[1082] Herring, *Relational Self* (n 35) 60. This is not to suggest that in all families the participatory goods for each member outweigh the negatives. Dysfunctional and oppressive families may exert a net negative weight on some members wellbeing. Nevertheless, even where a person chooses and is able to remove themselves from a dysfunctional or oppressive family group, the essential human drive towards relationship means that most individuals will strive to create or join a new family-of-choice.

[1083] Carol Gould, 'Group Rights and Social Ontology' in Christine Sistare, Larry May and Leslie Francis (eds), *Groups and Group Rights* (UP of Kansas 2001) 142-5.

[1084] Brian Epstein, Social Ontology *Stanford Encyclopedia of Philosophy* (Summer edn, 2018) <https://plato.stanford.edu/archives/sum2018/entries/social-ontology/> accessed 21/07/2019.

[1085] ibid.

[1086] Gould (n 43) 143.

groups are not abstract but are defined by their joint activity or common purpose.[1087] Such a social ontological approach is consistent with most people's lived realities. As Relis observes, 'it is well-established that the bulk of individuals in most non-Western cultures define themselves as members of larger groups or communities, not as autonomous entities.'[1088] The ideas of indigenous philosophers such as Durie, Jackson, Mikaere, Williams and Ruru can, for example, find space within this framework.[1089]

Applied to the family as a group unit, the inclusion in UDHR Article 16(3) and ICESCR Article 10(1) of the word 'natural' alongside 'fundamental' may seem to challenge the idea of families as socially constructed groups of the type Gould describes. However, analysis of the *Travaux Préparatoires* of the UDHR reveal that the reference to 'natural' is a compromise designed to appease Malik's Christian natural law beliefs. Malik had proposed that the Article read:

> The family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the creator with inalienable rights antecedent to all positive law and as such shall be protected by the State and society.[1090]

This idea was rejected by the majority of the drafters on the grounds that there are many different family types, including some not based on marriage, and that a universal rightsdocument could not define the family based on any one set of cultural norms, religious values or structural understandings.[1091]

[1087] ibid.

[1088] Relis (n 27) 513; see also Akani (n 43); R Coomaraswamy, 'To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights' in Cook RJ (ed), *Human rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994); Ruru (n 36).

[1089] Mikaere *Colonising* (n 36); Ruru (n 36); Tania Williams and others, *Care and protection of tamariki Māori in the family court system* (Te Arotahi, 2019); Jackson (n 36); Durie (n 738).

[1090] E/CN4/105 (n 299).

[1091] E/CN4/AC1/SR/38 (n 2); (n 2); A/C3/SR144 (n 398).

Of course, the drafters of the IBOR did not have access to the theoretical developments in group rights pioneered by Réaume, Gould and others. In the face of the newness of the concepts they were elucidating and the cultural and political divides separating the drafters from each other, they often floundered in their search for ways to explain their views and express their common understanding.[1092] Moreover, time was running out as Cold War tensions threatened the opportunity to gain agreement on a document. A degree of open-endedness about the parameters of some concepts, such as 'family', was necessary to reach agreement. From this pragmatic point of view, 'natural' can be taken to reinforce the idea of 'fundamental.' It allowed those with theist natural law tendencies to turn their minds to a structure mandated by God but did not require it. The rejection of a theist natural law view of the family is clear in the *Travaux Préparatoires.* As discussed in subchapter 2.3.2 of my thesis, Malek was so disturbed by this rejection that he requested that his alternative words be noted in the record.[1093] The term 'natural', severed from any reference to God in Article 16(3) of the UDHR and Article 10(1) of ICESCR, is, therefore, better read as an allusion to the fact that family groups exist naturally among humans (as they do among other primates and across many other species), rather than as a rejection of the ideas contained in a social ontological concept of group rights.

Modern scholars and human rights practitioners are fortunate to have access to tools of analysis developed since IBOR' drafting. As Campbell explains, it is only to be expected that IBOR' drafters would use words and concepts that were familiar at the

[1092] Chang suggested that the Secretary of the Drafting Committee, Humphreys take a six month pause to allow him to study Chinese philosophy; Schabas (n 714) lxxxvi. His suggestion was not accepted, leaving Western worldviews as the overwhelming shared framework for analysis. Nevertheless, members of the drafting committee from Islamic states raised points of discussion about their differing understandings of the Islamic approaches to family law and women's rights: eg E/CN4/SR13 (n 164).

[1093] E/CN4/77/Annex A (n 2).

time.[1094] In Pocock's words, people '"cannot do what they have no means of saying they have done; and what they do must in part be what they can say and conceive that it is."'[1095] The struggle to find the correct words to describe their proposed concepts is apparent in the debates on what became Article 16(3) of the UDHR. Now that useful analytical tools have been developed, using them is acceptable and necessary to elucidate the Article's content.

Yet, despite the useful explanations of writers such as Réaume and Gould setting out how the group rights provisions of human rights treaties can be understood, some theorists and practitioners continue to view the notion of group rights with suspicion and warn against applying the concept to analyses of the family. There is a prevalent fear that group rights will 'trump' the rights of individuals in the group and result in illiberal outcomes.[1096] Indeed, history suggests reasons to be cautious about group rights smothering the individual. The most striking examples concern the nation-state, which is so ubiquitous in its status as a holder of group rights that this is largely unquestioned. At its extremes, organicists—from romantics to reactionary monarchists to fascists—impute the state with personhood in which the individual is merely an expendable component: a decidedly illiberal outcome.[1097]

[1094] Campbell, *Women* (n 34) 29-35.

[1095] Cited by Campbell, 'Monitoring Women's Socio-Economic Equality' (n 34) 31.

[1096] Susan Moller Okin, "'Mistresses of Their Own Destiny": Group Rights, Gender, and Realistic Rights of Exit' in Peter Jones (ed), *Group Rights* (Ashgate 2009); John Eekelaar, *Family Law and Personal Life* (OUP 2017), 168-179.

[1097] Andrew Vincent, 'Can Groups be Persons?' in Peter Jones (ed), *Group Rights* (Ashgate 2009).

5. Responding to feminist critiques of group rights

Some liberal feminist theorists are concerned that giving weight to group rights undermines the rights of individuals who may be oppressed within those groups. These theorists argue that, too often, the group's interests are determined by a few—usually male adults within that group—in ways that further their own interests but undermine the realisation of the rights of less powerful group members, typically women and children. In this way, it is feared that group rights give false legitimacy to the worst aspects of patriarchal cultural traditions and religious practises. For example, concerning the family, Charlesworth argues that '[o]ne of the problems in promoting the protection of the family in human rights institutions is that it implies that the preservation of the family is more important than respecting the human rights of individuals within the family.[1098] This, she claims, can obscure 'pathologies in power relationships', and undermine calls for property and succession rights, as well as efforts to prevent violence against women.[1099]

Furthermore, Okin points out the pitfalls of accepting the position of writers such as Raz, Galston and Kukathas, which states that it is acceptable for the rights of the group to trump those of the group members, provided that it is possible for individuals to leave the group if they choose. She exposes the weakness of these arguments. She believes that defenders of group rights have tended to minimise the seriousness of gender inequality and that the tensions between 'the feminist project of achieving equality between the sexes and the multicultural project of recognizing minority religions and other cultural groups by granting them special group rights' must be brought to the fore.[1100]

[1098] Charlesworth (n 1036) 55.

[1099] ibid 55.

[1100] Okin, (n 1096) 323-25.

Okin's argument has four prongs. First, it is often hard or impossible for female members of minority cultural or religious groups to leave. Second, individual group members may not wish to leave the group. Rather, they want their individual rights to be upheld while remaining part of the group. Third, women's already limited in-group bargaining power is further reduced by the idea that if they do not like being subordinated in their society, cultural or religion, the correct recourse is to leave. Fourth, a construction in which individuals who do not agree with their rights being subordinated to those of the group are expected to leave can imply that women who remain in a subordinate role within a group have, in some way, consented to their oppression.[1101] These are all valid cautions to bear in mind and militate against any stance that requires the rights of a group as a whole to trump those of its least powerful members.

This does not, however, require the idea of group rights to be abandoned; it only requires it to be approached with more nuance. For example, Freeman argues that human rights, whether individual or group, involve balancing exercises between conflicting rights, and that this indeterminacy must be accepted.[1102] Gould's social ontological approach accords with that of many other jurists in holding that group rights must be compatible with the human rights of their members, not violate the rights of any internal minority and not reify groups as entities that stand above their members.

Réaume posits that the real purpose of group rights rests on the group as part of a society. Her analysis is particularly apposite to the interpretation of ICESCR Article 10(1). She argues that the claim of group rights 'is that the rest of society should

[1101] Susan Moller Okin, *Justice, gender, and the family* (Basic Books 1989).

[1102] Michael Freeman, 'Are There Collective Human Rights' in Jones P (ed), *Group Rights* (Ashgate 2009), 413.

somehow accommodate or support some practice of the group even though it conflicts with that of the majority'.[1103] In the case of the family as a group unit, Article 10(1) imposes a duty upon the state to respect, protect and fulfil its economic, social and cultural rights. Such group rights do not impose duties on individual group members (such duties are properly considered aspects of private family law). Nor do the group rights of families absolve the state of its duty to protect the rights of individuals, including their rights within the group.

6. Conclusion

As a result of the failure to pay significant attention to the family as a group rightsholder under ICESCR Article 10(1), a group rights argument has not been mounted in relation to the economic, social and cultural rights of families. Uncertainty about the risks and benefits of a group rights approach has limited feminist theorists' ability to argue convincingly on this ground. Moreover, difficulties defining the family and the fear that any focus on the family could embolden moral conservatives to gain traction with their insistence on a restrictive definition in which the family is restricted to a marital opposite-sex coupling and the resultant offspring (*a la* Malek) have also held back developments. This is understandable: if (a) group rights were held to trump individual rights, and (b) the family was defined as a marital opposite-sex unit in which authority rests with the patriarch, upholding group rights would further jeopardise the rights of women and children within such units. Indeed, moral conservatives have been the most prominent voices calling for protections to be afforded the family under international human rights law.[1104] However, conceding the field to such moral conservatism too easily would be a

[1103] Réaume (n 402) 187.

[1104] Doha International Conference for the Family and Al-Bader (n 313).

mistake. As my thesis articulates, the family in ICESCR Article 10(1) is correctly understood as the vulnerable-caring family group. Limiting the provision's application to the conservative-marital family was specifically rejected by the drafters. Rather, they were particularly concerned that families nurturing dependent children receive protection and assistance. A group rights approach is necessary for this.

SUPPLEMENTARY MATERIALS – PART 2: DRAFT OUTLINE OF A JOINT GENERAL COMMENT/GENERAL RECOMMENDATION

Note

The drafting process for General Comments/General Recommendations inevitably involve numerous iterations with input from academics, NGOs and others, as well as members of the treaty bodies and their secretariats, over some time. This outline is offered as a starting point for that process.

1. Introduction

The introductory section of the Joint General Comment/General Recommendation should outline its purpose by (1) grounding the guidance in international law and within the mandate of the particular treaty bodies through reference to specific articles of the relevant treaties and related General Comments and General Recommendations already issued by these treaty bodies; and (2) setting out the reasons for considering that states party may benefit from guidance on their obligations through reference, in general terms, to the empirical situation that gives rise to concerns.

The Joint General Comment/General Recommendation should elucidate the content of Article 10(1) consistently with the principles of treaty interpretation in VCLT Articles 31 and 32, which require the provision to be interpreted in accordance with the ordinary meaning of the terms in their context, in light of their object and purpose, and with supplementary regard to the preparatory work of the treaty and the circumstances of its conclusion. Adopting the metaphor of a dye washing over other substantive provisions of ICECSR would allow the treaty bodies to frame their guidance on Article 10(1) in terms that are already familiar to states through their engagement with guidance on non-discrimination and equality obligations under UN human rights treaties. The Joint

General Comment/General Recommendation should state that ICESCR Article 10(1) requires states party to ensure that economic, social and cultural rights enunciated in ICESCR are respected, protected and fulfilled to the widest possible extent in relation to family group units. It should be explained that the *Travaux Préparatoires* reveal that the purpose of this provision is to ensure that not only individual rights are protected but also the rights of families as micro-group units that require protection and assistance as collectives, particularly when responsible for the nurture of dependent children. The rationale for this group right rests on the inherently interdependent nature of the vulnerable-caring family, the significance of the functions it fulfils, especially in relation to the care and education of dependent children, and the demands such functions place on the group and its members.

Noting this intent and purpose, the drafters' express rejection of narrow definitions of the family (including any requirement that family be based on marriage) and the desire not to limit the protection of Article 10(1) to only certain types of family based on Eurocentric assumptions, the General Comment/General Recommendation should explain that the term 'family' refers to a functional unit, and not to a status-based one. A caring-vulnerable conception of the family drawn from family law theorists such as Fineman and Herring should be adopted as best serving the plain meaning of the text in light of its intent and purpose.[1105] A proviso should be added that this caring-vulnerable conception be understood in a pluralistic way that goes beyond Eurocentricism to acknowledge other conceptions of the family, such as *whānau* (Māori conceptions of family).[1106] At this juncture, it would be helpful for the treaty bodies to remind states that

[1105] Fineman, *Autonomy* (n 35); Fineman, 'Vulnerability'; Herring, *Relational Self* (n 35).

[1106] Ruru (n 36); Durie (n 738).

at the inception of the UN human rights system, its founders explicitly intended their use of the term 'family' to include single-parent families regardless of origin, recognising that their inclusion was needed to ensure that the family types most at risk of rights violations were protected.

In addition to ICESCR Article 10(1), the Joint General Comment/General Recommendation must also explain how it is grounded in CEDAW and CRC rights. With their respective foci on the elimination of all forms of discrimination against women and the rights of the child, these conventions place obligations on states in relation to two population groups, the violation of whose rights is tightly intertwined with the marginalisation of single-parent families. CEDAW Articles 5(b), 10(h), 11(2), 14, and CEDAW General Recommendation 29, which addresses the economic consequences of marriage, family relations and their dissolution in relation to Article 16, should be mentioned as examples of acknowledgement of this intertwining.[1107] The conception of autonomy as relational should be used to elucidate how dependency and derivative dependency can be acknowledged in relation to the rights of individuals under CEDAW, CRC and ICESCR. Insights from capabilities approaches and the conceptualisation of poverty as unfreedom or an absence of capabilities have been developed in previous statements of these treaty bodies and should be reiterated.

States should be reminded that CRC Article 18(2) places on states an obligation to 'render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities'. The centrality of families to children's development and

[1107] CEDAW/C/GC/29 (n 5).

rights enjoyment, which is recognised throughout the CRC, should be used to stress the interconnection between the realisation of CRC and ICESCR rights.[1108]

Further, a Joint General Comment/General Recommendation on the promotion, protection and fulfilment of the economic, social and cultural rights of single-parent families and their members must state that it is grounded in states' non-discrimination and equality obligations found in ICESCR Article 2(2) and Article 3,[1109] CEDAW Articles 1, 2 and 3 and CRC Article 2.

2. Need for a General Comment/General Recommendation

Next, the General Comment/General Recommendation should summarise the perilous economic, social and cultural situation of single-parent families worldwide to guide states' understanding of the *prima facie* evidence of widespread, severe inequality and discrimination.

Demographic data on single-parent families as a proportion of all families is available from the UN Department of Economic and Social Affairs Population Division.[1110] Data should be referenced to indicate the magnitude of the problem in low- middle- and high-income states, across geographic regions, and in states with all types of political, religious, cultural, legal and economic systems. Brief illustrative examples should be given of the impacts of state failures to protect single-parent families' economic, social and cultural rights. However, care should be taken to make these sufficiently general to avoid any particular state being singled out for critique, given the

[1108] Eg CRC Articles 3(2), 5, 7(1), 9, 10, 18, and 27.

[1109] As elucidated in E/C12/GC/20 (n 405); E/C12/2005/4 (n 417).

[1110] ST/ESA/SERA/433 (n 65).

universal nature of the problem.[1111] Overall, the point should be made that single-parent families suffer widespread poverty, disproportionate stigma, ill-health, exhaustion, a lack of safety, discrimination in housing and labour markets, and exclusion from social, political and cultural life.

The vast majority of single-parent families are made up of women and children. The inequality in enjoyment of economic, social, and cultural rights and the disproportionate burden of poverty suffered by women and children have proved stubbornly difficult to change. As the site where the interests of women and children are most clearly interdependent, the single-parent family bears the brunt of this double discrimination. However, it also holds potential as a locus for change if states were to genuinely address their obligations to these group units.

3. Obligations of state parties under ICESCR Article 10(1)

3.1 Content of Article 10(1)

Here, the General Comment/General Recommendation should recognise the lack of attention that has been given to Article 10(1) compared to many other provisions of ICESCR and acknowledge that this may have led states to believe that this provision was of less importance. In this regard, the unusual focus of Article 10(1) on a group unit, in contrast to the more typical framing of ICESCR rights as pertaining to the individual, should be highlighted. This focus is both a possible reason for the previous lack of attention and underscores why the provision is vital for filling a lacuna that would otherwise exist in the conceptualisation of economic, social and cultural rights: namely, the core universal nature of families (in their plurality of forms) as group units that are relied upon to perform vital physical and social reproduction functions and meet many

[1111] The illustrative examples provided in subchapter 1.8.2 of my thesis may be referred to for an indication of the type of issues that could be usefully included.

human needs for attachment, love and care; and that the interdependence of those who form a family within which dependent children are nurtured, including both dependence and derivative dependence elements, as well as collective identity renders purely individualistic approaches, including those based on relational autonomy, lacking.[1112]

To fill this lacuna, the General Comment/General Recommendation should breathe life into Article 10(a) by articulating an understanding of Article 10(1) as a provision that washes over all other substantive economic, social and cultural rights like a dye, and thus requires these provisions to be realised in a way that protects and assists families economically, socially and culturally. Previous General Comments and General Recommendations have adopted the promote, protect, and fulfil model of elucidating states' human rights obligations. That model also offers a helpful means of framing states' Article 10(1) obligations to the family group in this Joint General Comment/General Recommendation.

The Joint General Comment/General Recommendation should observe that the drafters of Article 10(1) and its parallel provision Article 16 in the UDHR recognised that all societies throughout history have had and relied on something that can be deemed a 'family group' through which human individuals are raised and nurtured; their social, economic and cultural needs and communally addressed; and they seek to experience love and security. Furthermore, the inclusion of Article 10(1) in ICESCR recognises that, particularly in relation to the care and education of dependent children, fulfilling these functions creates derivative dependency for those who provide care (archetypally mothers).[1113]

[1112] Fineman, *Autonomy* (n 35) xvii; Durie (n 738).

[1113] Fineman, *Autonomy* (n 35) 35-36.

The Joint General Comment/General Recommendation should emphasise the commitment to the elimination of all forms of discrimination against women expressed in CEDAW and the obligation of states to ensure the equal rights of men and women in the enjoyment of economic, social and cultural rights in ICESCR Article 2. This commitment means that it cannot be left to individual women to attempt to negotiate for support to counter derivative dependency on an individual basis with each one's spouse/partner or ex-spouse/ex-partner. In this regard, indicators of continuing discrimination, ranging from rates of intimate partner violence against women to gender inequalities in wealth and income, should be referenced as evidence of the ongoing failure of strategies that attempt to address gender inequality without tackle root causes, including the failure to address the disparate impacts of derivative dependency on women at a systemic level.

The choice in the General Comment/General Recommendation to focus specifically on the state obligations under ICESCR Article 10(1) to single-parent families, rather than on families more broadly, should therefore be explained on two grounds. First, the *prima facie* severe and widespread violation of single-parent families' economic, social and cultural rights requires urgent, sustained action, and hence, the priority is for the treaty bodies to draw states' attention to their obligations in this regard. Second, single-parent families serve as a paradigmatic example of the interplay of children's dependency and the derivative dependency of their primary caregivers (typically women), which underscores the importance of taking Article 10(1) seriously. Both women and children are continually overrepresented among the poorest in any society. Focusing attention on what must be accorded to protect and assist families in which all members are archetypal dependents or derivative dependents requires that states critically examine policy positions to ensure that responses centre the vulnerable-caring functions of the

family and consider how public (commercial and civic) life can be structured to support these.

To assist states in understanding their Article 10(1) obligations, the General Comment/General Recommendation should note that viewing Article 10(1) as a dye washing over other provisions of ICESCR is not a novel approach. Parallels can be drawn to the well-established view of ICESCR Articles 2(2) and 3, along with non-discrimination and equality provisions in other treaties, as operating similarly. A capabilities approach should be used to frame the consideration of single-parent families' economic, social and cultural rights realisation. Thus, states can be said to meet their obligations to provide the widest possible protection and assistance to single-parent families to the extent that such families' capabilities for having, loving and being are promoted, protected and fulfilled. While the various rights listed in ICESCR cover discrete areas, the VDPA requires states to read them as interconnected and indivisible.[1114] The 'having, loving, being' nexus promotes this by providing a lens through which state actions can be assessed in an interconnected fashion.[1115]

Although Article 10(1) complements and provides a dye that washes over other economic, social and cultural rights provisions in ICESCR and elsewhere, the General Comment/General Recommendation should stress that the collective aspect of Article 10(1) in no way diminishes the obligation on states to respect, protect and fulfil individual rights, including the individual economic, social and cultural rights of family members. The interests of the family as a group unit are not synonymous with the interests of a family head (whether patriarchal or otherwise). For CESCR, issuing a

[1114] A/CONF57/23 (n 33) [5].

[1115] Allardt (n 513).

General Comment/General Recommendation jointly with CEDAW and CRC brings home this point by enabling comments to be made on the obligations of states to promote, protect and fulfil the economic, social and cultural rights of single mothers and children in single-parent families from the perspective of the individual as well as the group.

The General Comment/General Recommendation should also explain that the family group unit is not a static entity. It may be that family members move in or out of the unit, or families reconstitute themselves in different forms. A pluralistic understanding of family necessitates acknowledging that a single-parent family may also be nested within a larger extended family. Moreover, a child (or other family member) may be part of more than one family. In joint care situations, it may be that a child is simultaneously a member of 'mum's family' and 'dad's family'.[1116] While these dynamics undoubtably complicate states' policymaking to protect and assist the family, they neither make it impossible nor unnecessary to do so.

3.2 Obligations of non-discrimination and equality

In this section, the Joint General Comment/General Recommendation should remind states that ICESCR Article 10(1) is to be interpreted in terms of ICESCR Articles 2(2). Noting that single-parent family status is not specified as a ground for non-discrimination, given the economic, social and cultural marginalisation of single-parent families worldwide, the General Comment/General Recommendation should identify it as an analogous 'other status' protected by the provision. It may also be noted that 'social origin' can be read to cover single-parent families, given that such families arise from specific circumstances—divorce, separation, birth to a single woman, or widowhood—which all have social meanings. Further, 'birth' may be seen to include the status of being

[1116] The terms 'mum' and 'dad' are used in favour of the more formal 'mother' and 'father' to reflect a child-centric perspective of how their families are envisaged.

born to a single parent (previously described by the stigmatising term ‘illegitimacy’ in many jurisdictions).

The Joint General Comment/General Recommendation should explain that the term ‘single-parent family’ is to be understood widely as a family with only one adult and one or more dependent children. The UN Population Division’s ‘single-parent household’ category is likely to provide an approximate correlation with single-parent family group units in many states.[1117] However, single-parent families also include such families nested in wider extended family units. In cases of equal joint custody, a child may be a member of more than one single-parent family.[1118] Moreover, the presence of another adult, such as the parent’s new intimate partner, does not in itself mean that the single-parent family ceases to exist. Importantly, the notion of ‘parent’ refers here to a person who fulfils an active parenting role. This role covers the day-to-day care of the dependent child, including responsibility for nurturing, attachment, emotional and physical care and development, safety, access to education, and provisioning. Thus, a family unit in which an aunt, grandparent or other adult takes on parenting responsibility alone also comes under the term ‘single-parent family’. It should be explained that the term does not require the existence of particular legal or biological bonds between the family members. Furthermore, the need for support to fulfil elements of the parenting role adequately should not used to deny that a person is a ‘parent’ in this terminology. Rather, where support needs are identified, Article 10(1) requires the state to accord the family the widest possible protection and assistance.

[1117] ST/ESA/SERA/433 (n 65) 31-32.

[1118] This is an increasingly common scenario in Anglo states where a child may spend a week about at each of two parents’ residences, during which time the parent with whom they are living has responsibility for their day-to-day parenting.

ICESCR Article 3 requires states to ensure the equal right of men and women to the enjoyment of all ICESCR rights. CESCR has explained that this is to be understood comprehensively as guaranteeing both de facto and de jure (that is, substantive) equality.[1119] In this regard, the General Comment/General Recommendation should highlight that states' failure to promote, protect and fulfil ICESCR Article 10(1) without discrimination towards single-parent families also represents a failure to ensure the equal right of men and women to the enjoyment of all ICESCR rights, given that the overwhelming majority of single-parents are women and that their situation as single-parents currently typically makes their equal enjoyment of these rights impossible. By the same token, the obligation on states party to CEDAW to pursue by all appropriate means and without delay a policy of eliminating discrimination against women (Article 2) also implies an obligation on states to pursue a policy of promoting, protecting and fulfilling ICESCR Article 10(1) without discrimination towards single-parent families, as an essential element of that obligation.

Further, the General Comment/General Recommendation should draw states' attention to their obligations under CRC Article 2 to (1) respect and ensure the rights of the child without discrimination of any kind irrespective of the child's or their parent's sex, social origin, birth, or other status, and (2) take all appropriate measures to ensure that the child is protected from all forms of discrimination or punishment based on the status or activities of the child's parents, legal guardians or family members. Thus, discrimination in the enjoyment of CRC rights experienced by a child as a result of being a member of a single-parent family, a status related thereto (for example, 'illegitimacy'), or as a result of discrimination against their parents on the basis of sex (including failure

[1119] E/C12/2005/4 (n 417) [7].

of states to eliminate the discriminatory impacts of single-motherhood) would also constitute discrimination under CRC.

Importantly, the Joint General Comment/General Recommendation should remind states that obligations of non-discrimination and equality are to be understood in the substantive sense and are not subject to progressive realisation. Non-discrimination and equality obligations may usefully be framed in terms of four dimensions: distribution, recognition, transformation and participation.[1120] This framework could be usefully referenced in the current General Comment/General Recommendation as a schema for states to consider in relation to their non-discrimination obligations towards single-parent families and their members. At a more granular level, reference to specific provisions of ICESCR, CEDAW and CRC, as well as to existing General Comments, General Recommendations and treaty body commentary, such as concluding comments made in relation to states' Universal Periodic Reviews, would assist states to understand, and therefore be better placed to fulfil, their obligations in concrete terms.

The General Comment/General Recommendation must also alert states to the ways in which many single-parent families and their members are multiplicatively marginalised due to intersecting axes of discrimination. To respect, promote and fulfil single-parent families' economic, social and cultural rights requires states to recognise and address the intersectional discrimination that affects many such families. For example, families that contain one or more members with disabilities, HIV or high health needs may need greater support to realise their capabilities. Moreover, discrimination against particular types of single-parent families or their members is also unlawful. This includes, for example, discrimination against children born outside of marriage and their

[1120] Fredman, *Discrimination* (n 45) 25.

mothers, single-parent families by choice, father-headed single-parent families (unless the different treatment is justifiable on the basis of temporary special measures), and young single-parents and their families. Other types of single-parent family at heightened risk of discrimination include those of marginalised racial backgrounds, those containing LGBTQI+ members, and those in which the biological father of the child is assumed to be a member of an occupying or enemy military or other force.

The Joint General Comment/General Recommendation should draw states' attention to the ways in which misrecognition, including stigmatisation and inappropriate paternalism, violate single-parent families' rights to the widest possible protection and assistance. Destigmatisation is necessary to overcome the entrenched denigration of single-parent families and their members from all sources. This denigration includes stigmatisation that has religious, cultural, or political (for example, neoliberal or nationalist) roots. The use of single-parent families and their members as a trope in political campaigning, including in situations where this is conflated with tropes based on other suspect grounds, such as race, must be deplored. Furthermore, the recognition dimension requires that the state and its agents assume the competency and agency of single-parents and offer assistance on that basis. This includes recognition of the diversity of single-parent families and avoidance of lazy stereotypes (for example, stereotypes conflating the particular needs of teen parents and their families with the situations of single-parent families generally). The adoption of a capabilities approach to assessing the fulfilment of Article 10 (1) rights based on the notion of 'having, loving, being'[1121] assists

[1121] Allardt (n 513).

in this by focusing states' attention on ensuring that single-parent families can do what they have reason to value.[1122]

The Joint General Comment/General Recommendation should stress that their obligations to accord the widest possible protection and assistance to single-parent families do not depend on how such a family came into existence. Specifically, unmarried single-mothers and their children should not receive less support from the state than, for example, those who become single-parent families due to the death of a second parent. Nor should obtaining a formal divorce be required to access support. Rather, any differential support should be justified on the basis of different need. Thus, for example, women and children fleeing family violence and coercion may need additional support to establish themselves in a new, safe location and to be protected from further coercion and violence (recognising that the point of separation is the most dangerous time for a woman in a violent relationship). Children and very young adults who are single parents may need extra support to finish schooling and develop life-skills.

3.3 Specific obligations

Without seeking to be exhaustive, the General Comment/General Recommendation should guide states on their obligations in relation to specific key areas of concern, grounded in the text of ICESCR, CEDAW, and CRC, as well as associated commentary from treaty bodies and others, with reference to the four dimensions of non-discrimination and equality. The following matters should be covered.

3.3.1 Adequate standard of living

States' attention should be drawn to the right in ICESCR Article 11 to an adequate standard of living for oneself and one's family, including adequate food, clothing and

[1122] Fredman, *Transformed* (n 28) 3.

housing, and continuous improvement in living conditions, as well as the right to be free from hunger. The requirement on states to immediately 'ensure the satisfaction of, at the very least, minimum essential levels of each of the rights'[1123] applies in relation to families, not merely the individuals within them. Therefore, a non-discrimination approach requires that the satisfaction of the basic needs of members of single-parent families not occur at the expense of the protection of the unit itself. Thus, for example, any approach to meeting a child's needs that requires the child's connection to their single parent be threatened or severed, or which placed the single parent or another member of the family in a position of greater marginalisation would violate Article 10(1).[1124]

Single-parent families experience inadequate standards of living and lack of satisfaction of minimum essential levels of these rights in significantly disproportionate numbers across all types of societies.[1125] Even in wealthy states, single-parent families are reported to be unable to afford sufficient heating, and some members (frequently the mother) go hungry on regular occasions. An absence of data collection and inadequate focus on single-parent families means, however, that the extent to which their rights are violated in particular states or specific circumstances may be unclear. Therefore, states have a dual obligation: to collect data to understand better the extent to which single-parent families disproportionately lack an adequate standard of living and, at the same

[1123] E/1991/23 (n 149) [9].

[1124] Examples of where there is a risk that states may take such steps in violation of Article 10(1) include situations where child protection services deem the single-parent incapable of providing for the child due to poverty and the child is therefore removed for institutionalisation, adoption or fostering, or where the mother's employment is deemed to create an unsuitable environment for the child – eg because she engages in sex work – and instead of ensuring the rights of the family as a whole of met, the child is removed.

[1125] ST/ESA/SERA/433 (n 65) 12.

time (given the *prima facie* evidence that they do), to take action to address this inequality.

The living standards of marginalised groups are particularly at risk in times of resource scarcity or crisis. In this regard, states should be reminded of their obligations not to take regressive measures that disproportionately affect the most marginalised, even in times of austerity, crisis or emergency. In the event of a catastrophic emergency in which the wealth and wellbeing of the whole state are affected, the state must look to all other areas for spending cuts and opportunities to raise revenue. CESCR's statement in its General Comment 3 should be reiterated, namely that:

> [E]ven in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or be other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.[1126]

Applied to single-parent families, this means that states must take care to ensure that single-parent families who already suffer economic marginalisation and poverty have their living standards protected during crises such as pandemics and conflict and are not made worse off by austerity or similar measures.

3.3.2 Economic equality

3.3.2.1 Policy and planning

The Joint General Comment/General Recommendation should inform states that data shows the disproportionate poverty of single-parent families in all states for which it exists and that this is *prima facie* evidence of states' failure to meet their obligations to fulfil single-parent families Article 10(1) rights. Financial inequality, including income insufficiency, is a key aspect of poverty. First, the promotion of the economic equality of single-parent families requires states to immediately cease any policies or statements that

[1126] E/1991/23 (n 149) [12].

accept the disproportionate poverty of single-parent families as natural, correct, or an accepted corollary of such families failing to meet traditional ideals of family form, and to commit to the goal of single-parent families' economic equality.

Second, the Joint General Comment/General Recommendation should recommend that states make and implement a plan to protect and progressively fulfil the distributive equality of single-parent families. This plan should set out realisable steps to address the disproportionate poverty and income inequality faced by single-parent families. A variety of tools exist for measuring income, wealth and poverty across different families or households.[1127] Given the depth and complexity of the challenge, an effective plan will have a transformative dimension. In this regard, it would be helpful for the Joint General Comment/General Recommendation to remind states that, although each state is free to pursue its own economic and political system, by signing up to UN human rights treaties, states choose to be bound by their provisions. For states party to ICESCR, this includes the Article 10(1) obligation to accord the family, without discrimination, the widest possible protection and assistance particularly while it is responsible for dependent children.

Transformational change is included under the phrase 'widest possible'. Where current systems and structures do not provide a route to equality, transformation is required. As an illustration, the Joint General Comment/General Recommendation might draw attention to the ways in which market economies typically fail to address the realities of dependency and derivative dependency and the particular impacts of this for single-parent families. Such an illustration would, however, have to be accompanied by a

[1127] Ideally, states would avoid measures that assume children require less resources per capita than adults, as these tend to be based on the assumption that the effort expended in caring for a child has no value, however, at least initially it is likely that states will deploy existing tools which tend to incorporate that assumption.

recognition that states based on other systems are also failing to meet their obligations to single-parent families under Article 10(1). The participative dimension of non-discrimination requires that single-parent families be included as central actors in planning for how this transformation will occur. In the process of developing and implementing such plans, stigmatising notions of single-parent families and their members will need to be confronted to ensure that government officials, employers, educators and others appreciate the validity of the single-parent family as a non-deficient family form deserving of equality. This includes recognition of the agency of the single-parent family group and its individual members.

Third, the General Comment/General Recommendation should advise states to review their policies, programmes and practices to ensure that single-parent families are not penalised. Policies that purport to incentivise paid employment by requiring labour market engagement from single parents should be subject to particular scrutiny as these are often implemented for political reasons without adequate regard to evidence of effectiveness (measured in Article 10(1) terms) or realistic consideration of single parents' caregiving responsibilities and their children's care and attachment needs.[1128] A proclaimed policy intention to improve the circumstances of single-parent families or their members is insufficient to absolve states of responsibility for ensuring that the effects of policies do not increase the de facto economic inequality and poverty suffered by single-parent families, nor deprive family members of rights to adequate rest and leisure, nor children of rights to security and appropriate nurture from their primary attachment figure, whether on a short- or a long-term basis.

[1128] As Chapter 4 of my thesis illustrates.

The Joint General Comment/General Recommendation should explain that any policy aimed at increasing single-parent participation in the paid workforce must be directed toward improving single-parent families' economic, social and cultural wellbeing and must ensure that marginalised single-parent families are not pushed further into poverty or unhealthy stress as a result of their implementation. Any such policies must take realistic account of the actual situation on the ground, including the adult hours available to single-parent families to provide for the needs of their family members (vis a vis of both two-parent families and families and individuals without dependent children),[1129] and the particular context including; the extent to which quality, accessible and affordable childcare is available; availability and time requirements for transportation to workplaces, childcare and education facilities; availability of suitable work that allows sufficient leave to attend to the needs of sick children, children on holiday from school and the like, as well as to attend to household maintenance[1130] and to exercise their own rights to rest, recreation, and cultural and civic participation.[1131]

3.3.3 Workers' rights

States' attention should be drawn to their obligations under ICESCR Article 6(1) to take appropriate steps to safeguard everyone's right to the opportunity to gain a living by work, which they freely choose and accept. Where single parents are engaged in paid work, states should be reminded of the right under Article 7 to enjoy just and favourable

[1129] In subchapter 4.3 of my thesis, I demonstrated that under a particular benefit caps workfare policy a single-parent family in which the parent undertook the hours of paid work required to avoid a benefit cap would have only 42 percent of the maximum hours available for hands-on parenting that a similarly placed two-parent family would have (70.5 hours/week compared to 166 hours per week).

[1130] This refers to food purchasing and preparation, cleaning, fixing, washing, administrative tasks and the like. It is distinct from the care and nurturing of children.

[1131] The modelling in my thesis assumes an allocation of one hour per day to each adult for recreation and relaxation. However, for many single parents this is unlikely to be a childfree hour as even when their children are sleeping, they are generally unable to obtain the childcare necessary to leave the premises to partake in recreation or civic engagement.

conditions of work which ensures, among other things, 7(a)(i), 'a decent income for themselves and their families', as well as 7(c) equal opportunities for advancement, and 7(d) rest and leisure, and the need to ensure this right to single-parents, including those whose paid employment is part-time.

CESCR's statement in its General Comment 23 that 'Discrimination, inequality and a lack of assured rest and leisure continue to plague many of the world's workers'[1132] should be reiterated with specific reference to the situation of single parents as workers and impacts on their families. Similarly, that General Comment's explanation of the concept of '[r]emuneration that provides all workers with a decent living for themselves and their families' as 'being determined by reference to outside factors such as the cost of living and other prevailing economic and social conditions' should be expanded upon in the current General Comment/General Recommendation with reference to conditions affecting single-parents and their families. The current General Comment/General Recommendation must make it clear that single parents, including those whose paid employment is part-time, are, like other workers, entitled to:

> Remuneration … sufficient to enable the worker and his or her family to enjoy other rights in the Covenant, such as social security, health care, education and an adequate standard of living, including food, water and sanitation, housing, clothing, and additional expenses such as commuting costs.[1133]

For single-parent families in paid employment, the need for remuneration sufficient to pay the costs of accessible, quality childcare, in addition to the other matters listed, should be stressed. Where, for example, the part-time hours worked are insufficient to generate enough remuneration to enable the single-parent family to enjoy their other

[1132] CESCR, 'General comment No 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)' (2016) E/C12/GC/23 [3].

[1133] ibid [18].

economic, social and cultural rights, the state has obligations to step in and assist. This obligation operates on two levels: first, the state's immediate obligation to address substantive discrimination in the enjoyment of economic, social and cultural rights may require single-parent families in paid employment to be provided with additional state assistance if they are less well-off than working families in general and this is a result of their single-parent family status. Second, the state has an obligation to progressively fulfil this right for all families to the maximum extent of available resources.

The Joint General Comment/General Recommendation must also remind states of their particular obligations to child workers, including those from single-parent families. These obligations are additional to the general obligations to all workers and recognise the particular needs and vulnerabilities of children.[1134]

3.3.4 Social security

The application of the right to social security (ICESCR Article 9) to single-parent families in light of the Article 10(1) obligation on states to accord the widest possible protection and assistance to the family without discrimination is particularly important given the extent to which the dependency and derivative dependency of members of the single-parent family limits hours available to undertake paid work. The Joint General Comment/General Recommendation should, therefore, draw states' attention to the ways in which social insurance schemes linked to length of time in the paid workforce, hours worked and paid work remuneration reinforce the economic marginalisation of single-parent families. Reference could be made to the guidance in CESCR General Comment 19 on gender inequality in relation to social security.[1135] However, the analysis must be

[1134] CRC Article 32.

[1135] E/C12/GC/19 (n 536) [32]. See also CESCR's comments on women's unpaid caring and contributory social insurance schemes in *Trujillo Calero* (n 441).

extended to address the specific impediments that fall on single parents as workers who typically do not have any ability to share their family's needs for hands-on parenting and supervision of children with another family member. Reference should also be made to UDHR Article 22, which elaborates that 'Everyone, as a member of society, has the right to social security and is entitled to realization … of the economic, social and cultural rights indispensable for his dignity and free development of his personality' without reference to their employment status or usefulness as an economic unit. Further, the elaboration in UDHR Article 23(3) of the right to social protection as a supplement to just and favourable remuneration from paid work sufficient to ensure an existence worthy of human dignity for oneself and one's family should be referred to in order to assist states in understanding their obligations to ensure that single-parent families that are engaged in the paid labour market have the financial wherewithal for a dignified existence, even if their wages are insufficient to provide this (for example, due to part-time work hours, or being trapped in low-wage roles).

3.3.5 Wealth and savings

Single-parent families suffer from disproportionate wealth inequality in addition to income inequality. Many have few, no, or negative assets. This has immediate impacts on opportunities and wellbeing including increasing the risk of catastrophic consequences of financial shocks, reducing stability of residence, limiting access to education and training, and reducing the possibility of engaging in small-business enterprises. It also has longer-term impacts. For example, debt, inaccessibility of home ownership, and inability to build up retirement savings are contributors to the disproportionate poverty faced by women, and single women in particular, in old age. The Joint General Comment/General Recommendation should advise states to investigate the extent of these issues in their jurisdictions and to develop strategies to ameliorate them.

CEDAW General Recommendation 29 on the economic consequences of marriage, family relations and their dissolution should be mentioned.[1136] However, ICESCR Article 10(1) obligation on states to particularly ensure that families are accorded the widest possible protection and assistance while responsible for the care and education of dependent children applies to all single-parent families, regardless of whether they came into existence as a result of the dissolution of a marriage or prior family relationship or through other means. Moreover, states should be advised that schemes in which a state requires the other parent to contribute financially to child support for single-parent families may be insufficiently effective, with non-compliance being frequent and payments that are often too small to ensure to single-parent families' economic wellbeing. Thus, states should be advised that such schemes are unlikely, on their own, to address substantive discrimination faced by single-parent families in the enjoyment of their rights under Article 10(1).

3.3.6 Housing

The Joint General Comment/General Recommendation should draw states' attention to CESCR General Comment 4: The Right to Adequate Housing (Art 11(1) of the Covenant) in relation to the widespread, persistent and severe housing discrimination faced by single-parent families.[1137] Paragraph 6 of that General Comment observes that the concept of family must be understood broadly to include female-headed households and other such groups without discrimination. Paragraph 11 calls for states to 'give due priority to those social groups living in unfavourable living conditions by giving them particular consideration, and paragraph 13 requires that monitoring take place focused on

[1136] CEDAW/C/GC/29 (n 5).

[1137] E/1992/23 (n 502).

those who are 'vulnerable and disadvantaged with regard to housing.'[1138] The right to adequate housing is 'the right to live somewhere in security, peace and dignity',[1139] and CESCR observes that achieving this will almost invariably require a national housing strategy.[1140] Regardless of whether a state has produced a national housing strategy, the current General Comment/General Recommendation should apply the guidance in General Comment 4 to single-parent families by guiding states to explicitly assess the extent to which single-parent families in their jurisdictions have access to adequate housing which provides security, peace and dignity. Such housing should: have legal security of tenure; have availability of services, materials, facilities and infrastructure; be at an affordable level; offer habitability including providing a healthy living environment; be accessible (including meeting any disability needs); be located in an area that allows access to employment options that are suitable for single-parents (given their other responsibilities), health-care services, schools, childcare centres and other social facilities; and be culturally adequate.[1141] Where single-parent families do not have access to adequate housing at the same rate as other members of society, the reasons for this must be identified and strategies developed and implemented to address the situation as a matter of urgency.

The nature of such strategies will vary depending on context. For example, in states where women face legal discrimination regarding ownership of land (for example, under patrilineal customary laws of land tenure), contracting for land purchases, access to finance, or entering into tenancy agreements, such legal impediments must be rectified. In

[1138] ibid

[1139] ibid [7].

[1140] ibid [12].

[1141] ibid [8].

states in which discrimination by private or other landlords against single-parent families (including discrimination which in practice discriminates against single-parent families, for example discrimination against tenants with children or against beneficiaries) is permitted or tolerated, law reform and enforcement is needed to end this. Where single-parent families' access to housing is limited by poverty, monetary support or provision of sufficient adequate and acceptable social housing with rents set levels that are manageable given single-parent families' incomes and needs (including number of family members, childcare costs and any health and disability costs) may be required.

In situations in which courts or administrative bodies have the power to make orders about the locality in which a single-parent family may live, for example, to enable the other parent to have access to the children, this must not be done in such a way as to force the family to remain in an area in which it is unable to maintain affordable, accessible and adequate housing for its needs.

3.3.7 Health

ICESCR Article 12 recognises everyone's right to the highest attainable standard of physical and mental health and obliges states to take steps to achieve the full realisation of this right. The Joint General Comment/General Recommendation should, therefore, alert states to the health impacts of discrimination against single-parent families and their members and their immediate obligations under Article 10(1) to address these. Poverty, exhaustion, housing insecurity, isolation, stress and stigma have negative effects on the health of single-parent families.[1142]

Ensuring access to health services is also required. In those states in which access to health services is linked to employment (for example through workplace health

[1142] Stats NZ (n 106).

insurance schemes), single-parent families may be at particular risk of not being able to access health services on an equal basis, and states should be advised to address this.[1143] In states in which single-parent families (or certain types of single-parent families) face high levels of stigma, this may render health services inaccessible, either through refusal to provide care or through stigmatised, coercive or unsafe treatment. This is likely to be a particular issue in states in which unmarried births are deemed evidence of criminal behaviour on the part of the mother and in states in which some single parents (for example those of indigenous or marginalised racial backgrounds, those with physical or mental disabilities, or those working in the sex industry) are particularly vulnerable to coercive state intervention including child removal.

In addition, the Joint General Comment/General Recommendation should draw attention to evidence that children with severe disabilities and high health needs are more likely to be raised in single-parent families, which consequently have additional needs for health care and disability support both for the child and in terms of respite for the other family members.

3.3.8 Education

The Joint General Comment/General Recommendation should draw attention to the ways in which single-parent families may be marginalised by failures to fulfil their members' rights to education on the basis of non-discrimination. In this regard, children in single-parent families should have equal access to education alongside other children. In no circumstances should a child be refused enrolment in an educational facility or equal opportunities within the facility on the basis of being from a single-parent family (or any variant thereof, for example, on the basis of being born to an unmarried mother). Where

[1143] Casey and Maldonado (n 78).

families contribute fees towards aspects of children's education (such as school fees, resource materials, uniforms or school trips), the state may need to subsidise these for children from impoverished single-parent families to ensure that they are able to benefit from an education on a basis of equality. Moreover, educational institutions must ensure that children from single-parent families are not stigmatised or bullied by members of staff or fellow students on the basis of their family type. Single parents must be treated with respect in their engagement with their children's educational institutions. In recognition of the time poverty often experienced by single parents, particularly those engaged in the paid workforce, schools and other educational institutions should be directed to ensure that timings for parent-teacher meetings and other interactions between the school and parent are flexible enough to allow single parents to attend.

Single parents themselves should be supported to continue education at all levels on a basis of equality with others. This support includes making provisions for girls to continue their education if they become mothers prior to completing schooling. It also includes supporting single parents to undertake tertiary education where they meet the academic criteria. At both school and tertiary level, financial or other material support may be required to enable single parents to provide for themselves and their families while studying. In addition, policies and practices of educational institutions should make reasonable accommodations for the needs of single-parent students and their families. This may include on-site or subsidised childcare, provision of child-friendly study spaces, and reasonable flexibility to respond to children's needs without penalisation. While it is possible that such assistance could be provided to all families as an aspect of the progressive fulfilment of Article 10(1), states should consider the provision of support of this nature to single-parent families as part of meeting their immediate obligations to guarantee their enjoyment of Article 10(1) rights on a basis of equality. The reasons for

this are two-fold. First, single-parent families cannot divide study and childcare responsibilities between two adults (so that while one parent studies, the other parent cares for children). Second, to earn an income sufficient to pay for childcare and other support necessary to care for and educate dependent children while also participating in the paid labour market, single parents need to command a higher hourly wage than coupled parents. However, women earn lower average wages than similarly qualified men.

Education provides a strategy to offset women's lower earnings and the need to obtain work that is sufficiently well-remunerated to enable childcare and other costs to the family of labour market participation to be met. To address the transformative dimension of non-discrimination, given both the lower hourly earnings single parents frequently receive and the greater demands on their time, states must not limit support for single-parent education to minimum qualification levels. Achieving economic equality and being able to contribute to society at all levels requires that single parents be supported to undertake advanced studies, where this is within the means of the state.

In states that use student loan schemes to enable students to study, repayment and interest thresholds should take into account the impacts of single-parenting on hours available to work and disposable income in order to ensure that single-parent families are not unduly penalised.

3.3.9 Cultural and civic life, and rest, leisure and play

ICESCR Article 15(1)(a) recognises the right of everyone to take part in cultural life, while Article 7(d) recognises (as part of the right to favourable conditions of work) the right of everyone to rest and leisure. The Joint General Comment/General Recommendation should advise states that policies, practices or socio-economic settings that necessitate or incentivise single-parents to be in the paid labour market (for example

as a condition of social security payments) or require them to attend activities such as parenting or job readiness courses must not place demands on their time such that they are deprived of their ability to enjoy their rights to reasonable rest, leisure and participation in cultural activities. In assessing compliance with their obligations in this regard, states should have regard to the time required to engage in paid work (such as commuting and child pick-ups), the requirements of home duties and maintenance, and the rights and needs of children to benefit from a significant number of hours of hands-on parenting, and parental rights to rest and leisure.[1144]

While Article 10(1) is a group right, states should be reminded of their obligations under CEDAW Article 3 to take, 'particularly in the political, social, economic, and cultural fields, all appropriate measures … to ensure the full development and advancement of women' so they can enjoy human rights and fundamental freedoms on a basis of equality with men. This implies a requirement to ensure that single parents' rights to develop and advance in cultural, civic, and social life are appropriately supported. Such participation may occur through ensuring that time is available and that it is possible to participate fully in these areas while also having one's children present or through ensuring that single parents are able to access childfree time to participate, develop and advance in these fields (for example, by having accessible, adequate and acceptable childcare available at appropriate times, and by supporting online participation where this is appropriate).

Moreover, the General Comment/General Recommendation should remind states of children's rights to play and engage in recreational activities, cultural life and the arts,

[1144] The tables I present in subchapter 4.3 of my thesis provide a rudimentary example of a starting point for this kind of modelling.

and the obligation of states to promote 'appropriate and equal opportunities for cultural, artistic, recreational and leisure activity',[1145] as well as the rights of children from ethnic, religious or linguistic minorities and indigenous backgrounds to enjoy their culture, practice their own religion and use their own language in community with other members of their group.[1146] States have an obligation to secure these rights for children from single-parent families on a basis of non-discrimination. In assessing their performance in this regard and determining steps to address shortfalls, states should be advised to consider the role of parents in facilitating such activities and the need for them to have the time and resources to do so. This is particularly relevant in states and localities where security, legal settings or culture prevent children from playing, travelling or socialising without adult supervision.

3.4 Interconnection of civil and political matters and single-parent families' economic, social and cultural rights

The interconnected and indivisible nature of human rights means that it is necessary to consider state obligations in a holistic rather than a siloed manner. Thus, the Joint General Comment/General Recommendation should draw states' attention to the ways in which decisions in the sphere of civil and political rights may have economic, social and cultural rights implications. In this regard, it should be highlighted that the 'best interests of the child tests' found in many judicial and administrative adjudication processes relating to children must consider the child from a social-ecological perspective. Such processes include those related to child custody, as well as youth justice and care and protection matters.

[1145] CRC Article 31.

[1146] ibid Article 30.

In establishing youth justice and care and protection laws, policies and practices, and in adjudicating matters, states must ensure that they do not require the impossible, or even the unreasonable, from single-parent families. For example, in situations in which economic and social support is not available to enable single parents to provide adequate material provisions for their children without negatively impacting their availability to offer adequate care, nurturing and supervision, interventions from the state, including its judicial system, must focus on rectifying such structural impediments rather than penalising the single parent through fines, mandatory parenting course attendance or other means. Removal of the child from the single-parent family due to neglect caused by the need to gain income or the effects of poverty on the child is in contravention of the requirement in Article 10(1) to provide the widest possible protection and assistance to the family group unit, read in light of the state's non-discrimination obligations.

Moreover, any regulation, policy or line of precedent that includes an assumption that single-parent family membership is undesirable or leads to deficiencies in parenting should be repealed as discriminatory. To the extent that there is *prima facie* evidence indicating worse outcomes for children raised in single-parent families in a particular state, this evidence should be reviewed to identify if social or economic inequality or stigma is implicated in the negative outcomes. Where this is found to be the case, urgent action is required to address this discrimination. Furthermore, a single parent's choice of work, including work in adult entertainment industries, should not be used as a ground for the removal of children from her care or as a reason to subject the single-parent family or its members to coercive measures.

3.5 A national policy and plan

The General Comment/General Recommendation should remind states that while economic, social and cultural rights (beyond a minimum core) are subject to progressive

fulfilment to the maximum extent of available resources, their obligations of non-discrimination and equality are immediate.[1147] CESCR General Comment 1 explains that the obligation 'to take steps … by all appropriate means …'[1148] puts an obligation on states 'to work out and adopt a detailed plan of action for the progressive implementation'[1149] of each right in ICESCR.[1150] In relation to single-parent families' rights under Article 10(1), this imposes an immediate obligation to recognise such rights and to develop plans to protect and fulfil them. Such an approach is in keeping with treaty bodies' emerging practice of encouraging states to develop national plans for the fulfilment of their obligations. To be effective, such plans must be specific, measurable and contain time-bound objectives. They must be based on accurate benchmarks. This requires appropriate data collection. Considering the participation dimension of non-discrimination, single-parent families must be at the heart of the development of such plans. Moreover, single-parent families must be resourced for their expenses (such as transport, childcare, and internet) and recompensed for their time and expertise to enable them to participate without creating additional burdens.

Respect for 'the principles of accountability, transparency and participation by interested groups'[1151] requires single-parent families be actively involved in setting the policy, developing the plan, monitoring outputs and outcomes, and determining modifications. As well as adult members of single-parent families, children in single-parent families must be included in these efforts in ways that are appropriate to their age

[1147] E/C12/2005/4 (n 417) [16].

[1148] ICESCR Article 2(1).

[1149] ibid Article 14.

[1150] E/1989/22 (n 625) [4].

[1151] Saul, Kinley and Mowbray (n 150) 831.

and development as required by the CRC principle of participation, and efforts made to develop ways for the family as a unit to participate.

The causes of economic, social and cultural discrimination against single-parent families are deeply embedded and systemic, presenting a 'wicked problem' to states working to fulfil their obligations. This does not mean that the realisation of single-parent families' Article 10(1) rights is impossible, nor that action should be foregone. The General Comment/General Recommendation should alert states to the existence of existing models for the realisation of particular rights, or in relation to particular marginalised populations, that may be adapted to assist in their national policies and plans for realising single-parent families' economic, social and cultural rights.

For example, in relation to ICESCR Article 10 (3), Saul, Kinley and Mowbray state that states are required to adopt a national policy of children's rights fulfilment, accompanied by 'a detailed plan for its realization' and 'the allocation of sufficient resources to finance it.'[1152] The policy, plan and funding must pay specific attention to disadvantaged groups, and include '(a) national mechanisms to monitor implementation; (b) numerical targets and time frames for implementation; and (c) means of ensuring compliance with national benchmarks and indicators'[1153] as well as respect for 'the principles of accountability, transparency and participation by interested groups'. [1154]

Saul, Kinley and Mowbray also refer to UNICEF's Protective Environment Frameworks, adopted in 2002 as a useful model. This model also offers features that states could refer to in developing national plans for the fulfilment of Article 10(1) with

[1152] ibid 831.

[1153] ibid 831.

[1154] ibid 831.

reference to non-discrimination against single-parent families.[1155] Eight broad environmental elements of the model are particularly helpful, namely:

- Government commitment to fulfilling protection rights including 'social welfare policies, adequate budgets, public acknowledgement and ratification of international instruments.'[1156]
- Legislation and enforcement including 'an adequate legislative framework, its consistent implementation, accountability and a lack of impunity.'[1157]
- Attitudes, traditions, customs, behaviour and practices: addressing social norms and traditions that excuse or contribute to injurious practices and supporting those that are protective.
- Open discussion including the engagement of media and civil society.[1158] In relation to single-parent families' Article 10(1) rights, this would focus on countering stigma and misinformation.
- Life skills, knowledge and participation. In relation to single-parent families, this would include ensuring families and their members were aware of their economic, social and cultural rights; had access to skills development to participate at all levels and were empowered to participate in society with a particular emphasis on their active participation in policies and services that most affected them.
- Capacity of those providing services to, supporting or interacting with families including community members, teachers, health and social workers, employers, housing providers, banks, and family courts.
- Basic and Targeted Services including basic social services, health and education, as well as 'specific services that help to prevent violence and exploitation, and provide care, support and reintegration assistance in situations of violence, [and] abuse'[1159], access to justice, childcare, and the means to participate in society.
- Monitoring and oversight including 'effective systems of monitoring such as data collection, and oversight of trends and responses.'[1160]

[1155] UNICEF, 'Child Protection Strategy' (3-5 June 2008) E/ICEF/2008/5/Rev1, 4; UNICEF, *Child Protection Systems Strengthening: Approach, Benchmarks, Interventions*, 2021).

[1156] E/ICEF/2008/5/Rev1 (n 1155) 4.

[1157] ibid 4.

[1158] ibid 4.

[1159] ibid 4.

[1160] ibid 4.

As is typical of a 'wicked problem', realising single-parent families' economic, social and cultural rights on a basis of non-discrimination and equality requires action across multiple domains. Therefore, the Joint General Comment/General Recommendation should recommend that the plan and accountabilities for delivery involve a cross-section of government agencies. Where the aspects of government are devolved to provincial or local levels, it may be necessary for planning to take place at these levels, as well as for provincial and local government representatives to participate in the national plan. In addition to government agencies and single-parent families, it should be suggested that other sectors, including civil society, cultural and religious groups and the business sector, be involved in planning with the proviso that all aspects of the plan must respect the dignity of single-parent families as an equally valid family type and be focused on the realisation of their rights.

The plan and its initiatives must be subject to effective, ongoing empirical monitoring and evaluation. They must have built into them an ability for policies to be halted or reversed should negative de facto effects on the distributive equality of single-parent families become apparent.

3.6 Benchmarks, indicators and monitoring

As mentioned, in drafting guidance on fulfilling obligations under Article 10(1), CESCR, CEDAW and CRC should recommend that states adopt a national policy of fulfilment of single-parent families' economic, social and cultural rights to the widest possible protection and assistance on a basis of equality and non-discrimination. This should be accompanied by a detailed plan for the realisation of the policy and 'the allocation of sufficient resources to finance it.'[1161] The policy, plan and funding must pay specific

[1161] Saul, Kinley and Mowbray (n 150) 831.

attention to those single-parent families who experience multiple axes of discrimination while also recognising and addressing the extent to which single-parent familyhood is independently associated with being victims of economic, social and cultural rights violations. Planning and implementation of the policy requires '(a) national mechanisms to monitor implementation; (b) numerical targets and time frames for implementation; and (c) means of ensuring compliance with national benchmarks and indicators'.[1162]

Where states have insufficient data to assess the current rights realisation of single-parent families for use as benchmarks, such data must be collected without delay. A first step is to adopt a statistical definition of single-parent families. The UN Population Division's seven household types provide internationally comparable categories, including a 'single-parent with children' household category, which could be used as a starting point.[1163]

Outcomes of monitoring must be publicly reported. The treaty bodies should put states on notice that they will be looking for this reporting in their assessments of state parties' periodic reports.

[1162] ibid 831.

[1163] UN Department of Economic and Social Affairs Population Division, *Household size and composition around the World 2017: data booklet* ((ST/ESA/SERA/405), United Nations 2017) Note, however, that this categorisation does not pick up single-parent families nested in larger households. Nor does it deal with each household in shared care situations. Therefore, states should be advised to supplement this unit with further monitoring to ensure that they have a good picture of the number and situations of all types of single-parent families in their jurisdictions.

3.7 International cooperation and assistance

As with other ICESCR rights, the principles of international cooperation and assistance apply and states should be reminded of these .[1164] Saul, Kinley and Mowbray write that:

> A state's capacity to fulfil rights relating to families, mothers and children under Article 10 as a whole will depend to some extent on resource and expertise considerations…. [S]tates are required to take steps individually and through international assistance and cooperation (ICESCR Article 2(1)) to achieve the rights in Article 10, including by treaty action, soft law making, consultation, research and technical assistance (ICESCR, Article 23)[1165]

Moreover, states and international government organisations (IGOs) should be reminded of their obligations to ensure that their actions in relation to other states accord with international human rights. The economic, social and cultural rights of single-parent families under Article 10(1) should be recognised and actively protected in all initiatives (including loans, investments, programmes and projects) in third-party states.

[1164] CESCR, 'General Comment No 18: The Right to Work (Art 6 of the Covenant)' (6 February 2006) E/C12/GC/18 [29].

[1165] Saul, Kinley and Mowbray (n 150) 851.

Bibliography

—— 'After UAE Law Change, Out-of-Wedlock Babies Still in Shadows' *Voice of America - Middle East* (13 December 2021) <https://www.voanews.com/a/after-uae-law-change-out-of-wedlock-babies-still-in-shadows-/6351934.html#:~:text=Although%20unwed%20mothers%20no%20longer,a%20maze%20of%20red%20tape.&text=In%20the%20UAE%2C%20hospitals%20issue%20birth%20certificates%20only%20to%20married%20parents.> accessed 17/2/2022

—— jlearn.net, 'Funi' Online Japanese Dictionary and Study Portal <https://jlearn.net/dictionary/%E4%B8%8D%E4%BA%8C-%E3%81%B5%E3%81%AB#:~:text=Kana,term%20advaitam%20(non%2Dduality)> accessed 5/10/2020

—— 'Meaning of the Sanskrit Word: advaitam' (2020) Sanskrit Dictionary, <http://sanskritdictionary.org/advaitam> accessed 5/10/2020

—— 'Widest possible: Synonyms' Power Thesaurus <https://www.powerthesaurus.org/> accessed 14/1/2021

Akani OO, 'Group Rights and Conflicts in Africa: A Critical Reflection on Ife-Modakeke, Nigeria' (2009) 16 IJ Minority and Group Rights 31

Allardt E, 'Having, Loving, Being: An Alternative to the Swedish Model of Welfare Research' in Nussbaum M and Sen A (eds), *The Quality of Life* (Clarendon Press 1993)

Almond B, *Fragmenting Family* (OUP 2006)

Alston P and Goodman R, *International human rights: the successor to international human rights in context: laws, politics and morals: text and materials* (OUP 2012)

Araujo RJ, 'Natural Law and the Rights of the Family' (2010) 1 IJ Jurisprudence of the Family 197

Atrey S, *Intersectional Discrimination* (OUP 2019)

Austin Center for Design, 'Wicked Problems: Problems Worth Solving', <https://www.wickedproblems.com/read.php> accessed 20/08/2020

Babe A, 'The stigma of being a single mother in South Korea' Al Jazeera <https://www.aljazeera.com/features/2018/3/1/the-stigma-of-being-a-single-mother-in-south-korea> accessed 17/2/2022

Bainham A, 'Is Anything Now Left of Parental Rights?' in Probert R, Gilmore S and Herring J (eds), *Responsible Parents and Parental Responsibility* (Hart Publishing 2009)

Barak-Erez D, 'Social Rights as Women's Rights' in Barak-Erez D and Gross AM (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007)

Beck U and Beck-Gernsheim E, *The normal chaos of love* (Polity Press 1995)

Bell DA, '*Brown v Board of Education* and the Interest-Convergence Dilemma' (1980) 93 HLR 518

Berlinski C, *There is No Alternative: Why Margaret Thatcher Matters* (Basic Books 2008)

Birthright, 'Birthright' <http://www.birthright.org.nz/> accessed 23 May 2017

Bjorge E, *The Evolutionary Interpretation of Treaties* (OUP 2014)

Bock JD, 'Doing the Right Thing? Single Mothers by Choice and the Struggle for Legitimacy' (2000) 14 Gender & Society 62

Boisvert M, *The Five Aggregates: Understanding Theravada Psychology and Soteriology* (Wilfrid Laurier UP 1995)

Bower-Brown S, 'Beyond Mum and Dad: Gendered Assumptions about Parenting and the Experiences of Trans and/or Non-Binary Parents in the UK' (2022) 18 LGBTQ+ Family: An Interdisciplinary Journal 223

Boyd SB, 'Equality: An uncomfortable fit in parenting law' in Leckey R (ed), *After Legal Equality: Family, Sex, Kinship* (Taylor and Francis 2014)

Boyd SB and others, *Autonomous motherhood? A socio-legal study of choice and constraint* (University of Toronto Press 2015)

Brest P, 'The Power of Theories of Change' (2010) 8 Stanford Social Innovation Review 46

Brook A-M, Clay KC and Randolph S, 'Human Rights Data for Everyone: Introducing the Human Rights Measurement Initiative (HRMI)' (2020) 19 JHR 67

Brown K, Ecclestone K and Emmel N, 'Review article: The many faces of vulnerability' (2017) Social Policy and Social Work

Brunet, G 'Orphans' *Encyclopedia of Children and Childhood in History and Society* <http://www.faqs.org/childhood/Me-Pa/Orphans.html#google_vignette> accessed 5/2/2014

Callus T, 'A new parenthood paradigm for twenty-first century family law in England and Wales?' (2012) 32 Legal Studies 347

Campbell M, 'Monitoring Women's Socio-Economic Equality Under ICESCR' (2018) Canadian Journal of Women and the Law

—— *Women, Poverty, Equality: The Role of CEDAW* (Hart Publishing 2018)

Casey T and Maldonado L, *Worst Off - Single-Parent Families in the United States: A Cross-National Comparison of Single Parenthood in the U.S. and 16 other High-Income Countries* (Legal Momentum 2012)

Chan C, 'China's unmarried women struggle to overcome barriers to having babies' Deutsche Welle <https://www.dw.com/en/chinas-unmarried-women-struggle-to-overcome-barriers-to-having-babies/a-36488553> accessed 17/2/2022

Chang P, *China at a Crossroads* (Evans Brothers 1936)

Charlesworth H, 'Culture and Tradition In the International Human Rights System' in Andreopoulos GJ and Carey HF (eds), *Justice and World Order: Reassessing Richard Falk's Scholarship and Advocacy* (Routledge 2022)

Charters C, 'The Sweet Spot Between Formalism and Fairness: Indigenous Peoples' Contribution to International Law' (2021) 115 AJIL Unbound 123

Charters C and others, 'He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand', (2019)

Choudhry S, Herring J and Wallbank J, 'Welfare, rights, care and gender in family law' in Wallbank J, Choudhry S and Herring J (eds), *Rights, Gender and Family Law* (Routledge 2010)

Christian Action Research & Education, 'Marriage and Family' (*Christian Action Research & Education,* <https://www.care.org.uk/our-causes/marriage-and-family/marriage> accessed 03/06/2017

Chzhen Y and Bradshaw J, 'Lone parents, poverty and policy in the European Union' (2012) 22 Journal of European Social Policy

Cicchetti D, 'Socioemotional, Personality and Biological Development: Illustrations from a Mulitlevel Developmental Psychopathology Perspective on Child Maltreatment' (2016) The Annual Review of Psychology

Coomaraswamy R, 'To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights' in Cook RJ (ed), *Human rights of Women: National and International Perspectives* (University of Pennsylvania Press 1994)

Craven M, *The International Covenant on Economic, Social, and Cultural Rights: a perspective on its development* (Clarendon Press 1995)

Crenshaw K, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Legal Theory and Antiracist Politics' (1989) 140 The University of Chicago Legal Forum 139

Cusack S and Pusey L, 'CEDAW and the rights to non-discrimination and equality' (2013) 14 Melbourne JIL 54

Daly M, 'Care As A Good For Social Policy' (2002) 31 JSP 251

Davis K, 'Intersectionality as buzzword: A sociology of science perspective on what makes a feminist theory successful' (2008) 9 Feminist Theory 67

Dawkins R, *The Selfish Gene* (40th Anniversary edn, Oxford Landmark Science 2016)

Dean H, 'Social Policy and Human Rights: Re-thinking the Engagement' (2007) 7 Social Policy & Society 1

Diduck A, *Law's Families* (LexisNexis UK 2003)

Dixon M, *Textbook on International Law* (7 edn, OUP 2013)

Durie M, 'Measuring Māori wellbeing' (NZ Treasury Guest Lecture Series August 2006)

Dwyer JG, *The Relationship Rights of Children* (CUP 2006)

Edwards R and Duncan S, 'Rational economic man or lone mothers in context? The uptake of paid work', *Good Enough Mothering? Feminist perspectives on lone motherhood* (Routledge 1996)

Eekelaar J, *Family Law and Social Policy* (2nd edn, Weidenfeld and Nicolson 1984)

—— *Family Law and Personal Life* (OUP 2017)

—— 'Forward' in Probert R, Gilmore S and Herring J (eds), *Responsible Parents and Parental Responsibility* (Hart Publishing 2009)

Engels F, *The Origin of the Family, Private Property, and the State* (Electric Book Co 2001)

England P, 'The Separative Self: Androcentric Bias in Neoclassical Assumptions' in Ferber MA and Nelson JA (eds), *Beyond Economic Man: Feminist Theory and Economics* (University of Chicago Press 1993)

Epstein, B 'Social Ontology' *Stanford Encyclopedia of Philosophy* (Summer edn, 2018) <https://plato.stanford.edu/archives/sum2018/entries/social-ontology/> accessed 21/07/2019

Esping-Anderson G, *The Three Worlds of Welfare Capitalism* (Princeton UP 1990)

Featherstone B, 'Social Policy and Human Rights and social policy' in Wallbank J, Choudhry S and Herring J (eds), *Rights, Gender and Family Law* (Routledge 2010)

Feng E, 'In China, Kids Of Unwed Mothers May Be Barred From Public Health Care, Education' NPR <https://www.npr.org/2019/11/06/775388226/in-china-kids-of-unwed-mothers-may-be-barred-from-public-health-care-education> accessed 17/2/2022

Figiel S, *Where We Once Belonged* (Pasifika Press 1996)

Fineman MA, 'The Family in Civil Society' (2000) 75 Chicago-Kent Law Review 531

—— *The Autonomy Myth: A Theory of Dependency* (The New Press 2004)

—— 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) Yale JL Feminism

—— 'The Vulnerable Subject and the Responsive State' (2011) 60 Emory LJ

—— 'What Vulnerability Theory Is and Is Not' (2021) <https://scholarblogs.emory.edu/vulnerability/2021/02/01/is-and-is-not/#:~:text=Prospects%20of%20Applying%20Vulnerability%20Theory&text=Vulnerability%20theory%20recognizes%20that%20the,sexuality%2C%20disability%2C%20and%20class.> accessed 1 February 2021

Firestone S, *The Dialectic of Sex: The Case for Feminist Revolution* (Quill, William Morrow 1970)

Fisher R, Ury W and Patton B, *Getting to Yes: Negotiating an agreement without giving in* (Random House 2012)

Fletcher M, Maré DC and Maloney T, 'The Economic Consequences of Marital Separation for Parents in New Zealand: Insights from a Large Administrative Dataset' (2020) IJL, Policy and the Family

Fox Harding LM, '"Parental responsibility": the reassertion of private patriarchy?' in Silva EB (ed), *Good Enough Mothering? Feminist Perspectives on lone motherhood* (Routledge 1996)

Fraser N, 'Social Justice in the Age of Identity Politics: Redistribution, recognition, and participation' (April 30-May 2 1996) The Tanner Lectures on Human Values: Delivered at Stanford University (1996)

—— 'Rethinking Recognition' (2000) 3 New Left Review 107

Fredman S, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008)

—— *Discrimination Law* (2nd edn, OUP 2011)

Freeman M, 'Are There Collective Human Rights' in Jones P (ed), *Group Rights* (Ashgate 2009)

Fukuda-Parr S, Lawson-Remer T and Randolph S, *Fulfilling Social and Economic Rights* (OUP 2015)

Galston W, 'A Liberal-Democratic Case for the Two Parent Family' (1990-91) 1 The Responsible Community

Geertz C, '"From the Native's Point of View": On the Nature of Anthropological Understanding' (1974) 28 Bulletin of the American Academy of Arts and Sciences

Gerstle G, 'The Rise and Fall(?) of America's neoliberal order' (2018) 28 Transactions of the Royal Historical Society 241

Gilbert N and others, 'Computational Modelling of Public Policy: Reflections on Practice' (2018) 21 Journal of Artificial Societies and Social Simulation 14

Gingerbread, 'About Gingerbread' (2017) <https://www.gingerbread.org.uk/what-we-do/about-gingerbread/> accessed 14/04/2022

—— 'Soaring inflation spells summer struggles for single parent families' (2023) <https://www.gingerbread.org.uk/our-work/news-and-views/soaring-inflation-spells-summer-struggles-for-single-parent-families/#_ftn2> accessed 27/09/2023

Glennon L, 'The limitations of equality discourses on the contours of intimate obligations' in Wallbank J, Choudhry S and Herring J (eds), *Rights, Gender and Family Law* (Routledge 2010)

Golombok S, *We are family: the modern transformation of parents and children* (1st US edn, PublicAffairs 2020)

Gould C, 'Group Rights and Social Ontology' in Sistare C, May L and Francis L (eds), *Groups and Group Rights* (UP of Kansas 2001)

—— 'Group rights and Social Ontology' in Jones P (ed), *Group Rights* (Ashgate 2009)

Harris-Short S, 'Making and Breaking Family Life: Adoption, the State, and Human Rights' (2008) 35 JLS 28

Hasselbacher L, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimums of Protection' (2010) 8 Northwestern JIHR

Herring J, 'Making family law less sexy ... and more careful' in Leckey R (ed), *After Legal Equality* (Routledge 2014)

—— 'Relational autonomy and family law' SpringerBriefs in Law, (Springer, 2014)

—— 'The Disability Critique of Care' (2014) 2 Elder Law Review

—— *Vulnerable Adults and the Law* (OUP 2016)

—— *Law and the Relational Self* (CUP 2020)

HRC, 'Membership of the Human Rights Council' <https://www.ohchr.org/en/hr-bodies/hrc/membership> accessed 28/03/2023

HRMI, 'Human Rights Measurement Initiative' (*Human Rights Measurement Initiative*, <https://humanrightsmeasurement.org/> accessed 06/12/2023

Humphrey JP, *Human Rights & the United Nations: A Great Adventure* (Dobbs Ferry 1984)

Humphrey J, Hobbins A and Piatti L, *On the Edge of Greatness: The Diaries of John Humphrey, First Director of the United Nations Division of Human Rights* (McGill University Libraries 1994)

Hyman P, *Hopes Dashed? The Economics of Gender and Inequality* (Bridget Williams Books 2017)

Ignatieff M, 'Introduction: American Exceptionalism and Human Rights' in Ignatieff M (ed), *American Exceptionalism and Human Rights* (Princeton UP 2005)

Ikeda D, 'Ethos of Symbiosis: a speech delivered to the Chinese Academy of Social Sciences, Beijing' (October 1992)

Jackson M, 'Whakapapa and the beginning of law' (2023) 'The Power in Our Truth', a Conference Inspired by the Work of Moana Jackson (Te Wānanga o Raukawa 2023)

Jordal M, Wijewardena K and Olsson P, 'Unmarried women's ways of facing single motherhood in Sri Lanka – a qualitative interview study' (2013) 13 BMC Women's Health

Kaganas F, 'Child protection, gender and rights' in Wallbank J, Choudhry S and Herring J (eds), *Rights, Gender and Family Law* (Routledge 2010)

Kittay EF, *Love's Labor: Essays on Women, Equality, and Dependency* (Routledge 1999)

Kohn NA, 'Vulnerablity Theory and the Role of Government' (2014) 24 Yale JL Feminism 1

KUMFA, 'About KUMFA' <https://kumfa.or.kr/#> accessed 28/07/2022

—— 'The Reality of Unwed Mothers in South Korea' <https://kumfa.or.kr/realityofkumfa/> accessed 28/7/2022

Krassoi Peach E and Cording J, *Multiple disadvantage among sole parents in New Zealand* (Social Policy and Evaluation Research Unit 2018)

Lammasniemi L, 'The Benefit Cap and the Complexity of Discrimination: R (SG and others) v Secretary of State for Work and Pensions' (2016) 24 Feminist Legal Studies 215

——, 'The benefit cap and the infliction of poverty' (2019) 41 Journal of Social Welfare and Family Law 368

Landes E and Posner RA, 'The Economics of the Baby Shortage' (1978) 7 JL Studies 323

Lawless J, 'Agency in Social Context' (2017) 94 Res Philosophica 471

Lee M and others, *How to Improve Government Welfare Services for Low-Income Unwed Mothers in Korea* (Korean Women's Development Institute, 2010)

Levitt SD and Dubner SJ, *Superfreakonomics: Global cooling, patriotic prostitutes and why suicide bombers should buy life insurance* (Penguin 2009)

MacCallum F and Golombok S, 'Children Raised in Fatherless Families from Infancy: A Follow-up of Children of Lesbians and Single Heterosexual Mothers at Early Adolescence' (2004) 45 Journal of Child Psychology and Psychiatry

Mackenzie C, 'Feminist innovation in philosophy: Relational autonomy and social justice' (2019) 72 Women's Studies International Forum 144

Maclean M and Eekelaar J, 'Child Support: The British Solution' (1993) 7 IJLF 205

Mani A and others, 'Poverty Impedes Cognitive Function' (2013) 341 Science (American Association for the Advancement of Science) 976

Marks S, 'Human Rights and Root Causes' (2011) 74 MLR 57

Marriott L, 'Unpaid tax and overpaid welfare: a comparison of the debt recovery approaches in New Zealand' (2014) 20 NZ Journal of Taxation Law and Policy 46

Martinez E and Davis AY, 'A discussion with Angela Y Davis and Elizabeth Martínez' (*Centre for Cultural Studies, University of California Santa Cruz,* 1993) <https://culturalstudies.ucsc.edu/inscriptions/volume-7/angela-y-davis-elizabeth-martinez/> accessed 2/12/2021

Mather L, 'Law and Society' The Oxford Handbook of Political Science (OUP 2013)

McDonald L, 'Can Collective and Individual Rights Coexist?' in Jones P (ed), *Group Rights* (Ashgate 2009)

McIntosh M, 'Social anxieties about lone motherhood and ideologies of the family: Two sides of the same coin' in Silva EB (ed), *Good Enough Mothering? Feminist perspectives on lone motherhood* (Routledge 1996)

McLanahan S, 'Strengthening Fragile Families' (2010) Policy Brief: The Future of Children

Mikaere A, 'Seeing human rights through Māori eyes' (2007) 8 NZ Yearbook of NZ Jurisprudence

—— *Colonising Myths: Māori Realities – He Rukuruku Whakaaro* (Huia 2011)

Milroy S, 'Domestic Violence: Legal Representation of Maori Women' (1994)

Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare, *Puao-te-ata-tu (Day break): The report of the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare* (September 1988)

Moyo ON and Kawewe SM, 'Lone Motherhood in Zimbabwe: The Socioeconomic Conditions of Lone Parents and Their Children' (2009) 24 Social Work in Public Health 161

Muralidhar S, 'Judicial Enforcement of Economic and Social Rights: The Indian Scenario' in Coomans F (ed), *Justiciability of Economic, and Social Rights: Experiences from Domestic Systems* (Intersentia 2006)

Ndeunyema N, *Re-invigorating ubuntu through water: A human right to water under the Namibian Constitution* (Pretoria ULP 2021)

Neal M, '‘Not Gods but Animals’’: Human dignity and vulnerable subjecthood' (2012) 33 Liverpool Law Review 177

Nedelsky J, *Law's Relations* (OUP 2011)

Nelson JA, 'The Study of Choice or the Study of Provisioning? Gender and the Definition of Economics' in Ferber MA and Nelson JA (eds), *Beyond Economic Man: Feminist Theory and Economics* (University of Chicago Press 1993)

Nomani AQ, 'She Shouldn't Be Stoned to Death. None of Us Should' The Washington Post <https://www.washingtonpost.com/archive/opinions/2003/06/01/she-shouldnt-be-stoned-to-death-none-of-us-should/01e0315d-e2b8-431c-b02d-04f64ce431a7/> accessed 17/02/2022

Nozick R, *Anarchy, State, and Utopia* (Basic Books 2013)

Nussbaum MC, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard UP 2006)

Nussbaum M and Sen A, 'Introduction' in Nussbaum M and Sen A (eds), *The Quality of Life* (Clarendon Press 1993)

Obinger H and Schmitt C, 'Guns and Butter? Regime Competition and the Welfare State during the Cold War' (2011) 63 World Politics 246

Odello M and Seatzu F, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Routledge 2013)

Odimegwu CO, Mutanda N and Mbanefo CM, 'Correlates of Single Motherhood in Four Sub-Saharan African Countries' (2017) 48 Journal of Comparative Family Studies 313

OECD, 'OECD Family Database' <https://www.oecd.org/els/family/database.htm> accessed 3/11/21

—— 'Doing Better for Families' (OECD, 2011) <https://www.oecd-ilibrary.org/social-issues-migration-health/doing-better-for-families_9789264098732-en> accessed 3/11/21

OHCHR, 'Special Procedures of the Human Rights Council' <https://www.ohchr.org/en/special-procedures-human-rights-council/special-procedures-human-rights-council> accessed 24/03/2023

—— 'Status of Ratification Interactive Dashboard' <https://indicators.ohchr.org/> accessed 31/03/2020

—— 'Universal Human Rights Index' <https://uhri.ohchr.org/en/search-human-rights-recommendations?mechanisms=0c43227f-61e1-48f9-878d-5af39566249b&searchText=Art.+10&mechanismsOpened=0c43227f-61e1-48f9-878d-5af39566249b> accessed 08/03/2024

—— 'Activities: Independent Expert on sexual orientation and gender identity' (2022) <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/activities> accessed 24/04/2022

Okin SM, *Justice, Gender and the Family* (Basic Books 1989)

—— '“Mistresses of Their Own Destiny”: Group Rights, Gender, and Realistic Rights of Exit' in Jones P (ed), *Group Rights* (Ashgate 2009)

Oppenheim M, 'Saudi women abandon their babies on the street if they give birth while unmarried' The Independent <https://www.businessinsider.com/saudi-women-abandon-babies-on-street-if-they-give-birth-unmarried-2019-4?r=AU&IR=T> accessed 15/04/2019

Patmore C, *The Angel in the House* (John W Parker 1854-1856)

Pearsall J (ed), *The Concise Oxford English Dictionary* (10th edn, revised, OUP 2002)

Pogge T, 'The Role of International Law in Reducing Massive Poverty' in Besson S and Tasioulas J (eds), *The Philosophy of International Law* (OUP 2010)

Posner RA, 'The Regulation of the Market in Adoption' (1987) 67 Boston ULRev 59

Pryor J, *Stepfamilies: A Global Perspective on Research, Policy, and Practice* (Routledge 2014)

Qvortrup J, 'Are Children Human Beings or Human Becomings? A Critical Assessment of Outcome Thinking' (2009) 117 Rivista Internazionale di Scienze Sociali 631

Rabindrakumar S, *Direct Pay child maintenance: innovation or failure?* (Gingerbread 2019)

Rawls J, *A Theory of Justice* (Revised edn, Harvard UP 1999)

Rawls J and Kelly EI, *Justice as Fairness: A Restatement* (Harvard UP 2001)

Réaume D, 'Individuals, Group, and Right to Public Goods' in Jones P (ed), *Group Rights* (2009)

Reece H, 'Book Review: Caring and the Law' (2014) 23 Social & Legal Studies 278

Relis T, 'Human Rights and Southern Realities' (2011) 33 HRQ 509

Ridley M, *The Red Queen: Sex and the Evolution of Human Nature* (Penguin Press Science 1994)

Rittel HWJ and Webber MM, 'Dilemmas in a General Theory of Planning' (1973) 4 Policy Sciences 155

Rodley N, 'International Human Rights Law' in Evans MD (ed), *International Law* (4 edn, OUP 2014)

Roth H, 'Parnell, Samuel Duncan' in *Dictionary of New Zealand Biography* (1990) https://teara.govt.nz/en/biographies/1p7/parnell-samuel-duncan accessed 17/2/2022

Rousou E and others, 'Single mothers' self-assessment of health: a systematic exploration of the literature' (2013) 60 International Nursing Review 425

Ruddick S, 'Care as Labor and Relationship' in Haflon MS and Haber JC (eds), *Norms and Values: Essays on the Work of Virginia Held* (Rowman & Littlefield 1998)

Ruru J, 'Kua tutū te puehu, kia mau: Māori aspirations and family law policy' in Henaghan M and others (eds), *Family Law in New Zealand* (15 edn, LexisNexis 2013)

Saiz I and Donald K, 'Tackling inequality through the Sustainable Development Goals: human rights in practice' (2017) 21 IJHR 1029

Saul B, Kinley D and Mowbray J, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (OUP 2014)

Schabas WA, 'Introductory essay: the drafting and significance of the Universal Declaration of Human Rights' in Schabas WA (ed), *The Universal Declaration of Human Rights: The travaux préparatoires*, vol 1 (CUP 2013)

Schneider DM, 'What Kinship is all about' in Parkin R and Stone L (eds), *Kinship and Family: An Anthropological Reader* (Blackwell Publishing 2004)

Schoon I and others, *Intergenerational transmission of worklessness: Evidence from the Millennium Cohort and the Longitudinal Study of Young People In England: Research Report DFE-RR234* (Dept for Education 2012)

Scruton R, *The Meaning of Conservatism* (3rd edn, Palgrave Macmillan 2001)

Semuels A, 'Japan Is No Place for Single Mothers' *The Atlantic* (7 September 2017) <https://www.theatlantic.com/business/archive/2017/09/japan-is-no-place-for-single-mothers/538743/> accessed 7/9/2017

Sen A, 'Capability and Well-Being' in Nussbaum M and Sen A (eds), *The Quality of Life* (Clarendon Press 1993)

—— *Poverty and Famines: An Essay on Entitlements and Deprivation* (Clarendon Press 1981)

—— *Development as Freedom* (2nd edn, OUP 2001)

Shah AK and others, 'Money in the Mental Lives of the Poor' (2018) 36 Social Cognition 4

Shaw MN, *International Law* (8th edn, CUP 2017)

Shelton D, 'International Law and "Relative Normativity"' in Evans MD (ed), *International Law* (4th edn, OUP 2014)

Siegel DJ, 'Toward an interpersonal neurobiology of the developing mind: Attachment relationships, "mindsight," and neural integration' (2001) 22 Infant Mental Health Journal 67

Sistare C, 'General Introduction: Groups, Selves, and the State' in Sistare C, May L and Francis L (eds), *Groups and Group Rights* (UP of Kansas 2001)

Skinner C and others, 'Child Maintenance and Social Security Interactions: the Poverty Reduction Effects in Model Lone Parent Families across Four Countries' (2017) 46 JSP 495

Skogly S, 'The Requirement of Using the Maximum Available Resources for Human Rights Realisation: A Question of Quality as Well as Quantity?' (2012) 12 HRLRev 393

So R, 'Poverty among single mothers in South Korea' (*The Borgen Project,* 2022) <https://borgenproject.org/single-mothers-in-south-korea/> accessed 18 May 2022

Somerville M, 'Children's Human Rights to Natural Biological Origins and Family Structure' (2010) 1 IJ Jurisprudence of the Family 35

Ssenyonjo M, *Economic, Social and Cultural Rights in International Law* (Hart 2009)

Stats NZ, 'Wellbeing outcomes worse for sole parents' <https://www.stats.govt.nz/news/wellbeing-outcomes-worse-for-sole-parents> accessed 14 September 2020

Steiner HJ, Alston P and Goodman R, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (3rd edn, OUP 2008)

Sun P, 'Pengchun Chang's Contributions to the Drafting of the UDHR' (2016) 5 Journal of Civil & Legal Sciences

Sunstein CR, 'American Exceptionalism and Human Rights' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton UP 2005)

Te Puni Kōkiri, 'Whānau Ora' (*Te Puni Kōkiri, Ministry of Māori Development,* <https://www.tpk.govt.nz/en/nga-putea-me-nga-ratonga/whanau-ora> accessed 9 April 2017

Teichman J, *Illegitimacy: A Philosophical Examination* (Basil Blackwell 1982)

Thirlway H, 'The Sources of International Law' in Evans MD (ed), *International Law* (4th edn, OUP 2014)

Trilsch M, 'What's the use of socio-economic rights in a constitution? - Taking a look at the South African experience' (2009) 42 Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America 552

Turpel ME, 'Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences' (1989) 6 Canadian HR YB 3

UN Women, *Progress of the World's Women 2015-2016: Transforming Economies, Realizing Rights* (UN 2015)

UNICEF, *Child Protection Systems Strengthening: Approach, Benchmarks, Interventions*, 2021)

Vincent A, 'Can Groups be Persons?' in Jones P (ed), *Group Rights* (Ashgate 2009)

Vuckovic Sahovic N, Doek JA and Zermatten J, *The Rights of the Child in International Law* (Stampfli 2012)

Waitangi Tribunal, *The Muriwhenua Land Report* (GP Publications 1997)

—— *He Pāharakeke, he Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (WAI 2915, Waitangi Tribunal 2021)

Walls NE and others, 'Transfeminine Spectrum Parenting: Evidence from the National Transgender Discrimination Survey' (2019) 43 Social Work Research 133

Wang V, 'For China's Single Mothers, a Road to Recognition Paved with False Starts' *The New York Times* (31/05/2021) <https://www.nytimes.com/2021/05/31/world/asia/china-mothers-children-birth.html> accessed 17/2/2022

Waring, *Three masquerades: essays on equality, work and hu(man) rights* (Auckland UP: Bridget Williams Books 1996)

Welfare Expert Advisory Group, *Whakamana Tāngata: Restoring dignity to social security in New Zealand* (2019)

Wells K, *Childhood in a Global Perspective* (3 edn, Polity 2021)

Wenar L, 'Rights' *Stanford Encyclopedia of Philosophy* (2023) < https://plato.stanford.edu/archives/spr2023/entries/rights/> accessed 11/05/2023

West R, 'The Right to Care' in Kittay EF and Feder E (eds), *The Subject of Care: Feminist Perspectives on Dependency* (Rowman & Littlefield 2002)

Willett, C, Anderson, E and Meyers, D, 'Feminist Perspectives on the Self' *Stanford Encyclopedia of Philosophy* (Spring edn, 2020) <https://plato.stanford.edu/archives/spr2020/entries/feminism-self/> accessed 13/07/2020

Williams T and others, *Care and protection of tamariki Māori in the family court system* (Te Arotahi, 2019)

Young K, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 Yale JIL 113

Yourow HC, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (1987) 3 Connecticut JIL 111

Zeanah CH and others, 'Sensitive Periods' (2011) 76 Monographs of the Society for Research in Child Development 147