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The Future of Social and Economic Rights

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1. Social and Economic Rights: From Past to Present

In a recent collection on the human rights impact of the global financial crisis (as) of 2008, social and economic (henceforth SE) rights are described as being 'at a critical juncture'[1]. On one hand, the past decade or so has seen an impressive rise in their presence both in domestic and international jurisprudence and in political discourse, so much so that they can now be considered to have drawn even with, if not passed by civil and political (CP) rights as the dominant global human rights concern.[2] On the other hand, the succession of financial and general economic crises since 2008 have afflicted countries of the global North as much as of the global South and have not only resulted in a dramatic rise in the violation of economic and social rights,[3] but also in some puzzlement about their viability in times of crisis.[4] What is

* This chapter is based on social rights-related work that spans a period of ten years, three countries (Brazil, the United Kingdom, and Germany), two hemispheres (global South and global North) and several professional transitions and reinventions. Along this stretch I have had the privilege of interlocution and inspiration from many colleagues and fellow human rights travellers, among them Philip Alston, Bethania Assy, Fernando Bentes, Marcia Nina Bernardes, Daniel Brinks, Leonardo Castilho, Basak Çali, Christine Chinkin, Philipp Dann, Mac Darrow, Sakiko-Fukuda-Parr, Luis Eslava, Varun Gauri, Conor Gearty, Siri Gloppen, Françoise Hampson, Stephen Humphreys, Nico Krisch, Malcolm Langford, Fabio Carvalho Leite, Susan Marks, Frédéric Mégret, Carolina de Camos Melo, Yoriko Otomo, Antonio Ilê Pele, Michael Riegner, Julie Ringelheim, Wojciech Sadurski, Margot Salomon, Magdalena Sepúlveda Carmona, Ralph Wilde, Alicia Yamin, and, of course and always, Andrea Ribeiro Hoffmann. Nehal Bhuta has been much more than this volume's editor and Academy convenor, and has enabled this whole endeavour, Anny Bremner has been, needless to say for those who know her, simply indispensable. I am deeply grateful to the above for their time at different moments, though remain, of course, fully and entirely responsible for what I have made of it in this text.

[1] Nolan, 'Introduction', in A. Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014); see also Rodríguez-Garavito and McAdams, 'A Human Rights Crisis? Unpacking the Debate on the Future of the Human Rights Field', *SSRN* (2016) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2919703&download=yes (last visited 20 January 2020).

[2] See L. Minkler, *The State of Economic and Social Human Rights: A Global Overview* (2013); K.G. Young, *Constituting Economic and Social Rights* (2012).

[3] See Bhuta, Ticktin, and Fukuda Parr, 'Human Rights and the Global Economy', 79 *Social Research* (2012) 785; and Salomon, 'Of Austerity, Human Rights and International Institutions', 21 *European Law Journal* (2015) 521; and Nolan, *supra* note 1; O'Cinneide, 'Austerity and the faded dream of a 'social Europe'' in Aoife Nolan (ed.), *Economic and Social Rights after the Global Financial Crisis* (2014), 169; Harrison and Stephenson, 'Assessing the Impact of the Public Spending Cuts: Taking Human Rights and Equality Seriously' in A. Nolan, R. O'Connell, and C. Harvey, *Human Rights and Public Finance* (2013) 219; O'Connell, 'Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity' in A. Nolan, R. O'Connell, and C. Harvey, *Human Rights and Public Finance* (2013) 59.

[4] See Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis', 1 *Journal of Human Rights Practice* (2009) 277; and Nolan, 'Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis', 4 *European Human Rights Law Review (2015)* 358; Balakrishnan, Heintz, and Elson, 'Economic

clear, however, is that SE rights are very much (back) on the agenda, with more and more people and institutions using them to frame the complex policy issues that beset (late-)modern welfare states in a globalized world. This is a far cry from as late as the mid-2000s, when prominent members of the international human rights community would still relativize references to SE rights by prefacing them with a sceptical 'so called'.[5] Since then, both their legal fabric has hardened and their political salience has become more compelling, so that their erstwhile classification as merely programmatic second-generation (aka second-class) rights has largely been rendered anachronistic. The previously intractable debate about the justiciability of SE rights, premised, as it was, on a fundamental scepticism about the subordination of social and economic policy to the logic of legally enforceable rights, has now given way to a more creative reflection on ever more fine-tuned techniques for measuring and monitoring compliance.[6]

This ascendancy has been driven, arguably, by developments in what will here be termed frontier regions of the economic and social rights map. One of these lies in the realm of domestic fundamental rights jurisprudence, where, in the past two decades or so, and mostly, but by no means only, in transition countries of the global South, there has been an explosive increase in the rights-driven judicialization of social (and to a lesser extent economic) policy. The main protagonist of this transformation have been domestic judiciaries, who gradually discarded their earlier reticence to directly intervene in the policy process and, instead, began holding constitutional SE rights to be not only directly justiciable, but also as often overriding the administrative legal precepts by which such areas as public health or education are regulated.[7] This judicial turn to a rights-oriented review of public policy was, in turn, triggered by a shift in civil society militancy away from constitution-making and legislative lobbying and towards the courts as the primary agents of policy and rights enforcement. Yet, as will be seen, after about two decades of this domestic rights revolution of sorts, the overall outcome is ambivalent, for it has not only generated significant undesired side-effects, but also considerable backlash from public authorities.[8]

Crises and Human Rights ?' in R. Balakrishnan, J. Heintz, and D. Elson, *Rethinking Economic Policy for Social Justice: The Radical Potential of Human Rights* (2016) 122.

[5] See Neier, 'Social and Economic Rights: A Critique', 13 *Human Rights Brief* (2006) 1.

[6] See the now classical debate between Kenneth Roth and Leonard Rubinstein: Roth, 'Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization' 26 *Human Rights Quarterly* (2004) 63; and Rubenstein, 'How International Human Rights Organizations Can Advance Economic, Social and Cultural Rights: A Response to Kenneth Roth' 26 *Human Rights Quarterly* (2004) 845; as well as Nolan, Porter, and Langford 'The justiciability of social and economic rights : an updated appraisal' (2007) *New York University School - Center for Human Rights and Global Justice Law Working Paper* available at http://www.socialrights.ca/Publications/porter_the_justiciabiliyt_of_social_and_economic_rights%20copy.pdf (last visited 20 January 2020); and Fukuda-Parr, Lawson-Remer and Randolph, 'Measuring the Progressive Realization of Human Rights Obligations: An Index of Economic and Social Rights Fulfilment', (2008); and Langford and Fukuda-Parr, 'The Turn to Metrics', 30 *Nordic Journal of Human Rights* (2012) 222; see also Philip Alston and Gillespie, 'Global Human Rights Monitoring, New Technologies, and the Politics of Information', *European Journal of International Law* 23, (2012), pp. 1089-1123, doi: 10.1093/ejil/chs073.

[7] See R. Gargarella, P. Domingo and T. Roux, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (2006); and V. Gauri and D. M. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (2008); Gauri and Brinks, 'The Impact of Legal Strategies for Claiming Social and Economic Human Rights' in Thomas Pogge (ed.) *Freedom from Poverty as a Human Right Theory and Politics* (2010) ?; M. Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008); and A. E. Yamin and S. Gloppen, *Litigating Health Rights: Can Courts Bring More Justice to Health?* (2011); Gloppen, 'Public Interest Litigation, Social Rights, and Social Policy' in in Anis A. Dani and Arjan de Haan (eds.), *Inclusive States. Social Policy and Structural Inequalities* (2008) 343; and Yusuf, 'The Rise of Judicially Enforced Economic, Social, and Cultural Rights-Refocusing Perspectives', 10 *Seattle Journal for Social Justice* (2012) 3; and L. Haglund and R. Stryker, *Closing the Rights Gap: From Human Rights to Social Transformation* (2015).

[8] See, generally, Gloppen, 'Public Interest Litigation, Social Rights and Social Policy', in A.A. Dani and A. de Haan, *Inclusive States: Social Policy and Structural Inequalities. New Frontiers of Social Policy* (2008) 343, at 353; see also the

The other main frontier region of SE rights is international and lies in the realm of multilateral development cooperation and economic policy coordination. It emerged, arguably, from two sets of developments, notably the gradual diffusion of SE rights into various international and regional human rights instruments, and the specific mainstreaming of human rights into both bi- and multilateral development cooperation. The most recent step in this process has been the much lobbied-for adoption of the Optional Protocol of the International Covenant of Economic, Social, and Cultural Rights (OP-CESCR), the initial significance of which lies not so much in the empowerment of the UN Committee on Economic, Social, and Cultural Rights (CESCR) to adjudicate individual complaints –of which, so far, only very few have reached the Committee on account of the as yet small number of signatories of the Protocol[9]- but in the general recognition, at the international level, of the justiciability of SE rights. It has also provided additional weight to the Committee's role as an authoritative interpreter of international obligations in the realm of SE rights and has strengthened its part in the Universal Periodic Review (UPR) process within the charter-based Human Rights Council system.

The second development goes back to the late 1990s when the UN launched its human rights mainstreaming agenda which, from the beginning, focused on the UN's development cooperation activities and which resulted in the emergence of the concept of the rights-based approach to development (RBD) that, in turn, has spread into virtually all multi- and bilateral development cooperation programs. Although RBD places no a priori emphasis on SE rights, the focus, inherent in development cooperation, on issues of social and economic policy has meant that the SE rights component of RBD has always been prominent. A further step in this mainstreaming agenda has been what could be termed a turn to (domestic) policy in (international) human rights. It is apparent, for instance, in recent efforts to elaborate detailed manuals, such as the UN Guiding Principles on Human Rights and Extreme Poverty,[10] that are directed at domestic policy-makers and administrators and aim to inform policy design and implementation at the intra-state level. Again, it is issues of social and economic policy that are at the forefront of this type of intervention, and with it comes a natural emphasis of SE rights. Likewise, the Committee's adoption of indicator-guided monitoring by means of the Indicators, Benchmarking, Scoping, Assessment (IBSA) procedure reinforces the trend towards ever more detailed measuring and reporting requirements on part of the duty bearers of SE rights.[11] In a parallel setting, the extensive work to mainstream human rights into the implementation of the Millennium Development Goals (MDGs) has also led to the increased visibility of SE rights, a process that is bound to continue with the Sustainability Development Goals (SDGs) that have since replaced the MDGs.[12]

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account in Hoffmann and Bentes, 'Accountability for Social and Economic Rights in Brazil', in Gauri and Brinks, *Courting Social Justice*, *supra* note 7, at 100.

[9] See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, GA Res. 63/117, 10 December 2008; as of time of writing, six individual complaints have been decided (four from Spain and one each from Ecuador and Italy), 16 have been declared inadmissible, 18 have been discontinued, and 144 are pending; of the 40 processed complaints, 33 come from Spain, which also accounts for approximately ninety percent of the pending cases; see *OHCHR, Statistical survey of individual complaints dealt with by the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, January 2020, available online at http://www.ohchr.org/Documents/HRBodies/CESCR/StatisticalSurvey.xls (last visited 20 January 2020).

[10] See HRC Res. 21/11, 18 October 2012.

[11] See Riedel, Giacca, Golay, 'The Development of Economic, Social, and Cultural Rights in International Law', in E. Riedel, G. Giacca, and C. Golay (eds.), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014) 3, at 25.

[12] See M. Langford, A. Sumner, and A. Sumner, *The Millennium Development Goals and Human Rights. Past, Present and Future* (2013); see also Sachs, 'From Millenium Development Goals to Sustainable Development Goals' (2012) 379 *Lancet* 2206; and Kabeer, 'Social Justice and the Millennium Development Goals: the Challenge of Intersecting Inequalities' (2014) 13 *The Equal Rights Review* 91.

In all this has led to an exponential rise in the presence and prominence of the SE rights agenda in development cooperation contexts, which, in turn, has provided a blueprint for a foray of SE rights discourse into the debate about the consequences of the financial crises that have rattled both developed and developing economies in the past fifteen years. While human rights impact assessments of both the policies of the multilateral finance institutions and of free trade agreements had been used as experimental debating chips before, it was in the wake of widespread austerity policies in some of the affected countries that SE rights were turned into primary arguments against the indiscriminate curtailment of states' legal obligations.[13]

The backdrop to this present state of affairs of SE rights is, of course, formed by several paradigmatic transformations that have been changing the world of rights holders and duty bearers since SE rights were first articulated in the Universal Declaration of Human Rights (UDHR) nearly seventy years ago. Firstly, the state, which is (still) the main duty bearer of these rights, has changed significantly over time. In its present incarnation, it is often referred to as the 'regulatory state' (in the global North) or as the 'new developmental state' (in the global South) and it differs from its earlier, post-War self in that its main role is today deemed to be as a guarantor of the functionality of (increasingly global) markets and as an absorber of intermittent market failures.[14] As a consequence, it is markets, and not the state, that generate an ever larger portion of the raw materials for social welfare and economic development, with the state merely providing necessary if limited regulatory and arbitral authority. Hence, notwithstanding its constitutional and international (legal) obligations, the contemporary state operates in a much reduced policy space that structurally curtails its capacity to directly attend to the demands brought to it by its constituents, including in the area of social and economic policy.[15]

This condition is exacerbated by a second transformation that affects the state's ability to bear its (legal) obligations, notably the fact that, increasingly, the policy issues faced by the state, as well as their solutions, lie outside of its jurisdictional and fiscal remit. The reason for this lies in the series of internationalization and transnationalization processes commonly subsumed under the label of globalization, a process which has transformed individual states from the sovereign monads of Vattelian international law into nodes within overlapping normative networks.[16] As a consequence, many of the state's fundamental tasks can only be fulfilled collectively, in conjunction with other states, intermediated by international organizations or, indeed, alongside different types of non-state actors such as corporations or civil society organizations (CSOs).

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[13] Nolan, *supra* note 1; and Salomon, *supra* note 3.

[14] See, classically, Majone, 'The Regulatory State and Its Legitimacy Problems', 22 *West European Politics* (1999) 1; and Trubek, 'Developmental States and the Legal Order: Towards a New Political Economy of Development and Law', 1075 *University of Wisconsin Legal Studies Research Paper* (2008) 1; see also Levi-Faur, 'States Making & Market Building for the Global South: The Developmental vs. the Regulatory State', 44 *Jerusalem Papers in Regulation and Governance* (2012); Alviar Garcia, 'Social Policy and the New Development State: The Case of Colombia', *IGLP Working Paper Series* (2011); and Scott, *Regulation in the Age of Governance: The Rise of the Post Regulatory State* (2004).

[15] See Hoffmann, 'Revolution or Regression: Retracing the Turn to Rights in "Law and Development"', 23 *Finnish Yearbook of International Law 2012-2013* (ed. Jarna Petman 2016) 45.

[16] This contention engages, of course, a large and diverse literature on the transformation of the state, state sovereignty, and the 'international' which cannot be reviewed here; in (international) law, relevant reflection has, inter alia, come from the Global Administrative Law (GAL) fold -see, for instance, Kingsbury, Krisch, and Stewart, 'The Emergence of Global Administrative Law' 68 *Law and Contemporary Problems* (2005) 15-, as well as from systems theoretical reflections -see Teubner and Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999; from an International Relations perspective, see, inter alia, B. Buzan, *From international to world society ? English school theory and the social structure of* globalisation; and, from a different angle, J. Bartelson, *A Genalogy of Sovereignty* (1995).

Thirdly, these developments have gone hand in hand with a general ascendancy of the rule of law as the main contemporary mode of (good) governance. Hence, as ever more aspects of national and international political life have become legalized, judicial bodies have (been) turned into core instruments in the domestic and international policy process meant to enforce the principles underlying the idea of good governance -such as accountability, transparency, participation, human rights, and legal and administrative due process- against potentially recalcitrant domestic executives and legislatures. However, while this trend to legalization and judicialization has certainly increased the overall receptivity for human rights and, in particular, for SE rights, it has also significantly tightened the legal constraints placed on governments, such as in relation to fiscal policy, and it has, thus, paradoxically raised, rather than decreased, the threshold for the fulfilment of constitutional or international legal obligations. Moreover, it has also produced a growing legitimacy crisis as judiciaries and legal experts often get the final say over policy while themselves being epistemically constrained by the particular legal horizon within which they operate. As will be seen, this tension has, for instance, been acutely present in those countries most affected by the financial crisis and the resulting austerity policies.

Fourthly and lastly, this predicament does, then, indeed, open up a crossroads for SE rights. On one hand, they are now more central than ever before to the way in which social wellbeing is conceived in domestic and international public policy. On the other hand, the material and administrative conditions for their fulfilment are much less favourable than they needed to be. What this may mean, concretely, will be explored in this chapter, which will proceed to look at each of the two frontier regions in order to then draw some tentative conclusions on the possible future(s) of SE rights.

2. A Present Beyond Justiciability: Monitoring and Measuring

A. Monitoring SE Rights: From Program to Obligations

Before advancing upon any frontier, a brief overview of the present of SE rights is called for. Beginning with their presence in domestic law, the 'Toronto Initiative for Economic and Social Rights' (TIESR) has recently suggested that of the 195 state constitutions currently in existence, over 90 percent contain at least one SE right and still over 70 percent contain at least one such right that, according to the study, qualifies as justiciable.[17] A closer look reveals a slightly more differentiated picture, with not all members of this class of rights being equally entrenched, though given their highly contested history on the international level, it remains remarkable that around 85 percent of national constitutions contain at least one of what the study considers core economic rights –notably the right to form or join a trade union, to strike, to leisure, to a fair wage, to a healthy work environment, and to (employment-related) social security[18]-, and still 80 percent contain at least one of the so called 'standard social rights', notably to healthcare, to education, to child protection, and to (general) social security; and in approximately 40 to 60 percent of jurisdictions, these two subsets of SE rights are deemed to be plainly justiciable. This selective but nonetheless strong domestic presence is, of course, the result of the coming together over a prolonged period of time of several factors, amongst them the proliferation of

[17] See Jung, Hirschl, and Rosevear, 'Economic and Social Rights in National Constitutions', 62 *American Journal of Comparative Law* (2014) 1043; see, generally, Toronto Initiative for Economic and Social Rights, available online at http://www.tiesr.org/index.html (last visited 20 January 2020); see, generally, Tourkochoriti, 'Comparative Rights Jurisprudence: An Essay on Methodologies´ (2017) *Law and Method* available at http://www.bjutijdschriften.nl/doi/10.5553/REM/.000030 (last visited 20 January 2020).

[18] Jung, Hirschl, and Rosevear *supra* note 17.

rights-oriented post-transition constitutions, an increased constitutional comparativism and, perhaps most importantly, the mentioned bottom up judicialization often driven by organized civil society – a conjunction that will be examined in greater detail further on.

On the international front, SE rights are now spread across a significant number of dedicated and general instruments, with their main anchor being, of course, the International Covenant on Economic, Social, and Cultural Rights (ICESCR). It is currently ratified by 164 state parties - and an additional six non-ratified 'mere' signatories, of which, however, one is the United States-, a ratification status nearly identical to the 168 of the International Covenant on Civil and Political Rights (ICCPR).[19] However, its long-in-the-making OP-ICESCR, which was adopted by the UN General Assembly in 2008 and has been in force since 2013, has currently only 21 state parties and a further 26 signatories, which, for the time being, significantly limits the ICESCR's direct justiciability vis-à-vis the Committee on Economic, Social, and Cultural Rights (CESCR).[20] Beyond the ICESCR system, all the instruments generally considered to be part of the 'international bill of rights', starting with the UDHR and including the ICESCR's alter-ego, the ICCPR, contain some provisions associated with SE rights.[21] The three evolved regional human rights protection systems in Europe, Africa, and the Americas contain a number of SE rights in their respective base treaties but have also adopted optional protocols or dedicated declaratory commitments thereon.[22] Three incipient human rights frameworks, notably of the Association of South-East Asian Nations (ASEAN), of the Commonwealth of Independent States (CIS), and of Arab states also feature certain SE rights, as does the European Union via the European Social Charter and the Revised European Social Charter.[23] Lastly, a

[19] See OHCH, Status of Ratification, available online at http://indicators.ohchr.org/ (last visited 20 January 2020).
[20] See *supra* note 9.
[21] See the Universal Declaration of Human Rights (Arts. 22–27), GA res. 217 A(III), 10 December 1948; the International Covenant on Civil and Political Rights (Arts. 1, 8, 22, 23, 27) 1966, 999 UNTS 171; the Convention on the Elimination of All Forms of Discrimination Against Women (Arts. 10–16) 1979, 1249 UNTS 13, (and its Optional Protocol 1999, 2131 UNTS 83); the Convention on the Elimination of All Forms of Racial Discrimination (Arts. 1–2, 5) 1965, 660 UNTS 195; the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Arts. 11, 14–15, 25–28, 30–32, 40, 43–45, 54–55, 64, 70), GA Res. 45/158, 18 December 1990; the Convention on the Rights of the Child (arts. 9, 16, 19, 24–36), GA Res. 44/25, 20 November 1989 (and also the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Arts. 1–3), GA Res. 54/263, 25 May 2000, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, GA Res. 54/263, 25 May 2000); and the Convention Relating to the Status of Refugees (Arts.17–24 and 30) 1951, 189 UNTS 137.
[22] See the African Charter on Human and Peoples' Rights and Duties ('Banjul Charter') (Arts. 2, 14–18, 20–22, 24) 1981, (1982), 21 I.L.M. 58 (see also the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (arts. 12–19), 11 July 2003, available online at: http://www.refworld.org/docid/3f4b139d4.html (last visited 20 January 2020)); the African Charter on the Rights and Welfare of the Child (Arts. 11, 14, 18) 1990, (1990) CAB/LEG/24.9/49; the Pretoria Declaration on Economic, Social and Cultural Rights, 2004, available at http://www.achpr.org/files/instruments/pretoria-declaration/achpr_instr_decla_pretoria_esc_rights_2004_eng.pdf (last visited 20 January 2020); the American Convention on Human Rights ('Pact of San Jose, Costa Rica') (Arts. 1, 6, 11, 14, 17, 21, 26), Organization of American States (OAS), 22 January 1969 (and the the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ('Protocol of San Salvador'), OAS, 16 November 1999; American Declaration on the Rights and Duties of Man (arts. V, VI, XI – XVI, XXII, XXIII), Inter-American Commission on Human Rights, 2 May 1948; and the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1951, 9 ETS.
[23] Association of Southeast Asian Nations (ASEAN) Human Rights Declaration (Arts. 13, 17, 19, 26–37), 18 November 2012; the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (Arts. 4, 13–18, 21, 26–28), 26 May 1995; the Arab Charter on Human Rights (art. 2), 15 September 1994; and the European Social Charter 1961, 35 ETS, and the Revised European Social Charter 1996, 163 ETS.

substantial number of treaties within the regime of the International Labour Organization (ILO) qualify as being concerned with the protection of SE rights.[24]

The normative density of SE rights on the international level is, hence, substantial, though justiciability and enforcement are not comparable with the domestic level. However, in aggregate, international mechanisms, including periodic reporting and complaints procedures, while not disposing of direct (domestic) effect, have continuously radiated into domestic systems by providing important interpretation aids to activists, litigants, and, not least, judiciaries, and by generally raising the consciousness of this class of rights among domestic actors.[25] In addition, the strain that domestic social policy has been put under in many countries of both the global North and South by the financial crises of the past decade has, arguably, not only bolstered their prominence in policy discourse, but also the interlinkage between domestic and international protection mechanisms.[26]

There is, hence, a thick interpretive sediment on the nature of the obligations imposed by SE rights, with the CESCR having played a leading, though by no means exclusive, role in its formation. Besides the Committee's 23 General Comments,[27] there are the Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights of 1987 and the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights of 1997 which have provided the backdrop for an ever more fine-tuned account of the nature of SE rights obligations.[28] The core passage, of course, remains Article 2(1) of the ICESCR which states that

> each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[29]

Its core terms, notably to 'undertake steps', 'maximum available resources', 'progressive realization', and 'appropriate means' have given rise to three interrelated definitional dichotomies that demarcate the current scope of SE rights obligations. The first concerns the means of implementation and, indirectly, the review timeline, and, thus, goes to the heart of the long-standing debate on (in)divisibility of SE rights in terms of justiciability and enforcement. It came up within a year of the ICESCR's entry into force (in 1976), when the International Law Commission (ILC) used Article 2(1) as an example of what, at the time, it termed an

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[24] International Labour Organization, Conventions available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12000:0::NO::: (last visited 20 January 2020); see also P. Alston (ed.), *Labour Rights as Human Rights* (2005).

[25] Riedel, Giacca, Golay *supra* note 11 at 46.

[26] Ibid., at 3.

[27] See General Comments of the Committee on Economic, Social, and Cultural Rights, available online at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11 (last visited 20 January 2020); see also Alston, 'The General Comments of the UN Committee on Economic, Social and Cultural Rights' 104 *Proceedings of the ASIL Annual Meeting* (2010) 4.

[28] See U.N. Human Rights Commission, *note verbale* dated 5 December 1986 from the Permanent Mission of the Netherlands the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ('Limburg Principles'), Annex, U.N. Doc. E/CN.4/1987/17, 8 January, 1987 (submitting the Limburg Principles on the Implementation of the International Covenant on Social, Economic and Cultural Rights); and Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January, 1997, available at wwwl.umn.edu/humanrts/instree/Maastrichtguidelines.html (last visited 20 January 2020).

[29] Art. 2(1), International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3.

'obligation of result' which it considered to imply a greater degree of discretion on part of duty bearers to choose the means of implementation than the stricter so called 'obligation of conduct'.[30] A corollary of this distinction was, of course, that the degree of scrutiny and also the review timeline differed between the two types treaty obligation, a classification that would subsequently be interpreted as underscoring a differentiated approach to the obligations imposed by the two initial rights classes.[31]

However, this interpretation of treaty obligation has long encountered opposition in the literature and by the CESCR itself, first in form of the insistence that Covenant rights contained both types of obligation,[32] then by a shift to an altogether different classificatory scheme, notably to the now prevalent 'respect, protect, fulfil' triad. Developed by the then Special Rapporteur on the Right to Food, Asbjorn Eide, in the late 1980s, it has since been adopted by a wide array of national human rights institutions and, as of General Comment 12 (1999), has become the predominant classificatory scheme of the CESCR.[33] As Malcolm Langford and Jeff King succinctly put it, the obligation to respect means to 'refrain from impeding', to protect implies to 'ensure others do not impede', and to fulfil entails to 'actually provide the conditions necessary for realizing' a particular right.[34] As such the scheme significantly expands the idea of rights as essentially negative protections against state action (as in the 'respect' obligation) by including both what has otherwise been called the horizontal effect (on third parties) of rights (the 'protect' obligation), and what used to be termed positive ('fulfil') obligations. The latter, in turn, has been subdivided into another obligations triad, namely 'to promote, to facilitate, and to provide', which serve a heuristic purpose when monitoring complex policy systems such as social security or health car/e.[35] The whole triadic SE rights analytic is, in any case, not meant to fragment obligations at the risk of rendering them less comprehensive, but, in practice, each of the three types will often be engaged to highlight different aspects of any particular obligation. However, what the triad does not concretize in and of itself is the degree and type of positive, including budgetary, action required.

This is where a second constitutive dichotomy comes in, notably between the idea of 'minimum core obligations', on one hand, and their qualification by the 'maximum available resources' clause, on the other. As of General Comment No. 3, the CESCR has worked with the idea that there is a minimum core to each Covenant right which must be guaranteed at all times in order

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[30] See International Law Commission, Report of the International Law Commission on Its Twenty Ninth Session, *Yearbook of the International Law Commission*, Vol. 2, pp. (1977) 20–21, at para. 8; see also Langford and King, 'Committee on Economic, Social, and Cultural Rights: Past Present and Future', in M. Langford *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 477, at 482; Rosga and Satterthwaite, 'The Trust in Indicators: Measuring Human Rights', *Berkley Journal of International Law (BJIL)* (2008) 253, at 254; Riedel, *supra* note 11, at 18.

[31] Although the CESCR itself did not make that point, considering the corresponding art. 2(2) of the ICCPR to also imply 'merely' obligations of result; the distinction was then adopted in the Maastricht Guidelines (art. 7), though merely as a qualification of the respect, protect, fulfil standard; it was, however, picked up -without reference to the latter standard- again in 2002 by the (then) Commission on Human Rights Independent Expert on the Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, whose report, in turn, ended up being used as additional argument to the much discussed rejoinder of the non-justiciability thesis set out by Michael Dennis and David Stewart in 'Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?', 98 *American Journal of International Law* (2004) 462; see also again Langford and King, *supra* note 30, at 483.

[32] See Alston and Quinn, 'Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', 9 *Human Rights Quarterly*, (1987), 156, at 185.

[33] See A. Eide (UN Special Rapporteur on the Right to Food), The Right to Food (Final Report) U.N. Doc. E/CN.4/Sub.2/1987/23 (1987), paras.66–69; 54; General Comment No. 12, Right to adequate food (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), para. 15.

[34] Langford and King, *supra* note 30, at 484.

[35] Riedel, Giacca, and Golay, *supra* note 11, at 19.

to avoid a breach of treaty obligations. There is general agreement that this necessarily implies the non-applicability of the 'progressive realization' criterion, i.e. that the minimum core of each right must be realized immediately. What is less clear is the degree to which the minimum core is entrenched and cannot be derogated from on any basis, including lack of resources. Initially, the CESCR had understood minimum core obligations to be, in principle, derogable on the basis of the 'maximum available resources' qualification, though in General Comments No. 13 (on education) and No. 14 (on health care) it referred to the core obligations of each right as non-derogable, relying, amongst others, on a non-derogability assumption expressed in the (earlier) Maastricht Guidelines.[36] Yet, from General Comment 15 (on the right to water) (2003) onwards, and in conjunction with its Statement on Maximum Available Resources of 2007, the CESCR has returned to its previous position on (non-)derogability.[37] Hence, the implementation of minimum core obligations must be assessed in terms of available resources on a case by case (i.e. country by country) basis, though this does not mean that the obligation to provide a basic 'survival kit' within the remit of a particular right (such as to food or drinking water) with immediate effect is thereby dispensed with.[38] Indeed, the Committee's practice firmly places the burden of proof on states to show that failure to provide the 'survival kit', even in times of armed conflict, has been literally impossible.[39]

Another debate that has arisen in the context of minimum core obligations involves two more (interrelated) dichotomies, namely between concreteness and comparability and between a substantive or a procedural approach. For on one hand, there has been a consistent demand for maximum concreteness of the standards set out by monitoring bodies such as the CESCR, yet, on the other hand, there has been equally consistent critique of one-size-fits-all approaches that appear to establish an across-the-board comparability of implementation levels. As will be discussed again further below, there has, of course, been a general trend towards human rights indicators and quantification, and, thus, comparability, but the CESCR, for one, has so far endeavoured to stir a course between the administrative preference for concreteness and comparability, and the judicial preference for case by case differentiation. Hence, while providing fairly concrete definitions of substantive standards in relation to some rights, it has, on the whole, favoured procedural review on the basis of the reasonableness principle.[40] The latter, in particular, has been held to imply that state or administrative action (on Convention implementation) has to be deliberate, concrete, and targeted, as well as non-discriminatory and non-arbitrary.[41] This further implies that duty bearers are under an obligation to choose the policy option that least restricts Covenant rights, to take into special consideration marginalized

[36] See CESCR, General Comment No. 13, UN Doc. E/C.12/1999/10,
8 December 1999; and CESCR General Comment No. 14, UN Doc E/C.12/2000/4, 11 Aug 2000; Maastricht Guidelines, *supra* note 26; and Langford and King, *supra* note 30, at 493.

[37] CESCR, General Comment No. 15, UN Doc. E/C.12/2002/11, 20 January 2003, CESCR, Statement on an Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant, UN Doc. E/C.12/2007/1, 10 May 2007; as well as Langford and King, *supra* note 30, at 493.

[38] Riedel, Giacca, and Golay, *supra* note 11, at 14.

[39] Ibid., at 14.

[40] Reasonableness is, of course, *prima facie* a common law construct though it has many close domestic siblings such as the principle of *proportionalité* in French law or of *Verhältnismäßigkeit* in German law; alongside the principle of proportionality, that, in turn, has primarily evolved in and through European Union law, it is now generally understood to be the leading standard in treaty interpretation; see Forman, 'Can Minimum Core Obligations Survive a Reasonableness Standard of Review Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ?', 47 *Ottawa Law Review,* forthcoming (2016); and Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review', 6 *Sur - Revista Internacional de Direitos Humanos* (2009) 98 at 99.

[41] See Riedel, Giacca, and Golay, *supra* note 11, at 22, referring, inter alia, to CESCR, General Comment No. 16, UN Doc. E/C.12/2005/4, 11 Aug 2005.

and disadvantaged groups and those under heightened risk.[42] Hence, while the Committee has been careful not to be seen as a policy-maker itself, the depth which its review of domestic public policy aspires to does approach that of domestic administrative tribunals (in jurisdictions where these exist) or correlate administrative (review) bodies – a fact that underlines the general 'turn to policy' on human rights that will be discussed below.

The dichotomy between immediate effect versus progressive realization has been interpreted by two further categories which stand not in a dichotomous relationship but which, instead, form what could be termed meta-categories of SE rights, namely non-discrimination and non-retrogression. The former has, arguably, become a sort of right of rights within general international and domestic rights jurisprudence.[43] Having a prima facie pedigree as a civil and political right, it was included as Article 2(2) in the ICESCR and forms, together with Article 3 on equal protection what Eibe Riedel has called 'cross-cutting and overarching principles that are to be applied in conjunction with [all Covenant] rights.'[44] It is, thus considered a right of immediate effect for the breach of which no 'lack of resources' defence will be accepted. The Committee has additionally issued two General Comments, No. 16 (2005) on equal rights and No. 20 (2009) on non-discrimination in which it provides detailed outlines of the categories specifically protected.[45] Hence, besides the conditions expressly mentioned in Article 2(2), which correspond to the group category set recognized in all principal international human rights instruments, notably race, colour, sex, language, religion, political or other opinion, national or social origin, property, and birth, the Committee also ventured into fleshing out the up to then debated 'other status' category by specifically including in it the additional categories of disability, age, nationality, marital and family status, sexual orientation and gender identity health status, place of residence, as well as the general economic and social situation.[46]

With this wide remit of explicit discrimination grounds the Committee sought to systematize its own earlier disparate practice (across different General Comments) and to attend to criticism of apparent blindspots, for instance in the area of gender equality. Needless to say, this move to spell out as many of the relevant group categories as possible has, in turn, attracted criticism for, thereby, endorsing a targeting approach to discrimination that might limit any monitoring body's sensitivity to intersectional and cross-cutting discrimination, besides running the risk of entrenching a target-centric tunnel vision to the review of potentially discriminatory state action.[47] The Committee did, in any case, make sure to include in General Comment No. 20 all modes of discrimination, including direct and indirect, formal and substantive, third-party (i.e. private), and systemic discrimination. Positive discrimination (i.e. affirmative action) is explicitly permitted though subject to the usual reasonableness test by which measures have to 'objectively' serve a legitimate purpose, be compatible with the nature of Covenant rights, be necessary in a democratic society, and be proportional in terms of their aims.[48] In light of the deep entrenchment of especially indirect and systemic forms of discrimination in most domestic policy environments across the globe, General Comment No. 2 articulates a very wide-ranging and comprehensive non-discrimination vision, though it, again, remains to be seen to what extent international monitoring and the gradual mainstreaming of its standards into domestic administrative practice are viable and effective.

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[42] See Riedel, Giacca, and Golay, *supra* note 11, at 19.
[43] See, inter alia, W. Vandehole, *Non-discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (2005).
[44] See Riedel, Giacca, and Golay, *supra* note 11, at 16.
[45] See General Comment No. 16, *supra* note 41, and CESCR, General Comment No. 20, UN Doc. E/C.12/GC/20, 2 Jul 2009.
[46] See Riedel, Giacca, and Golay, *supra* note 11, at 17.
[47] See Langford and King, *supra* note 30, at 490.
[48] See Riedel, Giacca, and Golay, *supra* note 11, at 16.

The second guiding principle is that of non-retrogression which the Committee has interpreted as of General Comment No. 3 as a corollary of 'progressive realization' and which it has spelled out in detail in General Comment No. 19 with regard to no less complex a policy field as the right to social security which the Covenant recognizes in its Article 9.[49] In the General Comment, the Committee introduces strict scrutiny for derogations of the non-retrogression principle and lays down the review criteria for such cases; hence, any retrogressive policy has to be reasonably justified, all alternative options have to be considered, affected groups have to be consulted, and there has to have been some domestic review of the (retrogressive) measures; in addition, the Committee will look at whether the measures are discriminatory and at whether the measure will have an adverse effect on the overall enjoyment of the right, whether it infringes on acquired rights, or whether it deprives any group of the minimum core content of the right.[50] Once again, the standard of review is geared to the procedural aspects of policy-making, though, as with non-discrimination, it is aimed to afford the reviewing body a deep gaze into that process. What is less clear is the precise relationship between non-retrogression and the obligation to respect, an issue that has become crucially important in the wake of austerity policies implemented during the world financial crisis – and which will be discussed later on.

How are these standards applied ? As was already mentioned, since the entry into force of the ICESCR-OP, there is now a quasi-judicial complaints mechanism comparable to the long established ones of the other main international human rights instruments of the 'international bill of rights'. It allows for individual and collective –though not directly CSO-sponsored- complaints, has jurisdiction over all Covenant rights and erects a relatively low entry barrier by qualifying admissibility with the requirement that the complainant must show to have suffered significant disadvantage from the impugned state measure.[51] The extent to which so called 'macro-issues' to do with general economic policy –such as poverty reduction strategies- can be litigated in this way was subject to considerable controversy during the drafting stage. With its already mentioned Statement on Maximum Available Resources, the Committee addressed this issue and shifted its weight onto the reporting, rather than the contentious, procedure while nonetheless laying down the procedural review criteria based on reasonableness which it would apply in assessing the adequacy of domestic policy. It remains to be seen if the OP-based complaints procedure will eventually generate enough jurisprudence to produce another layer of doctrinal sediment on top of that developed through general comments and periodic reviews. However, in the current economic and political climate, a significant expansion of the ICESCR-OP signatory group is unlikely, as is the CESCR's ability to meaningfully intervene in domestic policy-making on the basis of individual cases.

B. Measuring SE Rights: Quantifying Implementation

Perhaps the most crucial aspect of the present of SE rights, and the one, arguably, most consequential for their future, is what Malcolm Langford and Sakiko Fukuda-Parr have termed the 'turn to metrics' in human rights, connoting the proliferation of quantified measuring

[49] See, CESCR, General Comment No. 3, UN Doc. E/1991/23, annex III at 86 (1991); and CESCR General Comment No. 19, UN Doc E/C.12/GC/19, 4 Feb 2008.
[50] Ibid., para. 42.
[51] See Riedel, Giacca, and Golay, *supra* note 11, at 29; and Courtis and Rossi, 'Individual Complaints Procedure', in M. Langford, B. Porter, and R. Brown, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016) 47.

techniques and indicators for monitoring the domestic implementation of human rights.[52] It is so significant because it marks the emergence of a new quality of human rights monitoring aligned with a broader trend towards indicator-based governance that has, in turn, accompanied the mentioned rise of the regulatory (and now post-regulatory) state paradigm.[53] It is linked to such phenomena as the audit culture, the corporatization of the state, and the rise of 'expertocracy' and it represents a transformation of the meaning and source of organizational legitimacy as well as of the nature of knowledge production.[54] With regard to human rights it stands for what can be seen as a comprehensive 'turn to policy' that is characterized by a much more active role for (international) monitoring and advocacy agents and a consequently much deeper intervention into duty bearers' domestic policy process. Its broader implications will be examined in the concluding section of this chapter, at this stage the main trends in measuring SE rights shall briefly be summed up.

Traditionally, human rights monitoring and advocacy did not much take to quantification and indicators, not least on account of the law-centric episteme within which the human rights community has tended to operate and which has been characterized by the logic of adjudication, that is, the case-by-case assessment of specific facts in light of legal obligations.[55] The rendering of concrete conditions of human rights fulfilment into measurable units comparable across sectors or countries by and large fell outside the expertise of human rights professionals and, when initially attempted, tended to be received with well-warranted scepticism on account of oversimplification and potential bias.[56] However, it was, initially, in response to the quandaries arising from objectively assessing the ICESCR's 'progressive realization' obligation that the CESCR, other UN bodies, and the wider advocacy community began to look for indicators that could measure implementation beyond the subjective interpretation of duty bearers.

Yet, the 'turn to metrics' in human rights only gained real momentum in the wake of the emergence of the rights-based development paradigm in the late 1990s when quantitative measures, long used in development discourse, entered into human rights practice.[57] Since then, the CESCR itself has been a leading proponent of the mainstreaming of quantitative measuring into monitoring, so much so that, as of its General Comment No. 13 of 1999 (on education) it has read into the 'take steps' obligation of Article 2(1) an obligation to establish measures and indicators as monitoring tools.[58] This significant interpretive step is, arguably, as much owed

[52] See Langford and Fukuda-Parr, *supra* note 6.

[53] There is now an ample literature on this 'turn', see, for instance, the collections by K. Davis, A. Fisher, B. Kingsbury, and S.E. Merry, *Governance by Indicators: Global Power through Classification and Rankings* (2012); as well as T. Landman and E. Carvalho, *Measuring Human Rights* (2010), and the symposium issue edited by Caliari *et al.*, 'Bringing Human Rights to Bear in Times of Crisis: A Human Rights Analysis of Government Responses to the Economic Crisis', 30 *Nordic Journal of Human Rights* (2012) 222; see also Fukuda-Parr, `Indicators of human development and human rights – overlaps, differences...and what about the human development index ?´ 18 *Statistical Journal of the United Nations* (2001) 239; and also earlier commentary in Green, 'What we Talk when We Talk about Indicators', in 23 *Human Rights Quarterly* (2001) 1062, and more recent one in Bhuta, 'Indexes of State Failure and Fragility', in A. Cooley and J. Snyder (eds.), *Ranking the World* (2015) 85; Merry, 'Measuring the World', 52 Cu*rrent Anthropology* (2011) S83-S95; and, again, Rosga and Satterthwaite, *supra* note 30.

[54] See Merry, *supra* note 53, at S87; and Rosga and Satterthwaite, *supra* note 30, at 256

[55] Merry, *supra* note 53, at S84.

[56] The case in point here is of course, the well-known *Freedom of the World* index published since 1972 on a yearly basis by the Freedom house organization, available at https://freedomhouse.org/report/freedom-world/freedom-world-2016 (last visited 20 January 2020); see also Merry, *supra* note 53, at S87.

[57] See Merry, *supra* note 53, at S87; and Malhotra and Fasel, 'Quantitative Human Rights Indicators: A Survey of Major Initiatives', in *Expert Meeting on Human Rights Indicators, Abo Akedemi University, Turku, Finland, 10-13 March 2005* (2005), also available at http://www.gaportal.org/sites/default/files/Quantitative%20Human%20Rights%20Indicators.pdf (last visited 20 January 2020).

[58] See General Comment No. 13 and 14, *supra* note 36; and Riedel, Ciacca, and Golay, supra note 11, at 23.

to the general trend towards the objectification of human rights standards as it is to the CESCR's desire, representative of all UN treaty bodies, to reinforce both its authority and its legitimacy vis-à-vis state parties. In fact, in the years since then, the move to indicators has allowed the CESCR to re-shape its role in the monitoring and implementation process in two complementary ways; firstly, it has brought to bear the Office of the High Commissioner for Human Rights' (OHCHR) growing indicator expertise (and data set) both to its own formulation of standards (such as in General Comments and Statements), and to its proactive consultation with state parties on the construction of country-specific indicators within their reporting obligations; and secondly, it has taken to what Ann Janette Rosga and Margaret Satterthwaite have called 'monitoring of monitoring', that is, it has monitored what it previously established as the state's duty to construct and apply its own indicators.[59]

While interrelated, both activities have to be seen as articulating two distinct roles for the CESCR. The first makes it into a privileged channel for expert information on substantive indicators and on indicator construction, a proactive knowledge repository-cum-policy-consultant which seeks to guide the state's reporting process and, thus, stakes out a role well beyond the traditional evaluation of qualitative reports and the (very) occasional adjudication of individual complaints. It is a role which not only the CESCR has been seeking, but which virtually all specialized monitoring bodies as well as advocacy organizations have aspired to, which is why the past decade has seen a multiplicity of efforts to construct ever more fine-tuned indicators and indicator-based monitoring frameworks. The second role derives from a now formalized process known by its acronym as the IBSA (Indicator-Benchmarking-Scoping, Assessment) procedure in which the Committee advises (on indicators) and assesses (final reports) but, crucially, also makes proposals on benchmarking in the context of a mediated (scoping) dialogue with the state party. The IBSA process, thus, establishes *in nuce* the sort of inter-institutional cooperation procedure that is known from many domestic and international policy-making processes, except that, unlike with these procedures, the CESCR is also tasked with assessing the policy plans it has previously helped to draft, a not unproblematic bundling of distinct functions - and a point that will be returned to below.

In terms of the first role, the CESCR and other monitoring bodies can now rely on nearly twenty years of work on human rights indicators within the UN system, with organizations such as UNICEF, UNIFEM, the Commission on the Status of Women, the UN Statistical Commission, and, of course, the OHCHR all having contributed to the knowledge base.[60] In addition, many of the specialized agencies, among them UNDP, FAO, the WHO, the ILO and, of course, the World Bank have long been engaged in compiling socio-economic data and in developing specific indicator sets relevant to measuring human rights performance.[61] In 2008, the OHCHR published a *Report on Indicators for the Promotion and Monitoring of Human Rights* in which it set out its conceptual and methodological approach to indicators and drafted a set of illustrative indicators on forty eight rights contained in either of the Covenants.[62] In 2012, it topped this already comprehensive exercise up when it issued a nearly 200-page manual on *Human Rights Indicators: a Guide to Measurement and Implementation* (HRI) which it directed, significantly, not only to those domestic and international bodies directly tasked with human rights monitoring and reporting, but to virtually all policy-making agents whose remit

[59] See Rosga and Satterthwaite, *supra* note 30, at 275; they, in turn, refer to Hammarberg, 'Searching for the Truth: The Need to Monitor Human Rights with Relevant and Reliable Means', 18 *Statistical Journal of the UN Ecomomic Commission for Europe* (2001) 131, at 134.
[60] See Malhotra and Fasel, *supra* note 57, at para. 29; and Merry, supra note 53, at S87.
[61] Malhotra and Fasel, *supra* note 57, at para. 36.
[62] OHCHR, Report on Indicators for the Promotion and Monitoring of Human Rights, UN Doc. HRI/MC/2008/3, 6 June 2008.

may have any bearing on human rights implementation.[63] It is, thus, alongside such projects as the various UN Guiding Principles,[64] an instance of the mentioned 'turn to policy' in human rights monitoring which essentially seeks to address the most concrete and technical level of policy-making with a view to mainstreaming a comprehensive human rights impact assessment into virtually all domestic policy.

To that end, HRI adopts a five-pronged approach to indicator construction on any particular right. The first step consists of disaggregating specific 'attributes' of each right from the core international human rights instruments so as to render highly concrete and transparent definitions of the involved obligations. Fulfilment of these is then measured in relation to three distinct aspects of implementation, namely general commitment, specific effort, and overall results. These translate into three indicators which, following the then UN Special Rapporteur on Health Paul Hunt's 2003 classification, are termed structural, process, and outcome indicators.[65] The first include the basic elements necessary for the implementation of a right, such as the relevant international commitment (aka ratification of human rights treaties), as well as the fundamental structures, such as those associated with a functioning rule of law, required for its enforcement. Process indicators then measure the specific effort undertaken by a state in terms of the realization of a particular right, such as budgetary allocation, legislative or administrative action, or judicial processes that are related to compliance with the individual obligations attributable to the right. Lastly, outcome indicators purport to measure the objective level of realization of a right by aggregating the relevant socio-economic data. The fifth element of indicator construction is made up of what HRI terms 'cross-cutting human rights norms' through which the three indicator sets are meant to be further disaggregated. Unsurprisingly, it includes the meta-right of non-discrimination as well as the three core good governance principles of participation, accountability, and effectiveness.[66]

With this conceptual scheme in place, the HRI report goes on to provide detailed guidance on all aspects of indicator-based monitoring, from the compilation and interpretation of statistical data to the setting up of monitoring systems. The paradigm that emerges is not just one in which, aspirationally, domestic administrators would continuously self-assess policy-making by means of a comprehensive and detailed human rights indicator matrix, but one in which they would also be capable of plausibly correlating process and outcome data so as to establish clear causal relationships which can, in turn, be fed back into the policy-making process. As such, the HRI report incorporates a vision which, if fully implemented, would reshape the way social policy

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[63] It states that the manual is directed to

> stakeholders engaged in identifying, collecting and using indicators to promote and monitor the implementation of human rights nationally….[that is]….national human rights institutions, the United Nations human rights system in general and the treaty bodies in particular, the State agencies responsible for reporting on the implementation of human rights treaty obligations, as well as those responsible for policymaking across different ministries, public agencies at different levels of governance, statistical agencies, development practitioners, civil society organizations and international agencies with a mandate to further the realization of human rights;

see OHCHR, Human Rights Indicators: A Guide to Measurement and Implementation, UN Doc. HR/PUB/12/5 (2012).

[64] See the *Guiding Principles on Extreme Poverty and Human Rights*, A/HRC/21/39, 27 September 2012; or the *Guiding Principles on Business and Human Rights*, A/HRC/RES/17/4, 6 July, 2011.

[65] See ECOSOC, The right of Everyone to Enjoy the Highest Attainable Standard of Physical and Mental Health - Interim report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to enjoy the highest attainable standard of physical and mental health, Mr. Paul Hunt, E/CN.4/2003/58, 13 February 2003.

[66] They are part of the so called PANTHER principles, notably (p)articipation, (a)ccountability, (n)on-discrimination, (t)ransparency, (h)uman dignity, (e)mpowerment, and (r)ule of law; see, for instance, FAO, The Right to Adequate Food in Emergency Programs (2014), available at http://www.fao.org/3/a-i4184e.pdf (last visited 20 January 2020).

is conceived and made, with the relevant rights being rendered as a quantified set of independent variables upon which all other variables would depend.

However, despite its ambitious scope, the HRI report, as the 2008 Report before it, abstains from the attempt to define a single set of universal, that is, cross-nationally applicable, indicators and, instead, merely provides illustrative indicators alongside an extensive methodology for (national) indicator construction by duty bearers. This reflects an (albeit uneasy) consensus among the treaty bodies that universal indicators are, for the time being, too difficult to construct objectively and, as such, lack legitimacy vis-à-vis states.[67] Instead, and as hinted above, the treaty bodies and the CESCR, in particular, have endorsed a paradigm in which they function as auditors of the indicator-based self-monitoring of states.

This narrowly participatory approach by the CESCR -narrow in that it is primarily about state party participation in indicator construction and benchmarking- has, however, not prevented organizations outside the remit of UN treaty monitoring from developing expert indices that transcend OHCHR's approach either by creating cross-country comparability of SE rights implementation or by fine-tuning its monitoring methodology. Indeed, there has been a surge in human rights indicator development since the late 2000s, with several indicator projects having entered the scene with the stated aim of addressing specific shortcomings of earlier efforts.[68]

Three of these are directly geared to SE rights, notably the Social Economic Rights Fulfilment Index (SERF) of 2008, the Toronto Initiative for Economic and Social Rights (TIESR) of 2010, as well as the OPERA developed by the Center for Economic and Social Rights (CESR) in 2012.[69] Each seeks to address a specific aspect of the quantification and, in the case of the first two, of the comparison of SE rights implementation. The first of these, the SERF project, emerged in the wake of the proliferation of the rights-based approach to development and in response to two fundamental challenges the latter had been facing, namely the inadequacy of the existing development indicators, most notably the widely-used Human Development Index (HDI), for accurately measuring SE rights fulfilment, and the absence of a methodology for assessing the 'progressive realization' of SE rights. As was seen above, the latter implies both obligations of conduct and result, that is, government effort and de facto rights fulfilment, and, thus, a deep analysis of both social and economic background data as well as of specific public policies. This is, in turn, deeply entangled with the problem of comparing aggregated data across countries, as the 'maximum available resource' specification tends not to be disaggregated according to state 'capacities'. Building on –and transcending- earlier efforts at addressing this predicament, notably by a version of the Cingranelli and Richards Human Rights Data Project (CIRI), and by a separate indicator developed by Magwe Kimenyi (KI),[70] the SERF index purports to overcome these challenges by compiling both conduct and result data via a set of core indicators –on food, education, health, housing, and work-, and by then measuring these against country-specific performance benchmarks, termed 'achievement possibility frontiers' (APF), which measure a state's fulfilment of its obligations as a percentage of the benchmark. Importantly, the SERF index differentiates between 'core' (low- and middle-

[67] See Riedel, Giacca, and Golay, supra note 11, at 21.

[68] While these are well known in the specialist literature, they have not yet been systematically compared; for an overview, see Langford and Fukuda-Parr, *supra* note 6.

[69] On the SERF index see Fukuda-Parr, Lawson-Remer, and Randolph, supra note 6; on the TIESR, see *supra* note 17; and on the OPERA framework see CESR at http://www.cesr.org/downloads/the.opera.framework.pdf (last visited 20 January 2020).

[70] The CIRI index is available at http://www.humanrightsdata.com/ (last visited 20 January 2020); Magwe Kimenyi at 'Economic Rights, Human Development Effort, and Institutions', in S. Hertel and L. Minkler (eds.), *Economic Rights: Conceptual, Measurement,and Policy Issues* (2007) 182.

income) and 'OECD' (high-income) states and, thus, seeks to avoid the aggregation predicament that has been marring global cross-country comparison.[71] As such SERF has provided a powerful tool for both monitoring bodies and advocacy organizations and has become a standard measure for SE rights implementation.

The TIESR index, in turn, has the more specific objective of quantifying the presence and justiciability of core SE rights in domestic constitutions. It distinguishes between plainly justiciable and aspirational (aka programmatic) SE rights, and measures their incidence across several categories, such as evolution over time, world regions, and legal systems, and, thus, provides useful data for assessing the structural variables of state obligation.[72]

Lastly, the OPERA project was developed by the CESR with a similar aim as OHCHR's HRI and CESCR's IBSA process, notably to bring together all aspects of state obligation in a single framework that would enable a comprehensive yet contextual assessment of a duty bearer's performance.[73] In particular, it seeks to combine quantitative with qualitative approaches so as to tickle out all country-specific nuances that are missed out in a purely quantitative optic. To this end it adapts the structure-process-outcomes triad into a fourfold 'outcomes', 'policy efforts', 'resources', and 'assessment' matrix in which each cell contains several measurements that are then aggregated and evaluated in conjunction. Hence, outcomes, the equivalent of results, measure fulfilment of minimum core obligations, progressive realization, and non-discrimination. Policy efforts bring together legal structures and policy efficacy as measured by the widely used AAAAQ ('availability, accessibility, acceptability, adaptability, and quality') criteria and the good governance PANTHER ('participation, accountability, non-discrimination, transparency, human dignity, empowerment, and rule of law') principles.[74] Resources calculate maximum and available resources, and the assessment then reviews the preceding three for comprehensiveness, evaluates state constraints, and finally determines state compliance.[75]

3. From Present to Future: The Domestic and the International Frontier

A. The Domestic Frontier: The Rights-based Judicialization of Social Policy

[71] See Randolph and Guyer, 'Tracking the Historical Evolution of States' Compliance with their Economic and Social Rights Obligations of Result: Insights from the Historical SERF Index' in 30 *Nordic Journal of Human Rights* (2012) 297.
[72] See *supra* note 17.
[73] See *supra* note 69.
[74] Corkery and Way, 'Integrating Quantitative and Qualitative Tools to Monitor the Obligation to Fulfil Economic, Social and Cultural Rights: the OPERA Framework', 30 *Nordic Journal of Human Rights* (2012) 324.
[75] Two further initiatives that are not exclusively geared to SE rights but that are widely referenced in rights monitoring and advocacy are the World Policy Analysis Center (WPCA) dataset and the Human Rights Measurement Framework (HRMF). The former focusses, in particular, on comparative policy analysis of obligations of conduct and, to that end, compiles a large dataset on policy approaches and their relation to particular outcomes; see the discussion of the framework in Langford and Fukuda-Parr, *supra* note 6, at 225; the HRMF, in turn, has become a widely-cited example for how rights measurement can be adapted for the specific needs of national human rights institutions (NHRI) – in this case the UK's Equality and Human Rights Commission; in its multi-step approach that brings together quantitative measurement with qualitative judgement it broadly resembles OPERA's approach and has been applied to a number of domestic policy fields to assess policy efficacy from a human rights vantage point; see Vizard, 'Evaluating Compliance Using Quantitative Methods and Indicators: Lessons from the Human Rights Measurement Framework', 30 *Nordic Journal of Human Rights* (2012) 239.

Returning now to the two frontier regions that demarcate the future of SE rights, it is fair to start with the observation that it has been the domestic front that has dominated the SE rights literature for the past twenty or so years. The reason for this is, of course, what Charles Epp notoriously termed the 'rights revolution' that has unfolded in many constitutional democracies since the 1960s.[76] It is really the convergence of two distinct and partly conflicting revolutions and, despite its evocative name, it is essentially the product of a legal evolution that has neither been planned nor been predictable in its effects, which is why its impact has been the subject of controversial debate from the very beginning. The -in a non-chronological sense- first of these (r)evolutions has been on paper, namely in form of the proliferation of entrenched rights in, broadly speaking, postcolonial constitutions in Africa and South Asia in the 1960s, post-authoritarian constitutions in Latin America in the 1980s, and post-socialist -and post-apartheid- constitutions in Central and Eastern Europe, (some of) the successor states of the former Soviet Union, and South Africa in the 1990s.[77] Although these new waves of constitutionalism were to a significant extent driven by a growing commitment to all fundamental (human) rights, SE rights have played a particularly prominent role in the post-transition constitution-drafting in Latin American, post-Soviet, and (some) African states. This contrasts with many earlier and especially Western constitutions, such as those of the United States but also, and surprisingly, of some traditional European welfare states, which make no or merely preambular or generalized mention of SE rights.[78]

Although the precise reasons for the SE 'rights creep' into new-wave constitutionalism are complex and country or at least region-specific,[79] one common motive in post-transition constitution-drafting has certainly been the hope to effect social transformation by means of entrenched constitutional commitments to core welfare standards.[80] The rise of this rights-based 'social constitutionalism'[81] has, however, and paradoxically, been as much a reaction against neoliberal public sector reform and the attendant weakening of traditional re-distributive welfare policies as it has been enabled by that very neoliberal orthodoxy's turn towards (legal) institutions, the rule of law, and, with these, a new form of (judicial) state interventionism.[82] This, in turn, has produced the preconditions for the second rights (r)evolution, notably the widespread judicialization of social policy that took off especially in middle-income democracies of the global South as of the early 2000s.[83] It is this second revolution that has

[76] C. Epp, *The rights revolution : lawyers, activists, and supreme courts in comparative perspective* (1998); and Brinks and Gauri 'The Law's Majestic Equality? The Distributive Impact of Judicializing Social and Economic Rights', 12 *Perspectives on Politics* (2014) 375.

[77] See, inter alia, Ackerman, 'The rise of world constitutionalism', 83 *Virginia Law Review* (1997) 771; and D. Bellamy and D. Castiglione (eds.) *Constitutionalism transformation; European and theoretical perspectives* (1996).

[78] The German constitution, for instance, contains no explicit -and, thus, justiciable- social right but merely recognizes, in its Art. 20(1), that the Federal Republic is a 'social federal state' (the so called *Sozialstaatsprinzip* ('principle of the social [aka welfare] state'); most of its welfare state provisions are contained in ordinary legislation, such as the *Sozialgesetzbuch* (the 'social code'); see, specifically, D. Kommers and R. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2012); and, from a broader perspective, Glendon, 'Rights in Twentieth-Century Constitutions', 59 *University of Chicago Law Review* (1992) 519; as well as, again, Jung, Hirschl, and Rosevear, *supra* note 17.

[79] See, inter alia, Law and Versteeg, 'The Evolution and Ideology of Global Constitutionalism' 99 *California Law Review* (2011)163; and Brinks and Gauri, *supra* note 76, at 376.

[80] See, inter alia, Brinks and Forbath, 'The Role of Courts and Constitutions in the New Politics of Welfare in Latin America', *Law and Development of Middle-Income Countries* (2014) 221; Gargarella, Domingo, and Roux, *supra* note 2; and Haglund and Stryker, *supra* note 7.

[81] See Angel-Cabo and Parma, 'Latin American Social Constitutionalism: Courts and Popular Participation', in H. Alviar Garcia, K. Klare, and L. Williams, *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2015); and Brinks and Gauri, *supra* note 76, at 377

[82] Kennedy, 'Law and Development Economics: Toward a New Alliance', in D. Kennedy and J. Stiglitz (eds.) *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (2013) 19.

[83] See Brinks and Gauri, *supra* note 74.

really brought SE rights out into the open during the past two decades and it has redirected much SE rights advocacy and academic interest onto the domestic front. Concretely, it has consisted of an exponential rise in individual and class-action type litigation on basic public goods such as health, education, housing, food, or water and sanitation in emerging constitutional democracies such as Argentina, Colombia, Costa Rica, Brazil, India and South Africa.[84] As a socio-legal phenomenon it has by now been documented in a number of cross-country studies and is reasonably well-understood, even if differences in legal systems and forms of judicial review still pose an inherent challenge to straightforward comparison.[85] However, there is still a vibrant and ongoing debate about why this judicialization wave has built up when and where it did, about what impact on the distribution of basic goods it has had and how that impact should be assessed, and, related to this, about the overall legitimacy and efficacy of judicial interventionism in social policy.

In terms of the root causes of judicialization, several explanations have been offered at different zoom levels. On the most general level are the structural factors mentioned above, notably the current phase in the global political economy and its turn to law and courts as a way to constrain traditional government (aka politics) in favour of (market) functional governance, and the (arguably) unintended side-effect of a greatly expanded legal opportunity structure usable and used by SE rights activists.[86] The constrained policy space of the regulatory and post-regulatory state implies, of course, a shift in the forms and locations of political conflict, with the demand for and targeted use of (SE) rights becoming a primary strategy for a progressive politics advocating social transformation.[87] Where this configuration meets the 'new developmentalism' of many governments in today's global South, domestic courts are able and increasingly willing to assume the considerable political responsibility of wide-ranging intervention into social policy. [88] Under such circumstances, judicialization is seen as a pro-majoritarian instrument against backward social structures, policy deadlocks, and ineffective bureaucracies. Together with international pressure and feedback cycles, a general climate for a 'rights revolution' is, thus, generated.[89]

At a higher resolution, this picture becomes more differentiated, with the interplay of various distinct factors being suggested in the literature. On an intermediate zoom level, it is such elements as the level of social organization,[90] the de facto level of achievement of SE rights in a given locality, the legal support structure,[91] as well as the judicial and the wider (rights) culture that are deemed to impact on the likelihood and success of the legalization of social policy.[92] The most detailed model has, arguably, been elaborated by Siri Gloppen, who, building, inter alia, on Varun Gauri and Daniel Brinks' pathbreaking earlier work, distinguishes between three aspects of analysis, namely what she terms the 'anatomy of the litigation process', the 'legal

[84] See, again, Epp, supra note 76, and these recent empirical studies: Gauri and Brinks, *supra* note 7; Yamin and Gloppen, *supra* note 7; and O. Vilhena, U. Baxi, and F. Viljoen (eds.), *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* (2003).

[85]See Jung, Hirschl, Rosevear, *supra* note 17 at 11.

[86] For the concept of 'legal opportunity structure, see Gloppen, 'Studying Courts in Context: The Role of Nonjudicial Institutional and Socio-Political Realities', in Haglund and Stryker, *supra* note 7, 291.

[87] See, classically, C. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State (1993); and Gargarella, 'Theories of Democracy, the Judiciary and Social Rights', in Gargarella, Domingo, and Roux, *supra* note 2, at 13.

[88] See Brinks and Forbath, supra note 80, as well as N. Dubash and B. Morgan, *The Rise of the Regulatory State of the South* (2013); and, again, Trubek, supra *note* 12, at 22.

[89] For such a 'spiral' model, see T. Risse, S. Ropp, and K. Sikking, *The Power of Human Rights: International Norms and Domestic Change* (1999); see also B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009).

[90] Langford, 'The Justiciability of Social Rights: From Practice to Theory', in Langford, *supra* note 7, at 9.

[91] Epp, supra note 74, at 11.

[92] See Gloppen, *supra* note 84, at 293; and Langford, *supra* note 88, at 10; and Brinks and Gauri, *supra* note 74, at 378.

opportunity structure', and the 'assessment of impact'.[93] The first of these involves constructing a detailed map of the litigation process and its consecutive elements of 'claims formation', 'adjudication', 'administrative and political response', and 'effects' and the involved actors, namely litigants, judges, politicians, and bureaucrats.[94]

This anatomical structure is brought to life by the 'legal opportunity structure' which, according to Gloppen, is determined by three elements, namely motivation (of the actors involved), barriers faced, and resources required. Motivation is actor-specific -hence, distinct for litigants as demand-side actors and judges, politicians, and bureaucrats as supply-side actors[95]- and consists of 'goals, values, norms, interests, and preferences' the realization of which, however, depend on the external factors of the 'legal opportunity structures'' resources and barriers. These include core factors such as, on the resource side, the formal basis for SE rights claims, the courts' legacy in SE rights litigation, the legal support structure, legal competence, or rights consciousness, and, on the barrier side, lack of SE rights protection, lack of standing, a formalistic legal culture, litigation costs, or the lack of amenability for 'rights talk' within the general culture, as well as penumbral factors such as the broader social, political, and cultural landscape.[96]

With this detailed map it is, in principle, possible to reconstruct a specific legalization process taking into consideration all relevant local factors and to, thus, derive non-trivial conclusions that, as a self-reflective heuristic scheme, may help improve litigation strategies and outcomes. This complex -perhaps overly complex, as Gloppen herself concedes- but highly accurate mapping exercise is complemented by other, more limited frameworks, such as one developed by (Daniel) Brinks and William Forbath, who focus on the courts' decision-making styles and construct a two-dimensional matrix with one axis ranging from activist to restrictive courts and the other from 'syllogistic' i.e. formalist deduction from the constitutional text or judicial precedent- and 'pragmatic' -i.e. policy-oriented cost-benefit analyses- forms of judicial reasoning.[97]

However, while these models are able to base themselves on a limited, if growing, number of comparative empirical studies, there is, as yet, neither sufficient empirical material at hand to construct a comprehensive global map, nor does the analysis, even on a limited empirical basis, of what Gloppen calls the 'micro-foundations of court-enforced human rights accountability and policy legalization' render a uniform-enough picture for a generalizable explanation of why and how legalization and judicialization occurs.[98] Indeed, as Gloppen and others in the as yet small field of empirical human rights studies readily acknowledge, more empirical data and a wider scholarly community is needed to fully understand the 'rights (r)evolution'. One particular difficulty is the latter's apparent limitation to constitutional democracies with a reasonably well-functioning rule of law -without which, of course, there is no judicial enforcement of SE rights-, which leaves many 'new developmental states', such as China or, arguably, Russia, off the radar even though there are appreciable social policy deficits and a

[93] See Gloppen, *supra* note 84, at 295; and Gauri and Brinks, *supra* note 7; as well as Gauri and Brinks, *supra* note 74.
[94] See, in particular, the graphic process diagrams in Gloppen, *supra* note 84, at 295.
[95] This is an earlier distinction made (amongst others) by Gauri and Brinks in (amongst others) 'The Impact of Legal Strategies for Claiming Economic and Social Rights', in Haglund and Stryker, *supra* note 7, at 98.
[96] Gloppen, *supra* note 86, at 295.
[97] Brinks and Forbath, *supra* note 80, at 239.
[98] Gloppen, *supra* note 86, at 293.

concomitant demand for the type of social accountability that rights-based litigation would provide.[99]

Yet, perhaps more important than the question of why the 'rights (r)evolution' has happened and how it works is the question of what it does to those it is, primarily, intended to help – although, exactly who that is already part of the debate. That the judicialization of social policy does have a profound impact, be it on either party of the litigation process, on the way public authorities structure social policy, on public budgets, or, indeed, on those constituencies of social policies that are not directly parties to 'rights (r)evolutionary' action, is generally not disputed. Yet, whether that impact is to be seen as positive and, hence, judicialization as progressive from a human rights perspective, or whether it generates more negatives and would, thus, have to be seen as retrogressive, is still keenly debated. Initially, this debate was structured by broader normative positions, such as on whether courts can and should occupy a central role in social policy, or not;[100] or on whether (SE) rights-based strategies complement and reinforce welfare policies or whether, instead, they either hinder a more comprehensive approach to (re-)distribution and welfare policies or are, in fact, (ab)used to cover up the very dismantling of the latter.[101] While earlier analyses where often confined to extrapolating from the patterns identified in the well-documented public interest litigation in the United Sates,[102] more recent arguments have sought to incorporate data from a much broader empirical sample.[103]

Nonetheless, measuring and assessing impact remains a protracted effort even beyond the availability of data, as the meaning of social transformation and the terms by which it is framed tend to be contested. The starting point is often the idea of social justice which, with regard to social policy (and SE rights), is commonly approached in terms of the fair and equitable distribution of income and basic goods across a society.[104] The impact of SE rights litigation, which is sometimes also termed its social outcome,[105] is, thus, generally assessed by the efficiency and fairness with which a particular basic good, such as health care, education, housing etc., is (re-)distributed by means of this type of intervention. While efficiency and fairness are diffuse and highly sector-specific criteria, the overwhelming focus in the SE rights literature has been on the effect on poverty and 'the poor', as defined either by income (more narrowly) or capabilities (more broadly).[106] This corresponds to a general shift in development discourse away from state-centric macroeconomic growth and towards individual and collective well-being. It, accordingly, identifies 'the poor' as the main constituency of

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[99] See, for instance, Randal Peerenboom, 'Human Rights in China', in R. Peerenboom, C. Petersen, and A. Chen, *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA* (2006) 413; see also Maru ´Allies Unknown: Social Accountability and Legal Empowerment´ (2010) 12 *Health and Human Rights Journal*

[100] For a general critique of judicialization see Hirschl, 'New Constitutionalism and the Judicialization of Pure Politics Worldwide, The', 75 *Fordham Law Rev.* (2006) 721.

[101] See, for instance, Alviar Garcia, 'Social Policy and the New Development State: The Case of Colombia', *Institute for Global Law and Policy, Harvard Law School, Cambridge: IGLP Working Paper Series* (2011).

[102] Classically in Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', 9 *Law and Society Review* (1974) 95.

[103] See, again, the range of studies in Gauri and Brinks, *supra* note 7; Yamin and Gloppen, *supra* note 7, and Haglund and Stryker, *supra* note 7.

[104] See, in a UN context, DESA, Social Justice in an Open World The Role of the United Nations, UN Doc. ST/ESA/305 (2006); see also Meckled-Garcia, 'Human Rights or Social Justice? Rescuing Human Rights from the Outcomes View', *UCL Department of Political Science - School Of Public Policy Working Paper Series* (2011), available online at https://www.ucl.ac.uk/spp/research/publications/downloads/SPP_WP_30_-_Saladin_Meckled-Garcia.pdf (last visited 20 January 2020).

[105] See Norheim and Gloppen, 'Litigating for Medicines: How can we Assess Impact on Health Outcomes ?', in Yamin and Gloppen, *supra* note 7, 304 at 306.

[106] See Fukuda-Parr, Lawson-Remer, and Randolph, *supra* note 6, at 8; and Fukuda-Parr and Yamin, 'The Power of Numbers: A Critical Review of MDG Targets for Human Development and Human Rights', 56 *Development* (2013) 58, at 7.

development and re-focusses development policy on poverty-reduction through pro-poor growth and good governance. The rights-based approach is the main implementation format for the latter agenda, with strategic domestic (SE) rights litigation being essentially a sub-category thereof. Most impact studies have, thus, a pro-poor focus and ultimately seek to assess the effectiveness of litigation strategies as instruments of poverty-reduction.[107]

Arguments on either side of the debate have, therefore, largely hinged on how and when impact is measured. A further caveat is that litigation has occurred -and, thus, been studied- in a highly disparate fashion across different (social) policy fields, with public health being by far the most observed staging ground for the 'rights (r)evolution'. While the most recent studies deliberately adopt a cross-sectoral optic,[108] the current impact debate is still strongly influenced by the patterns observed in public health (litigation).[109] Yet, even with this narrower and more clearly-defined focus it has been difficult to interpret the empirical/ evidence unequivocally, for not only is poverty, itself, a complex and highly contextual phenomenon, but (litigation) impact is also multi-faceted and time-dependent. Gloppen, for one, has suggested that impact studies should distinguish between what she terms material, symbolic and political transformations;[110] the first are the tangible material benefits a judicial intervention generates, the second refer to changes in attitude and behaviour that result from such intervention, the third denotes shifts in the policy-making process. Each of these transformations has different time scales and the pro-poor impact of symbolic and political transformations, in particular, are often mid- or long term.

Brinks and Gauri have complemented this analytical scheme by distinguishing between individual and collective, and direct and indirect effects. They argue that a narrow focus on direct individual effects, that is, on individual litigants' success in securing a particular benefit, tends to distort litigation impact assessment as it often seems to simply confirm the distributionally negative outcome found in many of the earlier US public interest law studies.[111] These notoriously concluded that the 'haves' tended to disproportionally benefit from litigation compared to the 'have-nots'. Indeed, it is evident from many contemporary studies that better off middle-class litigants are able to appropriate a larger piece of the pie.[112] The reason is, of course, this group's better access to justice and its resulting capacity to twist the legal process to its advantage.

However, if aggregated, even individual direct effects may generate systemic ripples that produce indirect collective effects which may be less regressive -from a pro-poor perspective- than might be expected. Even more important than these ripples are, however, what Brinks and Gauri term direct collective effects, that is, class-action type litigation aimed to impact a hole category of stakeholders, such as carriers of particular diseases. Hence, in their five (middle-income) country study on litigation impact in public health and education, they find that direct collective litigation tends to produce disproportionately higher effects for 'the poor' as measured by their share of the overall population.[113] Indirect systemic effects may further

[107] Beitz, 'Protections Against Poverty in the Practice of Human Rights', in Thomas Pogge (ed.) *Freedom from Poverty as a Human Right Theory and Politics* (2010) 3.
[108] For example Haglund and Stryker, *supra* note 7.
[109] See, for instance, the prominence of public health-related case studies in all the larger collections on the theme, from Gargarella, Domingo Roux (2006), Gauri and Brinks (2008), and Langford (2008) to Yamin and Gloppen (2011) and Haglund and Stryker (2015); all in supra note 7.
[110] See Gloppen, *supra* note 86, at 294.
[111] See Brinks and Gauri, supra note 76, at 380.
[112] For this 'middle class capture' thesis, see, again, Galanter, *supra* note 102; and also Brinks and Gauri, supra note 76, at 387; Hoffmann and Bentes, supra note 8, at 142; as well as Ferraz, 'Harming the Poor through Social Rights Litigation: Lessons from Brazil', 89 *Texas Law Review* (2010) 1643, at 1667.
[113] See Brinks and Gauri, *supra* note 76, at 386.

compound this de facto pro-poor targeting by, for instance, producing policy-change that 'positivizes' these litigation impacts.

They, thus, conclude that 'for all the seemingly commonsensical reasons to expect litigation to be an elite game, the evidence does not support a finding that only the better-off benefit'; indeed, they affirm, if somewhat cautiously, that there is 'strong evidence that human rights litigation on behalf of SE rights is not inherently anti-poor, and can actually address the needs of marginalized groups.'[114] Other studies have been much more cautious on whether the empirical evidence really tells a (litigation) success story. In a comparative health rights litigation analysis focused not specifically on pro-poor impact but on the broader (social justice) criteria of efficiency and fairness,[115] Ole Norheim and Siri Gloppen conclude that 'most, but not all, of the cases were classified as low priority, providing "marginal" health benefits for severe conditions at a very high cost for the health system.'[116] Octavio Ferraz, in turn, in a study based on survey data of health-rights litigation in Brazil, comes out even stronger against the judicialization of social policy, arguing that when 'courts succumb to the pressure (or incentives) to "give teeth" to constitutional norms that recognize social rights, they end up transforming a collective and intractable issue of resource allocation among the numerous competing needs of the population into a bilateral dispute between single, needy individuals and a recalcitrant, stingy, and corrupt state.'[117] To him, the courts' (re-)distributional intervention not only reinforces the middle-class capture of public services but also, and perhaps even more problematically, diverts resources away from the systemic investments and reforms actually needed to make public services in low- and middle-income countries both efficient and equitable.[118]

What explains these starkly different interpretations of litigation impact is, of course, the complexity of the empirical scenario and the normative assumptions used to convert it into evidence. For, as Alicia Yamin has argued on the basis of James March and Herbert Simon's organizational theory approach, in highly complex scenarios such as SE rights litigation which is made up of a large array of categories that act on different levels and over time, the constitution of a discrete body of evidence is almost always subject to 'uncertainty absorption'. The latter occurs at the moment of evidence selection when the facts that will count as evidence

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[114] Ibid., 387.

[115] Which, in turn, are disaggregated to the terms by which a particular health care intervention on a particular health condition is prioritised; these are (a) the severity of the condition, (b) the effectiveness of the treatment, (c) its cost-effectiveness, and (d) the quality of evidence for all of these; the authors then use the common QALY (quality-adjusted life year) measure to classify priority-ranges for each of these items with a view to assessing the priority indicators selected health-rights cases produced; see Norheim and Gloppen, *supra* note 105, at 310.

[116] Ibid., 327.

[117] See Ferraz, *supra* note 109, at 1662; see also his contribution 'Brazil - Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health' in Yamin and Gloppen, *supra* note 7 at 76.

[118] See also his further debate with the anthropologist João Biel, for instance in Ferraz, 'Where's the Evidence? Moving from Ideology to Data in Economic and Social Rights' *Open Democracy* (2015) available at https://www.opendemocracy.net/en/openglobalrights-openpage/wheres-evidence-moving-from-ideology-to-data-in-economic/ (last visited 20 January 2020); Ferraz, 'Inequality, Not Insufficiency: Making Social Rights Real in a World of Plenty' 12 *Equal Rights Review* (2014) 77; Ferraz, 'Letter to the Editor: Moving the Debate Forward in Right to Health Litigation' 18 *Health and Human Rights Journal* (2016) 265; Ferraz, 'The Right to Health in the Courts of Brazil 10 Years on: Still Worsening Health Inequities? (Draft Paper) (2017) available at http://www.sps.ed.ac.uk/__data/assets/pdf_file/0009/233847/Ferraz2017The_Right_to_Health_in_the_Courts_of_Brazil_10_years_on_Onati.pdf (last visited 20 January 2020); and Biehl, 'Homo Economicus and Life Markets: Homo Economicus and Life Markets', (2011) 25 *Medical Anthropology Quarterly* 278; Biel, 'Judicialisation of the Right to Health in Brazil' (2009) 373 *The Lancet* 2182; Biehl and Petryna, 'Peopling Global Health' (2014) 23 *Saúde e Sociedade* 376; Biehl et al, 'Between the Court and the Clinic: Lawsuits for Medicines and the Right to Health in Brazil' (2012) 14 *Health and Human Rights* 17; Biehl, Socal, and Amon, 'Letter to the Editor Response: On the Heterogeneity and Politics of the Judicialization of Health in Brazil' 18 *Health and Human Rights Journal* (2016) 269.

are chosen, and at the moment of evidence communication, when 'inferences are drawn from the body of evidence, and the inferences instead of the evidence itself are then communicated.'[119] Not only is the complexity of the empirical scenario thereby reduced, and, as some would have it, distorted,[120] but both moments involve normative assumptions (about the facts) that are often not transparent. Hence, most scholars who have found a positive, or at least not necessarily negative, correlation between SE rights litigation and pro-poor social transformation start from the normative premise that law in general, and rights-based judicialization, in particular, is or at least can be harnessed to be, a strategic instrument for social transformation (if only the evidence is understood 'rightly').[121] Evidence to the contrary is, in turn, often underwritten by an a priori scepticism about the power of law, and rights, in particular, to remedy structural social wrongs, such as extreme inequality, which are taken to involve a much broader political struggle.[122] Either camp interprets the evidence, hence, from an advocacy perspective, with one side endorsing progressive legalism and the other some variant of radical politics.

Yet another perspective has sought to put the evidence for litigation impact into a wider (functional) perspective. Adherents of this view have argued that SE rights litigation cannot be assessed in isolation from the wider socio-political climate at any given moment. LaDawn Haglund and Robin Stryker have, for instance, argued that 'litigation conducted as part of a broad and sustained political advocacy campaign that includes institutionalized politics involving elites as well as noninstitutionalized political pressures from below will lead to greater rights-based social transformation than will litigation alone or litigation combined only with non-institutionalized pressures from below.'[123] Alicia Yamin, in turn, has stressed that litigation should be seen as a vehicle for public dialogue through which the justifiability of the conduct of public authorities in particular policy fields can be thematised.[124] Here, litigation is part of a wider turn to (bottom-up) social accountability as a component of system functionality.[125]

For even if it is difficult to interpret the evidence, there is no doubt that litigation does take place and that it does have an impact. Stakeholders on the ground are increasingly adopting a rights optic to analyse local-level situations and articulate the resulting demands in terms of rights claims; and this interaction between activists and local constituencies has in some instances crystalized into *both* sustained political pressure *and* into systematic legal mobilization 'from below'. Within this wider picture, courts enforcing (SE) rights claims can be seen to fulfil at least the following functions: firstly, they enforce 'bottom-up' accountability demands on system performance vis-à-vis public authorities; secondly, they, thereby, transmit

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[119] See Yamin, 'Power, Suffering, and Courts: Reflections on Promoting Health Rights through Judicialization', in Yamin and Gloppen, supra note 7, 333, at 363;

[120] See Rosga and Satterthwaite, 'Measuring Human Rights: UN Indicators in Critical Perspective', in Davis *et al.*, supra note 53, at 297; see also the remainder of the indicator-critical contributions in that collection.

[121] To this effect Brinks and Gauri, supra note 76, at 387.

[122] Most forcefully Ferraz, supra note 116, at 1667; as well as Mchangama, 'Legalizing economic and social rights won´t help the poor´ (2014) *Open Democracy* available at https://www.opendemocracy.net/en/openglobalrights-openpage/legalizing-economic-and-social-rights-wont-help-poor-0/ (last visited 20 January 2020); and Mchangama, 'Against a human rights-based approach to social justice', in D. Lettinga and L.v. Troost, *Can Human Rights Bring Social Justice ?* (2015) 53; more ambivalent Norheim and Gloppen, supra note 105, at 328; cautiously optimistic Yamin, supra note 117.

[123] Haglund and Stryker, 'Conclusion: Emerging Possibilities for Social Transformation', in Haglund and Stryker, supra note 7, at 331.

[124] Yamin, *supra* note 117, at 366.

[125] Young and Liebenberg, 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help ?', in Alviar, Klare, and Williams, *supra* note 81, at 237; and Gloppen, 'Public Interest Litigation, Social Rights and Social Policy', in Anis A. Dani and Arjan de Haan (eds.) *Inclusive States. Social Policy and Structural Inequalities* (2008) 343.

information on system performance back to system regulators and, thus, help fill the informational gaps left by regular (top-down) accountability mechanisms; thirdly, they act as inclusion instruments by which stakeholders factually excluded from system benefits can, individually or collectively, enforce their inclusion; fourthly, they 'irritate' system governance by inserting their own logic of formal or material justice and thereby make systems (more) self-reflective of their performance; as such, and fifthly, they can, in fact, generate indirect collective effects which act on the policy-making process and may end up altering the system itself; sixthly, they also intermediate between public and private providers of basic services and can help mainstream minimum standards into mixed policy fields.

Thus, on the hole, rights-based legal intervention may be indispensable for remedying what economists have now recognized as the inevitable incidence of market failures, not least in the realm of basic services provision, and they may represent the only available path to challenge political stalemate and entrenched systemic dysfunctionalities. From this perspective, whether the final outcome is progressive, from a social justice or pro-poor perspective, or regressive will always be difficult to ascertain, as complex governance systems are highly dynamic and unpredictable. This feature renders a clear-cut determination of the efficacy and the legitimacy of judicial intervention difficult. The aggregate of successful individual actions in, say, public health, is clearly empowering for the litigants while it may represent an inefficient allocation of resources in relation to legitimate systemic priorities. It may, in other words, let some people queue-jump, though by doing so, it may also expose faulty planning or embezzlement of resources. It may indicate a major deficit in system performance -for otherwise people would not go to the considerable trouble of suing public authorities-, but it may equally exaggerate the importance of 'rich people's concerns.'

It is also true that political systems may and do sometimes react badly to judicial interventionism, generating a backlash that seeks to fundamentally curtail the courts' capacity to meddle in policy-making.[126] But historical experience shows that even this is part of an ongoing and invariably dynamic story in which a backlash can end up producing further and wider, and sometimes even revolutionary change. And while a straightforward belief in the progressive effects of legal intervention is both naïve and dangerously dismissive of the centrality of politics, that politics is itself, in late-modernity, a complex field no longer confined to the traditional channels of political struggle. With the institutions of representative democracy now often deadlocked and incapable to deal with global challenges, and with conceptions of radical democracy mostly not having yet transcended their existence as paper tigers, rights-based litigation has been one, among several, tangible means of political action, albeit a non-linear and ultimately unpredictable one.[127]

B. The International Frontier: Social Rights Accountability for Development and against Austerity

Turning to the international frontier of SE rights and beyond the advances in monitoring and measuring discussed in section 2, two further themes have marked the discussion around SE

[126] Hoffmann and Bentes, *supra* note 8, at 145.

[127] See Hoffmann 'Shooting in the Dark: reflections towards a pragmatic theory of human rights (activism)', 41 *Texas International Law Journal* (2006) 403; and Hoffmann, 'International Legalism and International Politics', in A. Orford and F. Hoffmann, *Oxford Handbook of the Theory of International Law* (2016) 954; for another interesting take on why judicial intervention can be seen as legitimate see Çalı, Koch and Bruch, ' The Social Legitimacy of Human Rights Courts: A Grounded Interpretivist Theory of the Elite Accounts of the Legitimacy of the European Court of Human Rights', 35 *Human Rights Quarterly* (2013) 955.

rights, one now reasonably established, the other still new and experimental. The former refers to the entanglement of (SE) rights with development, the latter to their recent use to frame the adverse consequences of economic austerity policies following the world financial crisis of 2008. As to 'rights in development', this concerns, of course, the emergence of the rights-based approach to development (RBD) which, over the past two decades or so, has become the dominant paradigm in development discourse and in overseas development assistance (ODA) programming, in particular. It is not exclusively about SE rights, but as development discourse itself has shifted from a focus on macroeconomic stability to one on individual well-being (aka social policy), SE rights play a leading role in RBD.

This conjuncture of (SE) rights and development was by no means self-evident, as for a long time the two discourses were not seen as particularly related to one another. Indeed, they were deemed to be 'temperamentally' incompatible, with rights characterized by state-centrism, an inherently adversarial counterposing of the involved actors and a concomitant focus on violations, an orientation towards the judiciary, and an absolutist claim to trump any other concerns; in development, by contrast, states are seen, in principle, as partners, not adversaries and, in any case, are only one among several relevant stakeholders in the development process, remedies tend to come in form of negotiated policies based on compromises, and aid is framed as a conditional grant rather than as an unconditional entitlement.[128]

The two discourses only came together after the Cold War and as a result of the tectonic shifts in the global political economy that created the conditions for the general 'rise of rights' that was alluded to above. An important precursor and conceptual companion of RBD has, however, been the idea of a 'right to development' that was initially conceived by the Senegalese jurist Keba M'baye in 1972 and first articulated in the African Charter for Human and Peoples Rights in 1981. It was brought to international prominence through the UN General Assembly's Declaration on the Right to Development of 1986,[129] and was subsequently reaffirmed a wide range of (non-binding) instruments such as the Vienna Declaration and Program of Action (1993), the Millennium Declaration (2000), and the Durban Declaration and Program of Action (2002).[130] At the time of its inception it was closely associated with the Non-Aligned Movement (NAM) and the New International Economic Order (NIEO) programme and its objective to reframe, from a global Southern perspective, the terms on which the world economy and ODA were discussed. Within this context, the idea of a right, held by developing states, to fair and equitable development and implying, in particular, a binding commitment to international solidarity and self-determination, was a logical corollary.[131]

In fact, the language of human rights had already featured prominently in the UN theatre of the earlier decolonization struggle, where it had been employed by decolonization militants to stake an international claim both to self-determination as an entitlement and to the equality of colonial peoples. Indeed, as later revisionist historians would be adamant to point out, the language of

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[128] See Vandenhole and Gready, 'Failures and Successes of Human Rights-Based Approaches to Development: Towards a Change Perspective', 32 *Nordic Journal of Human Rights* (2014) 291; and P. Nelson and E. Dorsey, 'At the Nexus of Human Rights and Development: new methods and strategies of global NGOs', in 31 *World Development* (2003) 2013; see also Stephen Marks, 'The Human Rights Framework for Development: seven approaches', in B. Mushumi, A. Negi, and A. Sengupta (eds.), *Reflections on the Right to Development* (2005) 23.

[129] GA Res. 41/128, 4 December 1986.

[130] See Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, available online at http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx (last visited 20 January 2020); Millenium Declaration, GA Res. 55/L.2, 18 September 2000; Durban Declaration and Plan of Action, adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence (2002), available online at www.un.org/en/durbanreview2009/ddpa.shtml (last visited 20 January 2020).

[131] See generally Eslava and Pahuja, 'The State and International Law: A Reading from the Global South', *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* (2019) available at https://muse.jhu.edu/article/745684 (last visited 20 January 2020).

human rights was then more directly linked to the interest by pre-state collectivities and postcolonial states in independence and (collective) non-discrimination than to entitlements by individuals within and against them.[132] As such, the right to development emerged at once as part of the trajectory of human rights within the UN and as a discourse outside of it, being, as it was, a right deemed to be held by states vis-à-vis the international community and used as a counterhegemonic bargaining chip by global Southern states. Its main aim was, thus, to reinforce the argument, put forward by the dependency theory of development prevalent in the 1960s and 70s, that the world economy was historically unequal and, therefore, fundamentally unjust.[133] It, thus, helped anchor the language of (in)justice into development discourse and reframed development in terms of international rights and obligations, with the corollary of a common (international) responsibility for the provision of ODA.

With this pre-history, RBD emerged in the 1990s as a result of the confluence of several interrelated paradigm shifts. Firstly, human rights began to occupy a central position in the liberal triumphalist vision of a unipolar world, [134] and the previous 'rights divide' also began to be closed, with SE rights gradually gaining operational parity with their CP counterparts. Secondly, the latter process was partly brought about by a shift in development discourse towards 'human development' focussed on individual wellbeing. Rights, and SE rights, in particular, were seen as natural benchmarks for this wellbeing, an interpretation partly inspired by Amartya Sen's capabilities approach to development.[135] Based on social choice theory, the latter seeks to fuse the economic and political aspects of development by individualizing human welfare as the set of capabilities for 'achieving the kind of lives [people] have reason to value.'[136] It shifts the focus of development towards individuals, not states, and it makes these individuals' rights fulfillment a core indicator thereof.[137] This new perspective clearly informed UNDP's first Human Development Report of 1990, which used the fulfilment of human rights directly as a benchmark for development progress and set the scene for a rights-based redescription of development.[138] Thirdly, in a parallel process underwritten by the re-discovery, on part of neoclassical economics, of the importance of institutions (and law) for development,[139] the multilateral finance institutions and other ODA donors began promoting the 'good governance' agenda with its focus on, amongst others, the rule of law and human rights.[140] While critics have argued that 'good

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[132] See S. Moyn, *The Last Utopia* (2010) at 84; in a similar vein see SL Hoffmann (ed.), *Human Rights in the Twentieth Century* (2011).

[133] See, for instance, OHCHR, Realizing the Right to Development – Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development, HR/PUB/12/4 (2013); and Rajagopal, 'Right to Development and Global Governance: Old and New Challenges Twenty-Five Years On' (2013) 23 *Human Rights Quarterly* 893; see also S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011) at 95.

[134] See, classically, F. Fukuyama, *The End of History and the Last Man* (1992): and S. Marks, 'The End of History - Reflections on Some International Legal Theses' 8 *European Journal of International Law* (1997) 449-477.

[135] A. Sen, *Development as Freedom* (Oxford University Press: Oxford, 1999); and A. Sen, 'Human Rights and Capabilities' 6 Journal of Social Development (2005) 151-166; see also M. Kaltenborn, *Social Rights and International Development: Global Legal Standards for the Post-2015 Development Agenda* (2015); and Pahuja, *supra* note 130, at 172.

[136] Sen, *supra* note 132, at 291.

[137] Fukuda-Parr, 'The Human Development Paradigm: Operationalizing Sen's Ideas on Capabilities', 9 *Feminist Economics* (2003) 301.

[138] See UNDP, Human Development Report 1990 (1990), available online at http://hdr.undp.org/sites/default/files/reports/219/hdr_1990_en_complete_nostats.pdf (last visited 20 January 2020); see also Alston and Robinson, 'The Challenges of Ensuring the Mutuality of Human Rights and Development Endeavours', in P. Alston and M. Robinson, *Human Rights and Development: Towards Mutual Reinforcement* (2005) 2; and Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals' 27 *Human Rights Quarterly* (2005) 755; as well as Gauri and Gloppen, 'Human Rights-Based Approaches to Development: Concepts, Evidence, and Policy' 44 *Polity* (2012) 485–503.

[139] Kennedy, *supra* note 82, at 43.

[140] The World Bank is often credited with inaugurating the 'good governance' terminology, see World Bank, From crisis to sustainable growth - sub Saharan Africa : a long-term perspective study (1989), available online at

governance' was always instrumentally related to (neo-)liberal public sector reform and the emergence of a legally disciplined 'regulatory developmental state',[141] it did co-react with the emergent 'human development' paradigm to catalyse RBD.[142] Fourthly and lastly, the constitutionalization wave of the 1990s, discussed above, further reinforced the re-focussing of rights as both justiciable claims and as performance benchmarks for domestic and international public policy.[143]

With the scene, thus, set, the formal inauguration of RBD came in 1997, when then UN Secretary-General Kofi Annan's 1997 report Renewing the United Nations: A Programme for Reform established the official human rights mainstreaming agenda which mandated that human rights had to be part of 'everything the UN does'.[144] This represented nothing short of a re-branding of the UN at a moment when, just like in the aftermath of World War II, the world was mesmerized by recent conflict and humanitarian calamity, in this case the dual fallout over Rwanda and Bosnia, which provided an underlying impetus for an operational turn to human rights. It was to play out primarily in two of the UN's mandates, namely development and peace and security, with OHCHR and its activist (then) High Commissioner Mary Robinson, as well as some of the specialized agencies, most notably UNICEF, taking a lead role in concretizing RBD. Since then, it has become one of, if not the, dominant paradigm in contemporary development, as is evidenced by numerous programmatic statements and operational guidelines both in international and domestic ODA programming.[145] It remains, however, somewhat hazy and its ubiquity seems inversely related to any agreement on its precise legal force and content.[146]

In a welcome attempt to systematize its various meanings in different contexts, Gauri and Gloppen distinguish four 'analytic components' of RBD, notably what they term 'international legal precepts', 'donor-regulations and conditionalities', 'normative beliefs', and 'constitutional rights'.[147] The first of these is consonant with the 'deep monitoring' paradigm adopted, inter alia, in the CESC's IBSA procedure discussed above. It (re)frames development as the process by which compliance with positivised international legal (human rights) norms is achieved, with these norms meant to fulfill a triple role as interpretation manuals for development goals, as regulatory frameworks for development processes, and as benchmarks for development

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http://documents.worldbank.org/curated/en/498241468742846138/From-crisis-to-sustainable-growth-sub-Saharan-Africa-a-long-term-perspective-study (last visited 20 January 2020); see also Thomas, 'Re-Reading Weber in Law and Development: A Critical Intellectual History of "Good Governance" Reform', *Cornell Law Faculty Publications - Paper 118* (2008); and Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law', 5 *Buffalo Human Rights Law Review* (1999) 107; and Krever, 'The Legal Turn in Late Development Theory: The Rule of Law and the World Bank's Development Model', 52 *Harvard International Law Journal* (2011) 287.

[141] See Dubash and Morgan, 'Understanding the Rise of the Regulatory State of the South', 6 *Regulation and Governance* (2012) 261.

[142] Uvin, 'On High Moral Ground: The Incorporation of Human Rights by the Development Enterprise', 17 *Praxis: The Fletcher Journal of Development Studies* (2002) 1; and Fukuda-Parr, *supra* note 134; and Uvin, 'Final Synthesis and Questions' in P. Uvin, *Human Rights and Development* (2013), 167.

[143] See Wiener et al., 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law', 1 *Global Constitutionalism* (2012) 1.

[144] Renewing the United Nations: A Programme for Reform, Report of the Secretary-General, UN Doc. A/52/L.72/Rev.1, 19 December 1997; see also Hoffmann, *supra* note 15; and Gauri and Gloppen, *supra* note 135.

[145] For a seminal analysis, see P. Dann, *The Law of Development Cooperation: a comparative analysis of the World Bank, the EU, and Germany* (2013); as well as Sano, 'Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development." 22 *Human Rights Quarterly* (2000) 734; and also, again, Uvin *supra* note 139.

[146] See, for instance, Tsikata, 'The Rights-based Approach to Development: Potential for Change or More of the Same ?, 35 *IDS Bulletin* (2004) 130; Nyamu-Musembi and Cornwall, 'What Is the "Rights-Based Approach" All about ? Perspectives from International Development Agencies', *IDS Woking Paper* (2004) available at https://www.ids.ac.uk/files/dmfile/Wp234.pdf (last visited 20 January 2020); Abramovich, 'The Rights-Based Approach in Development Policies and Strategies', *CEPAL Review* (2006); and Hoffmann 'Twin Siblings: fresh perspectives on law in development (and vice versa)' (2017) 30 *Leiden Journal of International Law* 267.

[147] Gauri and Gloppen, *supra* note 135, at 4.

outcomes.[148] Yet, even though international human rights standards occupy a nominally prominent place in RBD, international (legal) institutions have not played a significant role in it. Their continuing lack of institutional capacity and enforcement authority means that they only play a small role in the the day-to-day running of RBD programs, even though the greater visibility of the international SE regime has given development actors advocacy tools to politically mobilize for greater international responsibility and for domestic policy change.[149]

It is rather as 'donor regulations and conditionalities' that RBD has been most prevalent. Here rights provide substance to abstract 'good governance' principles in the context of program design, implementation and assessment, and are, thus effectively converted into soft administrative guidelines for what amounts to rights-based development governance.[150] Such a procedural interpretation of 'rights in development' is primarily geared to enhancing the agency of the recipients of ODA, most notably the 'poor', and it performs a subtle semantic shift in development discourse, away from objective need and towards subjective want -often expressed as an increase in choice-, the fulfilment of which is then understood as 'empowerment'. It is about increasing the control of specific constituencies over their own circumstances, and it combines greater and more equitable access to socio-economic resources such as income, education, or health, with a subjective capacity to exercise choice over their specific allocation.[151] Importantly, such rights-based empowerment also implies the ability both to enforce accountability claims vis-à-vis all development stakeholders, and particularly donor agencies and recipient governments, and to participate in development planning, a notion nominally -though not always factually- fulfilled in the shift to recipient-oriented planning procedures such as the World Bank's and the International Monetary Fund's Poverty Reduction Strategy Papers (PRSPs).[152]

To its proponents, the reconstruction of good governance principles through rights language in RBD seems, th3erefore, to provide an at once coherent and compelling narrative which appears to be compatible with contemporary development practice while containing the spark for a potentially revolutionary transformation of development agency.[153] Yet, this optimistic reading of RBD has not gone uncontested. The two most direct critiques have concerned its claim to have refocused development onto 'the poor' and to provide the primary toolkit for their empowerment. Here the critics have argued that RBD has merely grafted itself onto an existing pro-poor agenda developed previously by dedicated agencies such as UNDP and that it has not really added more than embellishment value to the policies and mechanisms created by the latter.[154] More cautiously, Peter Uvin, for one, has argued that 'working out the relationship

[148] Examples include, again, UNDP's Human Development Index and the recent series of Guiding Principles, see *supra* note 64, such as the *Guiding Principles on Extreme Poverty and Human Rights*, A/HRC/21/39, 27 September 2012; or the *Guiding Principles on Business and Human Rights*, A/HRC/RES/17/4, 6 July, 2011; see also Chapman, 'Rights-Based Development: The Challenge of Change and Power', 27 *Global Poverty Research Group Working Paper Series* (2005); Kindornay, Ron, and Carpenter, 'Rights-Based Approaches to Development: Implications for Human Rights', 34 *Human Rights Quarterly* 34 (2012) 472.

[149] Gauri and Gloppen, *supra* note 135, at 5.

[150] See, for instance, UNDP, *Indicators for Human Rights Based Approaches to Development in UNDP Programming: A Users' Guide* (2006), available at http://www.undp-aciac.org/publications/other/undp/hr/humanrights-indicators-06e.pdf (last visited 20 January 2020); or UNDP, *Lessons Learned From Rights-Based Approaches in the Asia-Pacific Region* (2005) available at http://hrbaportal.org/wp-content/files/RBA-in-AP-region3.pdf (last visited 20 January 2020); and, again, the analysis in Dann, supra note 142.

[151] Pradhan, 'Measuring Empowerment: a methodological approach', in 46 *Development* (2003) 51, at 52.

[152] See Gottschalk, 'The Effectiveness of IMF/World Bank-Funded Poverty Reduction Strategy Papers', in Y. Bangura (ed.), *Developmental Pathways to Poverty Reduction* (2015); and Weber, 'Reconstituting the "Third World"? Poverty Reduction and Territoriality in the Global Politics of Development', 25 *Third World Quarterly* (2004) 187, at 197; see also Y. Bangura, 'Developmental Pathways to Poverty Reduction' in Y. Bangura (ed.), *Developmental Pathways to Poverty Reduction* (2015) 3.

[153] Hoffmann, supra note 15.

[154] See, for instance, Tsikata, *supra* note 143.

between development and human rights requires more than simply stating that one automatically implies, equals, or subsumes the other'.[155]

Indeed, if that automatic subsumption was not considered to hold, then the question would arise what human rights could actually add to development beyond the existing (non-RBD) frameworks ? RBD's real innovation lies, arguably, in its aspiration to radically democratize all aspects of development programming, though this is an implication hardly any of its official proponents have been prepared to advocate, not least as it would run counter all traditional notions of needs-based planning which still prevail in development practice, the nominal turn to RBD notwithstanding.[156]

The second persistent critique has been that RBD is essentially a new type of aid conditionality which places developing states under the permanent surveillance of the various human rights monitoring mechanisms and reduces them to duty-bearers vis-à-vis individual rights claimants. [157] This argument flows, of course, from the wider contention, alluded to above, that RBD is just the latest step in the neoliberal re-framing of the state. Within this reading, the state remains fully (legally) responsible for compliance with international human rights norms, with the current interpretation of its obligations implying that virtually all acts committed by non-state actors -such as transnational corporations (TNCs)- remain, ultimately, attributable to it.[158] The ongoing transformation of the state from direct provider to regulator of public service provision within the paradigm of post-welfarist regulatory statehood changes only the nature but not the scope of this responsibility.[159] Hence, market failures, through the human rights consequences they generate, are still essentially deemed to be attributable to the state.

This continuing state-centrism on the demand side is, however, increasingly unmatchable by the state's capacity to supply public service levels in accordance with international minimum standards either through its direct financial intervention or through its (market) regulatory authority. Indeed, the current phase of global finance capitalism has significantly reduced the fiscal and, therefore, the policy space in both developed and developing states, generating a mismatch between the demand for responsibility placed on the state by the logic of sovereignty and articulated through international (human rights) law, and its factual capacity to supply this normative demand with material substance.[160]

Yet, while the empirical state is, thus, both overburdened and overdetermined, it is, at the same time, inherently constrained by the precepts of good governance through rights. To this line of critique, then, these constraints are, in essence, devices to discipline the state and its formal institutions in relation to individuals, groups and civil society, with empowerment and its derivatives, notably accountability, participation and (formal) equality, ultimately aiming to make 'the people' at least partially autonomous from state institutions; indeed, the increasing privileging, by donors, of (sometimes donor-organized) CSOs as primary partners in ODA projects is evidence of this. By bestowing on development the authority of a global normative framework, RBD can, thus, be seen to legitimate the bypassing of formal state institutions and, thus, to erode the very sovereignty on which international (human rights) obligations are based on in the first place. The point is, thus, not that RBD fundamentally challenges the state, but, on

[155] See Uvin, *supra* note 139 at 3.
[156] Ibid., at 7.
[157] Manzo, 'Africa in the rise of rights-based development' 34 *Geoforum* (2003) 437, at 438; see also Gathii, *supra* note 137, at 158; and Pahuja, supra note 130.
[158] See, generally, A. Clapham, *Human Rights Obligations of Non-State Actors* (2006); and Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social', 26 *Michigan Journal of International Law* (2004) 199, at 217.
[159] Scott, *supra* note 14.
[160] Hoffmann, *supra* note 15, at 60.

the contrary, that it treats the state as the origin of the problem at hand, and, at the same time, relies on it as the only viable framework for a solution.

Ultimately, these critiques, as well their potential rebuttals, will have to be exposed to the light of the empirical realities RBD will have created 'on the ground'. The use of the future tense here implies that, despite the ubiquity of RBD language in development discourse, there is not yet much data to assess its impact and efficacy.[161] Partly this is because it is still relatively new and projects are only slowly beginning to reach the stage at which they, or their legacies, can be fairly assessed. Yet partly it is also because there remains considerable conceptual vagueness about whether RBD is essentially just an instrument of pro-poor development -in which case it could simply be assessed by its effectiveness in reducing poverty as compared to alternative frameworks-, or whether it really aspires to representing an entirely different idea of development, one in which donors prospectively surrender control over both the objectives and the implementation of development to its stakeholders, who, in turn, are willing and able to use rights to articulate their own developmental pathways. Assessing whether stakeholders have even made tentative steps into that direction implies a very different set of criteria than the mere measurement of their socio-economic status. This uncertainty about the nature of RBD and its concomitant objectives renders it at once highly resilient to conceptual challenges and yet persistently ephemeral.

The second topographical feature on the international frontier of SE rights is the as yet incipient application of international human rights standards, and specifically SE rights, to both the global economy, in general, and the causes and effects of economic and financial crises, in particular. As an approach it brings together several older *topoi* in international human rights research and advocacy, notably the extraterritorial application of human rights standards,[162] the human rights responsibility of both multilateral finance institutions and of multinational corporations,[163] the human rights implications of global or regional trade agreements,[164] the international labour regime,[165] and the human rights impact assessment of budgets and other macroeconomic measures.[166]

While human rights advocacy organizations have had the adverse impact of economic downturns and of the measures to counter them broadly on their radar since at least the crises in the Czech Republic, Hungary, Mexico, Thailand, Indonesia, South Korea, Argentina, and

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[161] Among the few studies, see, for instance, UK Interagency Group on Human Rights Based Approaches *The Impact of Rights-based Approaches to Development – Evaluation, Learning Process – Bangladesh, Malawi, and Peru* (2007), available at http://www.crin.org/docs/Inter_Agency_rba.pdf> (last visited 20 January 2020); and Schmitz, 'A Human Rights-Based Approach (HRBA) in Practice: Evaluating NGO Development Efforts', 44 *Polity* (2012) 523; and again Kindornay, Shannon Ron, and Carpenter. 'Rights-Based Approaches to Development, *supra* note 145.

[162] See, inter alia, Bhuta, 'The Frontiers of Exraterritoriality: Human Rights Law as Global Law', in Bhuta (ed.), N. Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and its Challenges* (2016), at 1; see also Balakrishnan and Heintz, 'Extraterritorial obligations, financial globalisation and macroeconomic governance', in Nolan, *supra* n.1, at 146; as well as R. Wilde, 'The extraterritorial application of international human rights law on civil and political rights', in N. Rodley and S. Sheeran (eds.), *Routledge Handbook on Human Rights* (2013); and, generally, M. Milanovic, *The Extraterritorial Application of Human Rights Treaties* (2011).

[163] See, for instance, M. Darrow *Between Light and Shadow. The World Bank, the International Monetary Fund and International Human Rights Law* (2003); and Bradlow, 'The World Bank, the IMF, and Human Rights', 6 *Journal of Transnational Law and Contemporary Problems* (1996) 47, 1996; and Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', *111 Yale Law Journal* (2001) 443; as well as from the former UN Special Rapporteur on Human Rights and Business, J. Ruggie, *Just Business: Multinational Corporations and Human Rights* (2013).

[164] See T. Cottier, J. Pauwelyn, and E. Brügi (eds.), *Human Rights and International Trade* (2006); and Alston ´Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann´ 13 *European Journal of International Law* (2002) 815.

[165] Alston, *supra* note 24.

[166] A. Nolan, R. O'Connell and C. Harvey (eds.), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013);

Russia in the 1990s, there has been little repercussion in the CESCR or the other treaty bodies, or, indeed, any other human rights monitoring institution.[167] It was really the burst of the housing bubble in the US in 2007/08 and the ensuing, now nearly decade-long series of financial, currency, and sovereign debt crises and the consequent economic downturn in many countries in both the global North and South that has catalysed these efforts into a concerted movement.

One of its principal articulators is the Extraterritorial Obligations Consortium (ETO), a group of advocacy organizations and human rights experts that was set up in 2007 and that, in 2011, adopted the 'Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', a systematic restatement of existing international legal obligations pertaining to this concern.[168] In 2012, members of ETO published an official Commentary of the Maastricht Principles,[169] and a continuous flow of literature has since emerged addressing the various issues that have arisen in the wake of the crisis in light of the Principles.[170] While ETO's focus has been on extraterritorial obligations as a means to promote global economic justice beyond the domestic/international dichotomy, several parallel efforts have sought to examine the human rights fallout from the crisis on the basis of existing frameworks such as the ICESCR and the CESCR.[171]

Common to these interventions is the dual aspiration to turn human rights -always understood in this context to particularly refer to SE rights- into the key markers for the human consequences of both economic crises and the policies adopted against them, as well as to turn international human rights law and its institutional infrastructure into key remedial instruments for these consequences. While previous efforts to promote these aspirations were somewhat hampered by the wide and diffuse nature of 'the globalized world economy' and the complex network of actors and, thus, lines of responsibility that characterize it, the post-2008 crises allowed for a much higher degree of focus, as many of its adverse effects on the enjoyment of human rights can be traced to specific acts or policies.

It was not, however, the root causes of these crises, such as (and primarily) market failure driven by reckless private-sector profiteering -but also by botched regulatory frameworks, negligent oversight, deceptive accounting or plain corruption on part of governments and international organizations- that were, for the most part, singled out for human rights scrutiny. Instead, it was the reaction to these -in large measure self-inflicted- crises that were adopted by governments and international organizations, namely the notorious austerity policies, that have been at the centre of attention. The latter have mostly consisted of the notorious -and up their revival largely discarded-structural-adjustment programs and their staple fare of a radical reduction of public sector spending and public service provision, deregulation and privatization.

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[167] Nolan, Lusiani, and Courtis, 'Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights', in Nolan, *supra* note 1, 121, at 126.

[168] Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, adopted 28 September 2011, available at http://www.maastrichtuniversity.nl/web/Institutes/MaastrichtCentreForHumanRights/MaastrichtETOPrinciples.htm (last accessed 31 August 2016).

[169] De Schutter *et al.*, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', 34 *Human Rights Quarterly* (2012) 1084.

[170] These efforts have, in turn, been thoroughly compiled and reviewed in R. Wilde, 'Dilemmas in promoting global economic justice through human rights law', in Bhuta, supra note 159, at 127.

[171] See, for instance, the evocative motto on the ETO website: 'Human rights have been locked up behind domestic bars to prevent their universal application to globalization and its much needed regulation. Extraterritorial obligations (ETOs) unlock human rights', available at http://www.etoconsortium.org/ (last visited 20 January 2020); see otherwise the contributions in Nolan, *supra* note 1.

However, while the very significant negative impact of the compounded crises on human welfare -and, thus, on the enjoyment of SE rights- worldwide is undeniable,[172] it is less straightforward to precisely disaggregate the causality of the retrogression in living-standards in terms of the direct effects of crisis -such as recession and the concomitant rise in unemployment- and the effects of austerity policies as reactions to these effects. Yet, even if austerity may not be the initial culprit for all of these effects, human rights advocates have argued that, contrary to the neo-classical economic rationale that underwrites these measures, they have at the very least aggravated and widened these negative consequences.

What makes austerity measures, however, really attractive as a target is, of course, the fact that they can be clearly attributed to states acting on their own or collectively through international organizations. Moreover, their direct human rights impact can be much better measured than the diffuse workings of the global economy. As a consequence, much of ETO and like efforts have concentrated on spelling out the terms of human rights accountability for austerity measures, with the focus having been on two fundamental normative challenges, namely the attributability of austerity-induced SE rights violations to state conduct under existing international human rights law, and the nature and scope of the non-retrogression obligation.

As to the former, the question arose most forcefully in the context of EU bailout measures for member states affected by severe sovereign debt crises, such as and most acutely Greece. As is well-known, this bailout was organized by the European Commission (EC), the European Central Bank (ECB), and the International Monetary Fund (IMF), the so called 'Troika,' on behalf of their respective constituencies, that is, EU member states, (EU) member states of the Eurozone, and the member states of the IMF. This group, in turn, introduced different institutional frameworks to enable the transfer of financial assistance to Greece and other countries, most importantly the European Stability Mechanism (ESM) which was established in 2012 to act as the primary 'firewall' against financial crisis within the Eurozone.

Owing both to the political resistance of non-Eurozone EU member states to assume financial commitments towards the common currency, and to legal restrictions imposed by the Treaty on the Functioning of the European Union (TFEU) which prohibits member states from assuming the financial liabilities of other member states,[173] the ESM was created not as an EU body but as a separate intergovernmental organization seated in Luxembourg. Most importantly, in this context, is the fact that by determination of the 'Troika', the ESM can only dispense funds conditionally, with the conditionalities essentially mandating the implementation of austerity policies. This is significant in two ways: it introduces into the EU's political model the inherent asymmetry of donor-recipient relations framed by conditionalities as is typical in an ODA context, and these particular conditionalities can be shown to have a directly adverse effect on the enjoyment of SE rights.[174]

The question that arises in this scenario is, of course, who bears responsibility for any violations of SE rights and on what grounds. Prima facie, any breach of an international obligation is, of course, attributable to the state in whose jurisdiction it occurs, which would, in this case be the

[172] See, inter alia, CESR, *Human Rights and the Global Economic Crisis: Consequences, Causes, Responses* (2009), available online at http://cesr.org/downloads/CESR-Human%20Rights%20and%20the%20Global%20Economic%20Crisis.pdf (last visited 20 January 2020); and Sepúlveda Carmona, 'Alternatives to austerity: a human rights framework for economic recovery', in Nolan, *supra* note 1, 23, at 23; and Salomon, *supra* note 3.

[173] European Union, Consolidated version of the Treaty on the Functioning of the European Union, 2008/C 115/01, 13 December 2007.

[174] Salomon, supra note 3, at 8.

states implementing the austerity measures. This position was duly affirmed by the European Committee of Social Rights, a body under the Council of Europe, in a series of decisions against Greece in which it rejected the Greek government's defence that any potential violation of the European Social Charter -in this case of the right to social security- was exclusively due to the fulfilment of its international obligations vis-à-vis the ESM and the 'Troika'. Instead, it reaffirmed that it was the state party's responsibility to ensure that the implementation measures it adopted in fulfilment of its international obligations did not violate its obligations under the Social Charter. This position, besides leaving Greece between a rock and a hard place, also opened up the further question of whether its 'other international obligations', i.e. its ESM conditionalities, could ever be interpreted as causing a rights violation, and, thus, a breach of human rights obligations on part of those who imposed it, or whether it was always merely the implementation by the conditionality-bound state that could do so.

This question is, arguably, at the core of ETO-type arguments, and Margot Salomon, for one, has forcefully answered it in the positive. Critically examining the European Court of Justice's (ECJ) decision in *Pringle v. Ireland* to hold the establishment of the ESM by EU member states outside of the EU's legal framework, including its Charter of Fundamental Rights, to be lawful,[175] she contends that while EU member states may have exempted themselves from direct responsibility for Charter violations by EMS-imposed measures, their co-optation of EU institutions, notably the EC and the ECB, into the ESM effectively extends that responsibility to the latter.[176] She cites solid legal opinion that, unlike EU member states, EU institutions are bound by the Charter even when they are not directly implementing EU law, as in the ESM's case.[177] In other words, fundamental rights obligations are inalienable by EU institutions, regardless of the particular legal framework of reference.

Salomon further complements the EU law argument with some straight ETO staple, namely the contention that all EU (and ESM) member states are signatories of the ICESCR and, thus, clearly bound by its obligations in whatever individual or collective context, including extraterritorially.[178] While the ETO initiative has, hence, audaciously sought to engage the neoliberal Goliath in rights-based guerrilla lawfare, Ralph Wilde, amongst others, has pointed to some of the inherent limitations of this approach; drawing, broadly, on the analytical perspective of Third World Approaches to International Law (TWAIL), he argues that the an unproblematised reliance on international human rights law 'as is' inadvertently incorporates many of the asymmetries, Eurocentrisms, and hegemonies inherent in the historical corpus of this law, besides potentially reinforcing, rather than transgressing, the very neoliberal logic ETO is staked against.[179] Wilde's argument echoes, if from a different angle, a set of contemporary 'left' critiques of human rights, in general, and SE rights, in particular that date back to the 1990s and that, in turn, often build on the classical Marxian critique of rights as 'rights of inequality.'[180] It has been reiterated in a recent intervention by Susan Marks where, reflecting on the London riots of 2012 and the 'right' critique of rights issued, amongst others, by then British prime minister David Cameron, she associates rights discourse with the

[175] Case C-370/12, *Pringle v Ireland*, Judgment (Full Court) of 27 Nov. 2012.
[176] Ibid., at 15.
[177] For instance, Craig, 'Pringle and Use of EU Institutions outside of the EU Legal Framework: Foundations, Procedures and Substance' 9 *European Constitutional Law Review* (2013) 263, im ibid., at 15.
[178] See Salomon supra note 3, at 22.
[179] See Wilde, *supra* note 167.
[180] For the latter, see Marx 'Critique of the Gotha Programme' (1891) at K. Marx, *Kritik des Gothaer Programms* (2017); see also O'Byrne, 'Marxism and Human Rights: New Thoughts on an Old Debate' (2019) 23 *The International Journal of Human Rights* 638; for the 90s critique, see, in particular, T. Evans (ed.*) Human Rights - fifty years on* (1998).

mystification of (economic) power relations.[181] Drawing, inter alia, on Naomi Klein and Wendy Brown, Marks charges rights activism -and activists- with effectively depoliticizing the, to her necessarily political, engagement with the political economy of contemporary capitalism, which she sees as the root cause of the predicament that ETO activists then, misguidedly, try to address with 'more of the same'.[182] Samuel Moyn, the influential revisionist historian of (international) human rights, has subsequently picked up Marks' argument in order to simultaneously critique it for presuming too strong causal relationship between the rise of international human rights and the rise of neoliberalism as of the 1970s -a claim he deems unhistorical-, and endorse it for its scepticism of human rights as a tool against neoliberalism and its social consequences -which he shares-. At this level of debate, the specific salience of SE rights-based anti-austerity lawfare and the role extraterritorial human rights obligations may play in it becomes, of course, a mere backdrop to a much wider inquiry about the relevance and, indeed, the future of human rights as such. It will, thus, be returned to in the concluding section.

As for the second challenge to the endeavour of 'righting' austerity, it consists of the somewhat hazy character of the non-retrogression obligation of Article 2(1) of the ICESCR. As was already seen above, this hinges on a core theme in SE rights talk at this moment, notably on the empirical measurability of rights fulfilment as a basis for the attribution of legal responsibility. For while it is easy enough to identify certain normative measures, it continues to be difficult and controversial to correlate these to empirical socio-economic data in a solid enough way to ground a finding of breach of obligation. This is due both to a continuing lack of data, but also to the lack of consensus over economic models themselves.[183] As Aoife Nolan, Nicholas Lusiani and Christian Courtis point out, a particular austerity measure, such as the curtailing of unemployment benefits, has a different connotation even in different versions of orthodox neo-classical thought, let alone in neo-Keynesian or other heterodox schools.[184] In any case, economic policy operates on an entirely different and much longer term time scale than the 'progressive fulfilment' obligation, resulting in an inherent disjuncture between what really amounts to two distinct epistemic horizons.

This naturally impacts on the ways in which responsibility can be attributed, as virtually all empirical socio-economic situations are multi-causal and require 'polycentric analysis' of both state and non-state actors.[185] Even if the 'respect' dimension of the current obligations doctrine is taken to nominally cover non-state actors, such as credit rating institutes or hedge funds, insofar as these operate on the basis of complex transnational legal networks they partly escape national jurisdiction and, hence, responsibility. As a consequence, the CESCR and the wider ETO communities have focused on outlining negative criteria by which retrogressive measures can be linked to breaches of obligation, with the burden of proof resting on the state that undertakes such measures. In this vein, and on the basis of a thorough review of the normative material, Nolan, Lusiani and Courtis have identified several partly overlapping 'derogation criteria' which must apply for a state to justify retrogressive (emergency) measures; these include an (a priori) time-limitation of the measures, their non-discriminatory character, the requirement of establishing an objective necessity for as well as the proportionality of the

[181] Marks, 'Four Human Rights Myths,' in D.Kinley, W. Sadurski, K. Walton, *Human Rights: Old Problems, New Possibilities* (2013), at 217.
[182] See also Marks, 'Human Rights and Root Causes', 74 *Modern Law Review* (2011) 57; as well as N. Klein, *The Shock Doctrine* (2007) and Brown '"The Most We Can Hope For...": Human Rights and the Politics of Fatalism, 103 *South Atlantic Quarterly* (2004) 451.
[183] See *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece*, European Committee of Social Rights, Complaint No. 80/2012, 16 Jan. 2012, para. 75.; also cited in ibid., at 12.
[184] See Nolan, Lusiani, and Courtis, *supra* note 164, at 129.
[185] Ibid., at 130.

measures, their need to be manifestly reasonable, the required participatory character of their adoption, a special focus on disadvantaged and vulnerable groups, and the entrenchment of a (previously identified) minimum core content. In making this assessment, review bodies like the CESCR are then held to adopt a contextualist optic whereby such factors as the general level of development, the nature of the (economic) emergency, the existence of correlative international obligations, and the international assistance situation are considered.[186] Needless to add, the deliberateness of a measure is a crucial consideration, even though, again, the 'protect' obligation in principle mandates a very high degree of scrutiny of all socio-economic activities that a state undertakes and that may be relevant to its SE rights obligations.

Unsurprisingly, these procedural obligations bear a close doctrinal resemblance with the derogation provisions -and jurisprudence- for CP rights, though, in their sum total, they (would) impose a burden of proof that goes far beyond what the economic theories behind austerity measures are capable of justifying. Hence, this may either be a clever way of holding virtually all such measures to be prima facie breaches of the Covenant, or, conversely, it represents the sort of hypertrophied rights militancy that, for revisionists like Moyn, lies at the heart of what he sees as the (political) irrelevance of human rights. What, then, is the future of SE rights ?

4. The Future of Social Rights: Utopia or Dystopia ?

The answer depends, of course, on the time horizon to be considered, as well as on the level at which the question is asked. In terms of the former, for the short- and mid-term, many of the general future trends have been charted in the previous sections. Hence, as far as SE rights monitoring is concerned, the CESCR is likely to consolidate its combined role as a clearing house for SE rights implementation standards and, on that basis, as a pro-bono consultant to states both in relation to their ever-expanding reporting and accountability obligations, but also and increasingly to the ways in which their internal administrations design and execute relevant policies. This 'turn to policy' is, of course, a wider trend within the SE rights community and is, in itself, driven to a significant extent by the 'turn to metrics' in monitoring which has occupied the agendas of monitoring bodies and CSOs alike. It marks a significant departure from the judicial logic that heretofore had characterized human rights monitoring, with both monitoring bodies and CSOs increasingly assuming the role of expert consultants assisting governments in what amounts essentially to large-scale human rights mainstreaming exercises.

This also indicates the further rise of SE rights vis-à-vis CP rights (activism), so much so that it might not be exaggerated to claim that the future of human rights lies in SE rights. In part, this is due to the window of opportunity which the general crisis in (democratic) governance, and its articulation in form of the current string of political and economic crises, have opened both for the reception of the concerns represented by SE rights and for their inherently more dialogical, as opposed to condemnatory, modus operandi. Yet, the much increased role which such a de facto partnership with overburdened and understaffed domestic administrations affords to the SE rights community has also evident drawbacks. For despite the technical -some would say technocratic- rigor with which the turn to SE rights-indicator-based governance is implemented, it still represents a subtle shift away from adjudication on the basis of formal criteria (and their inherent limitations in terms of appraising the complexities of 'real life' social policy) and towards a more political and activist role for those involved in monitoring. While this might represent a unique chance to create a new level of dialogue on the social policy issues underlying SE rights enjoyment, it will only gain relevance if the political character of the

[186] Ibid., at 133.

exercise is transparently acknowledged and not shrouded by a legal-technical formalism that simulates an all-encompassing objectivity.[187] Sally Engle Merry has likened indicator-based monitoring to the use of witchcraft, that is, to a political technology that guides 'supernatural forces' to a variety of purposes including 'advocacy, reform, control, and management.'[188] Rosga and Satterthwaite have added that indicators as such are, like the law itself, indeterminate and, thus, capable of being used to oppress as well as to emancipate. They accordingly admonish the global monitoring bodies to be openly self-reflective about their use of indicators and to takes sides, notably for the 'governed' with whom they should 'form strategic political alliances […] in the task of holding their governors to account.'[189] However, and ironically, where these SE advocates want to politically charge the 'turn to indicators' with an emancipatory pro-poor and pro-justice impulse, the revisionists will take their continuing focus on the obligations of states hollowed out by global capitalism as at best naïve (Moyn et al), at worst straightforwardly pro-neoliberal (Marks et al).

The domestic frontier faces a similar predicament in a different key, as the earlier enthusiasm about an SE-rights revolution has given way to ambivalence about the 'progressiveness' of its impact and, in some instances, open backlash from executives (and legislatures) resentful of judicial meddling.[190] Yet, at the same time, there seems to be no let-up in the advance of judiciaries who, in the wake of the global legitimacy crisis of representative (i.e. majoritarian) institutions, increasingly assume meta-executive functions and often enjoy considerable public support, especially when they target deadlock issues such as corruption or, indeed, certain types of rights violations. However, the latest judicialization wave is, arguably, driven more by the top-down (self-)empowerment of judiciaries than by the bottom up legal mobilization that characterized the early 'rights revolutions'. In fact, in some places, the (apex) courts have now begun to curtail the effects of constitutional rights litigation on social policy, and have, at least in part, accepted the priorization and (cost-)effectiveness rationale of public authorities. Where such attitudinal changes in domestic judiciaries are occurring, they tend to go hand in hand with a change in the underlying decision-making models to, in Brinks and Forbath terminology, a more pragmatic and deferential style.[191]

This naturally comes with a much higher degree of receptivity for the broader empirical implications of individual cases -that is, an increased sensitivity for their direct and indirect collective effects, and a concomitant turn to metrics-based argument. Such a trend towards quantification and indicators is, of course, part of a wider turn towards evidence-based policy-making in the domestic sphere which may come to fundamentally alter the role rights play in both adjudicatory and policy contexts. For, in essence, it shifts the normative authority of rights from (absolute) legal validity to (relative) empirical functionality, so that legal argument over rights claims would eventually hinge on which side is able to muster the better evidence. Rights would only 'win' if and when it could be shown that they provide the 'better' overall outcome, as measured by the efficiency-cum-fairness standard. This is, surely, not what SE rights advocates had in mind when they embarked on their well-intentioned mission to mainstream human rights impact assessment into all levels of policy-making. Yet, given the current economic and political climate, it may well come to pass that the judicial landscape of the future will become more functionalist while the fiscal space for social policy will further shrink. In

[187] For a fascinating recent analysis of how such legal formalism plays out on the development ground, see L. Eslava, *Local Space, Global Life* (2015).
[188] Merry, *supra* note 53, at S92.
[189] Rosga and Satterthwaite, *supra* note 30, at 315.
[190] See, for instance, the recent study by MC Ingram, *Crafting Courts in New Democracies: The politics of subnational judicial reform in Brazil and Mexico* (2015).
[191] Brinks and Forbath, *supra* note 80, at 239.

such an environment, it will be even more important than today to understand the potential, but also the hazards, of 'rights in action' and to take the functional optic, inimical as it is to the traditional understanding of human rights, seriously enough to explore the extent to which rights, as the primary mechanisms for social (bottom-up) accountability, 'work' (better than alternative modes of governance), while resisting the epistemic traps of the 'audit culture'. The bottom line is still that despite the (likely) empirical undecidability of the (judicialization) impact debate and despite the shifting role of judiciaries, it remains an -equally empirical- fact that people 'on the ground' continue to use constitutional SE rights to claim a minimum standard of social welfare. As long as the rights-critical positions have not provided compelling argument to reduce such claims to mere false consciousness, they must be taken as serious attempts to 'shoot into the dark' and to thereby irritate the system.[192]

The same goes, in essence, for the other SE rights frontiers. Rights-based development is now so deeply entrenched in aid programming that it is likely to remain a principal component of development discourse for some time to come. Indeed, it is, arguably, even reinforced by the recent trend towards results-based (development) financing, which purports to transfer ever more ownership of the ODA process towards recipient states by shifting conditionalities from inputs to results, though at the cost of much increased good governance conditionalities, including human rights, monitoring.[193] The trends sketched above are likely to lead to more independent studies, outside operational imperatives, and, thus, to an ever better understanding of RBD's real impact and 'value added' in relation, primarily, to pro-poor objectives, and a similar impact debate as the one currently going on about domestic judicialization is likely to become as ubiquitous as it will be (empirically) undecidable.

As with domestic judicialization, there will be some pieces of evidence that will underscore the transformative potential of RBD, that will show that human rights have become one of very few globally understood benchmark systems by which human conditions can be described and remedies formulated, and that they are, thus, no longer just an add-on to development but its very *raison d'etre*. However, other pieces of evidence will contradict this representation and, instead, find RBD to have become a self-referential process that is primarily geared to generating an input legitimacy largely abstracted from real outcomes and oriented towards the self-reproduction of the normative-institutional system at its base.[194] And again, the two narratives will stand against each other, all the while the rights within RBD will continue to live a life of their own, inherently transgressive of the (positive or negative) roles foreseen for them, usable and used by 'people on the ground', and, thus, resilient to capture by either camp.

Lastly, the extension of RBD to the global North and to macroeconomic policy in the wake of the global financial crisis and the austerity reaction to it is similarly bound to stay. One reason is, of course, the gradual convergence of the predicaments of states -and their social policies- in the global North and the global South, of the regulatory and the (new) developmental state paradigms. With this global regulatory developmental state, social policy is increasingly at the mercy of forces beyond its jurisdiction, most notably transnational (financial) markets, and its capacity to uphold those levels of welfare that lie at the basis of the conception of SE rights is

[192] Hoffmann, supra note 127.

[193] See Dann, *supra* note 142, at 429; and Hoffmann, *supra* note 15.

[194] See Hoffmann, *supra* note 15, where this is likened to a 'complex managerialism', as described and critiqued by Martti Koskenniemi, such as Koskenniemi, 'Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 *European Journal of Legal Studies* 8; Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4; Kokenniemi, 'The Politics of International Law— 20 Years Later' (2009) 20 *European Journal of International Law* 7; and Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *European Journal of International Relations* 395.

likely to further erode. If anything, the global financial crisis has provided a reality check for many countries, with austerity, arguably, simply being used to masque the fact that the post-War welfare system has been rendered impossible to finance with the reduced means of the contemporary state.

For SE rights, this, again, forebodes two competing stories, notably the crossroads predicament cited in the beginning of this chapter: on one hand, there is a clear disconnect between the optimistic foray by SE rights advocates into the deepest redoubts of (economic) policy-making and their seemingly unperturbed commitment to ever denser SE rights monitoring frameworks, while their addressees, states and international organizations, seem to be going in the opposite direction. Indeed, states' de facto commitment to SE rights protection is, arguably, as low as never, with the main issue not being the specific minimum cores mandated by the treaties, but the very logic of SE rights, i.e. the idea that people are *entitled* to certain substantive and procedural minimum standards regardless of the overarching economic situation. This, by all accounts, many states are no longer prepared to fully support, their continuing commitment to their legal obligations notwithstanding. If, for example, one takes the Euro crisis as a case in point, then one would have to concede that not only did rights concerns play virtually no role in its management, but the relevant actors were also fundamentally unreceptive to the sort of rights-based argument advanced in ETO-type advocacy, so much so that the 'naming and shaming' logic on which rights advocacy is staked could never unfold; European publics were simply too acutely worried about their socio-economic future to massively mobilize for cross-border rights action.

This argument is reflected in two recent critiques of SE rights (advocacy) which, from very different angles, converge on the conclusion that SE rights are at best irrelevant to the objectives sought by their advocates, at worst perilous diversions and (thus) fundamentally illegitimate. One, Eric Posner's *The Twilight of Human Rights Law*, is an unabashed 'right' critique of rights that essentially replicates his earlier re-reading of international law from a (political) realist and (methodological) rational choice perspective.[195] In his account, international law, and with it, international human rights law, fundamentally fails to solve what he terms global collective action problems because of both its ignorance of the true driver of state action, namely rational self-interest, and its mistaken belief that international norms can be effective in the absence of a world government.[196] SE rights, whether domestic or international, are additionally alleged to be ambiguous and inconsistent as they purport to establish clear-cut absolute claims where their implementation really always involves trade-offs and balancing acts on part of political (i.e. democratically elected) as opposed to legal decision-makers.[197] While the latter 'SE rights as programmatic' critique merely echoes earlier arguments in the justiciability debate, Posner's main point is, arguably, the international character of human rights law and its misguided premise that states and national populations can be made to incorporate the idea, apparently behind human rights, that there is 'a moral obligation not to harm strangers, and […] to help them if they are in need.'[198]

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[195] See E. Posner, *The Twilight of Human Rights Law* (2014) and E. Posner, *The Perils of Global Legalism* (2014).

[196] For a more detailed review of Posner's general position on international law, see Hoffmann, *supra* note 127.

[197] Posner, *supra* note 192, at 87; see also the critical review by Hurst Hannum 'Review of The Twilight of Human Rights Law' (2015) *Human Rights Quarterly* 1105.

[198] Posner, *supra* note 192, at 9; as for the 'SE rights as programmatic' critique, *Twilight* is full of examples from both the domestic and international sphere of how legal human rights discourse has allegedly been dysfunctional; a recurrent illustration is Brazil, though the way it is represented is a case in point for Posner's highly tendentious, deliberately simplistic and thinly researched approach to empirical realities -especially those further away from (his) 'home'; this, alas, turns an otherwise thought-provoking argument into precisely the Eurocentric cliché his critics have come to expect.

Ironically, this last critique of international human rights is also one of the lines of attack on (conventional) SE rights discourse recently advanced by Samuel Moyn, even if he would likely object to being thrown in with Posner's political realist perspective. Moyn has, of course, in recent years become the *praeceptor* of a revisionist historiography of human rights with the undercurrent of his argument being that today's discourse on human rights, which are referenced to all humans and addressed, in principle, to all states, has to be sharply distinguished from the earlier discourse on the domestic-constitutional rights of citizens within nation states. Indeed, as he has exhaustively argued since his influential *The Last Utopia*, human rights have to be understood (only) as expressions of an anti-sovereigntist cosmopolitan utopia that springs from the liberal internationalist tradition.[199] This particular understanding of human rights is born, according to Moyn, in the 1970s and that period is, therefore, the (only) correct historical period in which to locate the origins of the contemporary understanding of human rights. What was termed as rights in previous periods carries, according to Moyn, the opposite connotation, notably of appeals to the protection afforded by sovereign states and, by implication, to the ideal of sovereign statehood itself. Despite their linguistic similitude, domestic and international (human) rights are, thus, entirely different ideas and spring not only from distinct but, in fact, conflicting utopias. As a consequence, to forcefully read a unified idea of human rights into what to Moyn are disparate historical episodes is not just anachronistic but misses the point of what human rights really are about.[200]

This broader historiographical point is then critically directed at contemporary SE rights (activism). Firstly, Moyn argues that the affirmation of an obligation of cross-border solidarity that underlies the idea of SE rights as international *human* rights is an (anachronistic) misreading of the intentions behind the internationalization of SE rights. The latter have to be understood in the context of the ideological capture of human rights discourse during the Cold War, with their articulation in the UDHR and the CESCR actually representing a strict (de-)limitation of their reach vis-à-vis the systemic alternative of (real-existing state) socialism.[201] Crucially, however, their implementation was, to Moyn, always closely tied to national sovereignty and it is only when several new conditions begin to be met as of the 1970s that (international) rights talk transcends the confines of UN diplomacy and is transformed into a supranational normative horizon.[202] One such condition is decolonization and the achievement, by the 1970s, of national sovereignty by most former colonies. This freed human rights from their earlier association with self-determination and anti-discrimination struggles in the context of the anti-colonial struggle, while simultaneously re-launching the discourse as a device, primarily at the hands of governments in the global North, to internationally monitor and condition the newly independent states of the global South; in time, this would turn human rights into one of the primary benchmarks for (international) political legitimacy. However, the factor that is, arguably, most important for SE rights in Moyn's argument is the demise of socialism as a utopia of emancipatory politics and its replacement, again as of the 1970s, with the cosmopolitan internationalism at the core of which lie the 'new' human rights.

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[199] Moyn, *supra* note 129.

[200] For a more detailed review of the revisionist argument advanced by Moyn and others see also Hoffmann and Assy, '(De-)Colonizing Human Rights' in J.v.Bernstorff and P.Dann, *The Battle for International Law during the Decolonization Era* (2020); and J. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (2011).

[201] For a critical look at the rise of SE rights talk in the United States in relation to Roosevelt's 'Second Bill of Rights' programme see Moyn 'The Second Bill of Rights: A Reconsideration' in S. Voeneky and G. Neuman (eds.), *Human Rights, Democracy, and Legitimacy in a World of Disorder* (2018) 111.

[202] Seminally S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018); as well as earlier iterations of the argument in Moyn 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2014) 77 *Law and Contemporary Problems* 147 at 157; see also S. Hopgood, *The Endtimes of Human Rights* (2013); and the excellent collection in D. Lettinga and L.v. Troost, *Can Human Rights Bring Social Justice ?* (2015).

However, while SE rights broadly express the programme of post-War welfarism -which, in any case, starts to come under attack, both economically and ideologically, also as of the 1970s- human rights generally suffer, according to Moyn, from the crucial blindspot of (in)equality. More precisely, they neither articulate an egalitarian utopia nor do they serve as instruments against inequality – they are, to Moyn, simply silent on the question, which, in a neoliberal age in which inequality has not only grossly increased but is an essential part of the 'incentive structure', amounts to nothing less than tacit consent. Indeed, by exclusively focussing on the floor of protection rather than on any ceiling, they actually end up doing part of neoliberalism's dirty work of maintaining the lowest strata of society just about alive while removing any cap on how far upward stratification can go. Hence, insofar as human rights imply merely formal status equality and not distributive equality, they are, for Moyn, unsuitable as instruments against the neoliberal social fallout.[203]

This controversial position has since generated a vibrant and ongoing discussion on the salience not just of SE rights but of human rights in general as either drivers or impediments in the fight against growing inequality, which, in turn, has emerged, alongside poverty, as a major focal point in the debate about the neoliberal world order.[204] Indeed, while inter-state inequality is taken to have generally fallen, not least through the economic rise of China and other ´emerging economies´, intra-state inequality has been on the rise in the North as much as in the South and is seen as one of the root causes for the political populist turn that has swept across many an established democracy.[205] While the detailed picture on both inter- and intra-state inequality is more differentiated and contested, its evident impact on social cohesion and political culture has placed inequality at the centre of the discussion not just about the real or potential failings of neoliberalism but also about human rights.[206] It has often been framed in the broader terms of distributive justice and the question of the relationship of rights –both as cognitive frameworks and as practical legal devices- to the latter.[207] Does a human rights optic

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[203] See J.R. Pruce, 'Floors, Ceilings, and Beams: What's Missing in Samuel Moyn's Account of Inequality' *Humanity Journal* (2015) available at http://humanityjournal.org/blog/floors-ceilings-and-beams-whats-missing-in-moyns-account-of-inequality/ (last visited 20 January 2020); S. Fukuda-Parr 'It's about Values: Human Rights Norms and Tolerance for Inequality' (2015) *Open Global Rights* available at https://www.openglobalrights.org/its-about-values-human-rights-norms-and-tolerance-for-inequality/ (last visited 20 January 2020).

[204] See, inter alia, P. Alston, 'Extreme Inequality as the Antithesis of Human Rights' (2015) *Open Democracy* available at opendemocracy.net/openglobalrights/philip-alston/extreme-inequality-as-antithesis-of-human-rights (last visited 20 January 2020); J.K. Galbraith, *Inequality: What Everyone Needs to Know* (2016); A. Barrera, *Distributive Justice and Economic Ethics: Distributive Justice in the Knowledge Economy* (2007); M. Salomon, 'Why should it matter that others have more ? Poverty, inequality, and the potential of international human rights law' (2011) 37 *Review of International Studies*, 2137; B. Esperanza Hernández-Truyol and S.D. Day, 'Property, Wealth, Inequality, and Human Rights: A Formula for Reform' (2001) 34 *Indiana Law Review*, 1213; T. Landman and M. Larizza, 'Inequality and Human Rights: Who Controls What, When, and How' (2009) 53 *International Studies Quarterly*, 715-736; J. Dehm, 'Highlighting Inequalities in the Histories of Human Rights: Contestations over Justice, Needs and Rights in the 1970s' (2018) 31 *Leiden Journal of International Law* 871.

[205] François Bourguignon, *The Globalization of Inequality* (Princeton: Princeton University Press, 2015)

[206] G. MacNaughton, 'Beyond a Minimum Threshold: The Rights to Social Equality' in Minkler, *supra* note 2 at 271.

[207] See, inter alia, J. Waldron, 'Socioeconomic Rights and Theories of Justice' (2010) *New York University Public Law and Legal Theory Working Papers*, Paper 245, available at https://www.peacepalacelibrary.nl/ebooks/files/363358072.pdf (last visited 20 January 2020); S. Meckled-Garcia, 'Human Rights or Social Justice: Rescuing Human Rights from the Outcomes View' (2011) *UCL School of Public Policy Working Paper*, Paper 30 available at http://www.ucl.ac.uk/political-science/publications/downloads/SPP_WP_30_-_Saladin_Meckled-Garcia.pdf / (last visited 20 January 2020); D. Miller, 'Justice and Global Inequality' in A. Hurrell and N. Woods, *Inequality, Globalization, and World Politics* (1999) 187; B. Kingsbury, 'Sovereignty and Inequality' in A. Hurrell and N. Woods, *Inequality, Globalization, and World Politics* (1999) 66; G.O. Aguilar and I. Saiz 'Tackling Inequality as Injustice: Four Challenges for the Human Rights Agenda' *Center for Economic and Social Rights* available at https://www.cesr.org/tackling-inequality-injustice-four-challenges-human-rights-agenda (last visited 20 January 2020); Balakrishnan R, 'How Inequality Threatens All Human Rights' (2015) *Open Global Rights* available at https://www.openglobalrights.org/how-inequality-threatens-all-humans-rights/ (last visited 20 January 2020).

inadvertently divert attention away from the neoliberalism´s underlying distributional scheme by focussing both on specific issues and on partial and minimum remedies ?[208] Does human rights activism, not least in and through the courts, impede potentially more effective and macro-level collective political action, ranging from traditional party electoral politics, via collective (economic) interest representation through trade unions and similar, and to broader and often transnational social movements ?[209] Are human rights, thus, mere handmaidens of neoliberalism and its production of inequality ?

However, while Klein, Marks and others on the ´left´ side of the debate openly endorse a Marxian response to this predicament –and with it, a Marxian critique of rights and the concomitant opposition to rights activism-,[210] Moyn´s overall conclusion is ironically much closer to Posner's, notably that human rights are simply irrelevant. For it is, to him, essentially civil society actors and (some) liberal elites in the global North who, starting in the 1970s, have 'spoken' the language of these new human rights, an ultimately too insignificant force either to be held co-responsible for the rise of neoliberalism or to be capable of its defeat. To Moyn, human rights have simply not been designed for the sort of use they are being put to by their activists, though he concedes that to merely state as much without offering a tangible alternative is not particularly useful either.[211]

Ultimately, the 'left' and 'right' critiques of (SE) rights -as well as Moyn's attempted 'centrist' position- converge on a surprisingly rudimentary form of political realism in which power -or rather, a fairly essentialist caricature of power- is everything. Moyn, for one, says as much when he concludes his reflection on human rights and neoliberalism with the disarmingly simplistic assertion that market fundamentalism demands 'a threatening enemy, rather than a powerless companion' (such as human rights).[212] Yet, for all their alleged powerlessness, the persistence of these critiques across the political spectrum suggests that the opposite is the case, notably that human rights (language) remain(s) a 'fact of the world' to which still very many people across the globe and in virtually all social and institutional settings turn in order to either resist oppression or to claim respect for different aspects of their personal or group identity.[213] The 'real' power of human rights is, thus, epistemic, namely as a language game by which the real-life conditions of humans can be (re-)described and brought into a simplified focus. Whatever institutional power their legalised form acquires is only a reflection of this epistemic power. And to resort to this language out of an experience of violence against oneself or out of care for (an)other is surely a political act and ought not easily be dismissed as mere false consciousness.

Both the 'left' and 'right' seem to fear this power, if for opposite reasons. The 'right' because human rights (in their legalised and internationalized variant) can and have been used to irritate the logic of capitalism (which, to Posner, is, of course, realized most purely in 'America' which he, therefore, wishes to be left alone by internationalist rights activists). The 'left' because rights can and have (also) been conceptual handmaidens for neoliberalism, though their structural indeterminacy and inherent transgressiveness -not least in and through legal process- make them at the very least unstable bedfellows of capitalism; and, in any case, those alternative

[208] See D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (2016).
[209] See M.E. Glasius, 'Economic and social rights and social justice movements: some courtship, no marriage, no children yet' in I. Lintel, A. Buyse, and B. McGonigle Leyh (eds.), *Defending Human Rights: Tools for Social Justice* (2012) 127.
[210] See a well-worked out version of this argument W. Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015).
[211] Ibid., at 169.
[212] Ibid., at 169.
[213] Rabossi, 'La Teoria de los Derechos Humanos Naturalizada' (1990) 5 *Revista del Centro de Estudios Constitucionales* 159.

political-economic projects that seeks to (re-)build the promise of (democratic) socialism beyond the authoritarian statism of its earlier namesake should not fear but welcome rights activism as a (complementary) form of political action. As for Moyn's 'centrism', his otherwise valuable and thought-provoking dissection of human rights discourses in a variety of settings has one significant blindspot, namely the vast world beyond the West where, quite regardless of particular (mis-)readings of the meaning of human rights at different historical junctures, people continue to turn to them often as their last *pièce de résistance*.[214] With Moyn's Western-centric view in the process of, as Philip Alston puts it, 'being swept away by the emergence of an international order no longer dominated by the West', his perspective is now itself increasingly anachronistic.[215]

It is especially in the laboratories of global capitalism, in places like the BRICS and other 'emerging markets' in the global South, but also in those countries in the global North that have found themselves on the receiving end of 'market failures', that SE rights have become one of the only remaining floodgates against the full-scale dismantling of welfare policies and a mutilation of the state into a rump permanently incapable of advancing an egalitarian politics. It is the language of SE rights that allows those exposed to the sweeping liberalization of labour markets, the privatization of education and health care, the elimination of even the most basic support for the poorest, or the blanket capping of public expenditure to frame their predicament in clear cut terms beyond the muddle of economic theory and the path dependencies imposed by global (financial) markets. (SE) rights might not be a 'threatening (enough) enemy' of exploitation, injustice and misery, but those using them surely are.[216]

[214] Although Moyn ventures outside the West when he reviews the role human rights played -or did not play- for anti-colonial activists in the run up and during the decolonization period, his reading has largely focussed on the UN and anticolonial politics in this context, see Moyn, supra note 199, at 84; for more nuanced readings see, inter alia, R. Burke, *Decolonization and the Evolution of International Human Rights* (2011); Terretta, '"We Had Been Fooled into Thinking That the UN Watches over the Entire World": Human Rights, UN Trust Territories, and Africa's Decolonization" (2012) 34 *Human Rights Quarterly* 329; and S. Jensen, *The Making of International Human Rights: The 1960s, Decolonization and the Reconstruction of Global Values* (2016).

[215] Alston, 'Does the Past Matter? On the Origins of Human Rights' (2013) 126 *Harvard Law Review* 2043.

[216] Alston, 'The Populist Challenge to Human Rights' 9 *Journal of Human Rights Practice* (2017) 1; and Alston, ´Human Rights under Siege´, 14 *SUR International Journal on Human Rights* (2017) 267; see also Hoffmann, ´Facing South: On the Significance of an/other Modernity in Comparative Constitutional Law´ in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law* (Oxford University Press, forthcoming 2020)-