**The Ambivalent Status of Socio-Economic Rights in Human Rights-Based Approaches to Development**

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Most development objectives overlap with socio-economic rights. It might therefore be assumed that human rights-based approaches to development would imply the strict application of socio-economic rights principles derived from Article 2(1) of the ICESCR. Twenty years of rights-based development reveal a more ambivalent practice. Accountability is understood primarily in democratic terms associated with participation and empowerment, as opposed to legal terms implying use of a violations-based framework familiar from the doctrinal development of the ICESCR. This does not stem from scepticism about socio-economic rights as rights. Instead, it reflects a discrepancy between the normative and operational level of rights-based development that follows from a reluctance to inscribe clear legal principles relating to *all* categories of rights into practice. Socio-economic rights principles find their greatest application in their programmatic role, integrated loosely as standards in donor, multilateral organisation and NGO development policies. This reflects the reality that socio-economic rights are generally employed not as something enforceable in a court of law, but as morally serious and politically compelling criteria with which to modify the state’s traditional development aspirations of moving numbers of undifferentiated individuals beyond a threshold of service provision.

Key words: socio-economic rights, development, ICESCR, poverty, justiciability

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1. **Introduction**

Human rights-based approaches to development (HRBAD) are most usefully, if not tautologously, understood as a conceptual framework for development that is based on international human rights law. They emerged in the mid-1990s on account of the self-evident failures of neoliberal economic models of development that were based on a mix of market-led growth, minimalist state regulation and models of liberal democracy. Until this point in time development discourses and human rights evolved separately as mutually exclusive domains of economists and lawyers.[[1]](#footnote-1) Development actors and human rights experts operated through parallel sets of intergovernmental institutions that seldom overlapped, notwithstanding similar foci on hunger, inequality and education.[[2]](#footnote-2) Activists began to argue that human rights could serve as both an objective of development in its own right and as a means of improving the quality and effectiveness of work in this field.[[3]](#footnote-3) Narrow concepts of GDP growth as the measure of development began to be replaced by an emphasis on minimum essential levels of basic rights like the right to education, an adequate standard of living, health and work. Charity-based, need-based or service-based understandings of development where citizens were passive recipients would give way to understandings that emphasised the legal obligations of duty-holders to rights-holders. Human rights were believed to contribute to development programming of donor agencies and supranational development organisations by, *inter alia* (a) providing a steadfast normative basis for policy choices that otherwise might prove negotiable, (b) empowering citizens and states to pursue human-centred development goals, (c) generating means to secure redress for violations through legal enforcement, and (d) fostering accountability at the domestic and international/donor levels.[[4]](#footnote-4)

It was assumed that HRBAD could redefine the aims of development such that the boundaries between this field and human rights would disappear.[[5]](#footnote-5) By 2003, all development activities by UN bodies like UNICEF, UNIFEM, UNDP, UNESCO and the Food and Agriculture Organisation were to be structured so as to advance the principles contained in the Universal Declarations of Human Rights and the succeeding conventions.[[6]](#footnote-6) Rights-based approaches dominate the development policies of donor states in the Global North. HRBAD have been also promoted by international financial institutions,[[7]](#footnote-7) NGOs operating on behalf of the poor[[8]](#footnote-8) and supranational organisations.[[9]](#footnote-9) One can trace a plausible history of the concept that identifies a progression from buzzword to subsequent mainstreaming and on to a present day taken-for-granted status in discourse and policy-making.[[10]](#footnote-10)

It has long been understood that ‘[m]ost development objectives generally overlap with ESC rights.’[[11]](#footnote-11) Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes a standard of gradual achievement (i.e ‘progressive realisation’) of its enumerated rights, which will obviously track development. The greatest beneficiaries of development and human rights activities flowing from Covenant are in the same target groups (the poor, the socially-excluded, the vulnerable) and in subject areas (education, housing, food, water).[[12]](#footnote-12) Furthermore, the Covenant can be understood as a framework intended to mandate that certain outcomes of economic processes (like development) should be realised in conformity with non-derogable standards of humanity.[[13]](#footnote-13) The CESCR has, since its earliest days, insisted that States should make particular efforts to ensure that protection of socio-economic rights (hereinafter ESR) is ‘built in’ to national development programmes. As Nankani *et al* argue, the disciplines of development and ESR share ‘a considerable area of convergence on actions proposed by both schools of thought’ inasmuch as the state has primary responsibility for ensuring the welfare of its citizens, improving capacity design and implementing the requisite public policy.[[14]](#footnote-14)

Given this emphasis on outcomes, one might assume that ESR would be the paramount consideration in HRBAD, even if we accept that all rights are indivisible and that rights-based approaches apply to civil and political rights (a matter addressed in Section 4) as well as distinct legal regimes like CEDAW, ICERD and the CRC. Realisation of all these rights conduce to realisation of socio-economic rights, and vice-versa. It might further be expected that HRBAD in practice would draw on the legal codification of ESR norms and standards in international treaties, as well as well as on the work of human rights monitoring bodies and courts.[[15]](#footnote-15) For example, the fully implemented right to education is generally understood as a resource which enables development, and full implementation of this right is detailed in Articles 13 and 14 of the ICESCR and General Comment No.13 of the Committee on Economic, Social and Cultural Rights (CESCR).[[16]](#footnote-16) Our image of what rights-based development outcomes look like therefore echoes the Covenant. One of the reasons advocacy for socio-economic rights is so vociferous is that they offer better analytic and practical leverage than previous framings in neoliberal development models for the achievement of basic minimum standards of welfare.[[17]](#footnote-17) Indeed, the emergence of HRBAD has been traced in part to the belated embrace of ESR by traditional human rights organizations like Amnesty and Human Rights Watch that largely ignored them during the Cold War.[[18]](#footnote-18) A core aspect of this leverage, therefore, is legal accountability. CESCR captures this idea in General Comment 9 on the domestic application of the Covenant: ‘the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.’[[19]](#footnote-19)

However, as the reference to *approaches* should make clear, there is no monolithic model of HRBAD, even if there is some degree of concurrence on basic constituent features.[[20]](#footnote-20) Its application differs by state, by region, by thematic focus.[[21]](#footnote-21) The concept bridges top-down macro-economic planning and bottom-up capacity development and projects. It is the fungibility of concept of rights-based approaches that gives rise to the titular ambivalence. When the concept was initially outlined, it was expected that HRBAD should serve as the ‘scaffolding’ of development policy and not merely as a refinement of existing approaches.[[22]](#footnote-22) However, it is clear that the HRBAD label is being used and practiced in widely disparate ways by numerous different actors. Contemporary studies addressing twenty years of practice in which rights realisation has been halting, partial or illusory now critically reassess ‘the extent to which there have been actual systematic changes in practice by contrast to mere rhetorical incorporation’.[[23]](#footnote-23) This is an important question, because many scholars of socio-economic rights primarily understand accountability in a way that emphasises action through the courts, by focussing on how right-holders act as empowered claimants and by consistently reiterating the justiciability of rights contained in the ICESCR.[[24]](#footnote-24)

However, accountability can also be understood in a more political sense, placing the accent on civil and political freedoms, most notably democratic accountability at the ballot box but also in the sense of participation and empowerment more broadly. As the points about the indivisibility of ESR and civil and political rights above make clear, there is no essential opposition between the two. However, beyond the implied concern with normativity inherent to all rights-based prescriptions, the primary *operational principles* that apply in HRBAD emphasise participation, nondiscrimination, empowerment and inclusion,[[25]](#footnote-25) largely excluding ESR-specific legal principles that interpret their limit and extent like progressive realisation, maximum available resources, non-retrogression and minimum core. None of this is to deny that participation, non-discrimination, empowerment and inclusion are key aspects of ESR realisation. However, these operational principles are generally understood in HRBAD not as strict legal principles, but rather as a looser, process-based mixing of good development with rights.[[26]](#footnote-26)

Accountability is primarily what distinguishes rights from capability-, needs- or charity-based approaches. It has therefore emerged as the cardinal virtue of HRBAD, now anchored in human rights obligations and not, as heretofore, in *ad hoc* goals.[[27]](#footnote-27) The initial assumption in rights-based approaches was that the principle of recourse to the legal system to see ESR enforced would enjoy parity of esteem or emphasis with those that would enable the poor to demand political accountability.[[28]](#footnote-28) However, while ESR are universally understood in HRBAD as legitimate claims that give rise to correlative obligations or duties, the legitimacy of these claims is for the most part not to be vindicated in the courts. In fact, the ‘legal reflex which automatically and unthinkingly resorts to law as remedy’ has been conspicuously absent.[[29]](#footnote-29) This does not stem from a scepticism about ESR *as* human rights. From a review of over twenty years of scholarship and policy documents on HRBAD specifically, the author has found no source that contests the legality of ESR, their parity of status with civil and political rights, or their justiciability. However, accountability in HRBAD is understood primarily as variegated *political* accountability, which revolves around participation of the poor in policy-making at the input stage of planning and democratic accountability at the output stage of implementation.

This article explores the (perhaps) surprising eclipse of judicial accountability for ESR violations by political accountability, on the one hand, and the eclipse of justiciability-based standards by looser operational standards, on the other. This is the first study to specifically survey the role of ESR generally in rights-based approaches to development. Rooted in the apparent fungibility of rights-based approaches, it can be understood as a contribution to what Miller and Redhead describe as a ‘third wave’ of research focused on rights-based development. This began in the mid-to-late 2010s and takes the dominance and applicability of rights-based approaches in development for granted, but which explores how HRBAD are actually being implemented after more than two decades as a self-conscious field of study and practice.[[30]](#footnote-30) They note a ‘disjuncture’ between what they observe in practice and interview testimony, on the one hand, and what existing literatures presume about HRBAD, on the other.[[31]](#footnote-31) Others, similarly, have noted an apparent discrepancy between the normative and operational level of HRBAD that follows from a reluctance to inscribe clear legal principles into practice.[[32]](#footnote-32)

The argument in this article is not normative, and in particular is not premised on the argument that judicial approaches to ESR needs to be re-centred in HRBAD. There are valid reasons, some explored in this article, why ESR-specific organisational principles and justiciability are downplayed. It is not my intent to second-guess them. I agree with Darrow and Tomas when they argue that while formal legal mechanisms are potentially vital, human rights ‘need to be seen as open-textured and flexible, and capable of application in diverse situations in ways not limited to adjudication in courts and tribunals.’[[33]](#footnote-33) The argument instead is empirical in seeking to explain how and why the (valid) critical complaint that HRBAD ‘remains more of a slogan than a concrete framework for measuring human rights, *particularly economic rights’* (emphasis added) came to be.[[34]](#footnote-34) In making this argument, I undertook a systematic literature review approach to summarise and evaluate the body of writings on rights-based approaches to development insofar as they advocated, employed, analysed or even mentioned socio-economic rights. It started with systematic searches in databases using well-defined search terms (‘human rights-based approaches’, ‘socio-economic rights’, ‘ESR’, ‘HRBAD’, etc) to find relevant literature with a direct bearing on this central focus. I reviewed published books, articles, chapters and ‘grey’ literature of practitioner accounts and programme evaluation studies. It became apparent that certain scholars and studies are cited quite frequently in the literature and would appear to be considered key works. From this starting literature, I employed a ‘snowball method’ that involved both forward snowballing (seeing where a given paper was cited) and backward (exploring what citations a given paper used to build its case). I also drew on the somewhat smaller English-language policy literature on HRBAD that emerged from three key sources, namely the foreign and development aid agencies (e.g. DFID, Irish Aid, SIDA), multilateral organisations (e.g. UNESCO) and NGOs (e.g. Oxfam, WaterAid) where their general interpretation of, and experience in applying, rights-based approaches are outlined.

Section 2 examines how ESR scholars theorised the role of judicial enforcement of socio-economic rights in HRBAD under this central rubric of accountability. Section 3 explores how HRBAD has operated less as defined legal standards and instead is applied as an ‘umbrella concept’ covering a wide array of practices, from which the relevant actors tend to pick and choose varying aspects to put into use.[[35]](#footnote-35) Section 4 builds on this by showing how ‘accountability’ came to be understood in almost exclusively non-judicial terms in HRBAD. It further notes the conscious departure by policy-makers from litigation-based strategies in HRBAD that resulted. Section 5 employs documentary analysis of official donor and NGO documents to outline how ESR instead is vindicated in its programmatic role, integrated as norms, principles and standards in state and NGO plans, policies and processes of development. This reflects the reality that socio-economic rights are generally employed not as something enforceable in a court of law, but as criteria with which to inspire and assess the state’s traditional development aspiration of moving numbers of undifferentiated individuals beyond a threshold of service provision. As such, HRBAD is less the expected sea-change in development that was initially anticipated, but rather the combination of ESR with the classical planning and programming tradition of development.[[36]](#footnote-36)

**2. Application of Justiciable ESR Standards in Human Rights-Based Approaches to Development**

At the most basic level, HRBAD amount to a demand for compliance on the part of the state, donors and international agencies with those legal standards that can help identify the core minimum threshold of entitlements to health, education, food security, sanitation etc, making clear that progressive realisation of a given right requires policy and behavioural change in the state ‘duty-bearer’ to protect, respect and fulfil such rights. These standards have been clarified in General Comments of the CESCR, Concluding Observations of country reports and Special Rapporteur reports. It is assumed that HRBAD would employ recommendations of such international human rights mechanisms when assessing the capacity of rights-holders to claim their rights and of duty bearers to meet their obligations.[[37]](#footnote-37)

Any use of ICESCR as a basis for HRBAD is *in theory* inseparable from the idea of justiciable standards. As Jochnik argued when the shift from neoliberal development to HRBAD began, the main potential of rights-based approaches lay in their ability to change the way people perceive themselves in relation to the government and other actors, reframing, re-analysing and renaming certain deprivations as ‘violations’, and therefore as something ‘that need not and should not be tolerated.’[[38]](#footnote-38) At the time HRBAD was formulated, litigation before domestic courts on social and economic rights had increased dramatically in frequency and scope in many parts of the world, including in developing countries like South Africa and Colombia.[[39]](#footnote-39) Implicit in this argument is the sense that only justiciable standards can clarify the state's obligations imposed by socio-economic rights, entailing clear criteria by which to judge policy in lieu of previously amorphous standards.[[40]](#footnote-40) Direct engagement with the legal system can take a number of forms like seeking recognition for claims to institutionalize rights in law, testing the parameters of an already-legislated right and challenging the legality of state policies on the basis of ESR.[[41]](#footnote-41) Beyond justice in the individual case, making ESR justiciable can establish ‘a culture of continuing justification’ in sectors directly related to human wellbeing that otherwise tend to be relegated to a largely unfettered political discretion.[[42]](#footnote-42) As the Office of the High Commissioner for Human Rights put it

‘For people to be enabled to assert a legally binding claim that specific duty-holders provide free and compulsory primary education (International Covenant on Economic, Social and Cultural Rights, art 13) is more empowering that it is to rely on “needs” alone or to observe the high economic returns on investment in education.’[[43]](#footnote-43)

Of course, faith in the efficacy, or relative importance, of litigation-based strategies was not unanimous. Even in the early days, some cited grassroots agitation, public discussion and shared ideological constraints as potentially more propitious routes to accountability than justiciable legal remedies – as Uvin rightly noted, ‘what is socially and legally feasible today is never fixed, but a matter of political struggle,’ calling into question any incipient legal determinism at the time.[[44]](#footnote-44) Subsequent years have made clear that there are any number of reasons why domestic judicial enforcement of ESR in developmental states is unlikely, impossible or too infrequent to underpin human rights-based development on the part of donors or multilateral agencies given the weakness of judicial institutions, lack of rule of law and the inability of the marginalised to access courts. These reasons are explored in greater detail in Section 4. However, there is a belief that even in the absence of litigation-based strategies, the suite of ESR-specific principles underpinning justiciability and/or a violations approach like maximum available resources, non-retrogression and minimum core should bring a certain hitherto-absent rigour to development thinking and practice, providing standards for policy-making and evaluation.[[45]](#footnote-45) Whereas once the broad terminology of the Covenant and open-ended nature of some of the obligations appeared vague, it is now generally accepted that these doctrinal developments provide normative clarity and demarcate a relatively precise and objective enforceable core of the ICESCR.[[46]](#footnote-46)

To begin with, CESCR Article 2(1)’s core concept of progressive realisation should become a holistic reference point for HRBAD. Progressive realisation recognises that the resources at the disposal of a government are limited, but nevertheless stipulates that a government must take specific steps to ensure that advances in areas like health, welfare and education improve incrementally over time via systematic, timetabled plans. For example, at the time when HRBAD was first mainstreamed, it was expected that national reporting on attainment of the Millennium Development Goals would employ ‘clear indicators, benchmarks and targets to measure progress’ derived from socio-economic rights law.[[47]](#footnote-47)

Likewise, the doctrine of maximum available resources should guarantee that governments do not shrug off human rights obligations on the grounds of lack of resources. If, as Alston and Robinson argue, the challenge for HRBAD is to improve project effectiveness in a manner consistent with existing resource constraints,[[48]](#footnote-48) it was assumed this doctrine should serve to guide principled maximisation of available ways and means.

Similarly, the minimum core obligations doctrine means that there is a ‘floor’ of immediately enforceable entitlements that enjoy immediate priority in development – the government of a country in which a significant number of persons is deprived of essential thresholds is prima facie failing to meet these core obligations.[[49]](#footnote-49) This could obviously be employed in development planning to specify the extent to which the need for a threshold level of education/healthcare/food etc generate immediate obligations, ‘thereby blocking the allocation of scarce resources away from those needs in order to satisfy mere preferences or desires.’[[50]](#footnote-50)

 The principle of non-retrogression means that once a certain level of enjoyment of rights has been realised, it should be maintained in the absence of compelling reasons justifying contraction.

However, as Sections 3 and 4 later illustrate, references to progressive realisation, maximum available resources, minimum core, and non-retrogression are conspicuous by their absence in development programming. Donors and policy-makers adopting HRBAD seldom refer to operative legal standards in assessing state compliance with the general prohibition of non-retrogression or attempt to define a workable minimum core for the projects they pursue. Furthermore, despite the tremendous growth of such benchmarks and targets in relation to ESR like housing, education and health, these indictors seldom find their way into policy papers in relation to individual socio-economic rights.[[51]](#footnote-51) Where specific human rights standards like the right to the highest attainable standard of health are used, it tends to be disassociated from any concrete targets, exemplifying the ‘rhetorical flirtation with rights’ that critical friends of HRBAD have identified.[[52]](#footnote-52) While there are isolated examples of ESR frameworks supplying social and economic tests for identifying and monitoring risks when development actors take decisions,[[53]](#footnote-53) we still see what concerned observers describe as the general reluctance on the part of the development community to fully engage with international legal obligations and how to reflect these norms in policy at the domestic level.[[54]](#footnote-54) Before examining how ESR are used in Sections 3 and 4, it is first useful to examine why this reluctance exists. The reluctance stems more from an ambivalence about human rights in development generally, as opposed to ESR particularly.

**3. All Things to All Men: The General Ambiguity of Rights-Based Approaches**

While scholars and activists generally accept that the HRBAD framework is something both instrumentally useful and morally robust, this enthusiasm coexists with a widespread sense that there is no full agreement on what HRBAD means for development strategies.[[55]](#footnote-55) Arguments that HRBAD is imprecise[[56]](#footnote-56) or that rights-based approaches serve as a ‘catchall for the complexity of development issues’[[57]](#footnote-57) convey a sense that the moniker is used both promiscuously and inconsistently. This lack of precision fosters a sense that organisations purporting to adopt HRBAD are merely ‘repackaging what they have always done’ in this new language, adding little more than good intentions.[[58]](#footnote-58)

How reasonable is this view? Certainly, there are agencies that adopt an approach that revolves around legal interpretation, applying human rights as standards against which development interventions might be assessed, for example the UN’s Sustainable Development Cooperation Framework.[[59]](#footnote-59) There are other agencies or governments for whom the realisation of human rights more broadly underpins the entire development enterprise and so yields a normative framework that requires a thoroughgoing re-definition of development goals.[[60]](#footnote-60) However, there are other approaches where human rights are more marginal and more fungible. For some donors, international agencies and states, HRBAD is a capacious metanorm, ‘understood to represent a “mantle”, “slogan” or “metaphor”’ covering a variety of praxes, ‘an all-encompassing veneer that is effectively malleable’ to accommodate any number of differing approaches.[[61]](#footnote-61) This is not cynicism and does not automatically mean that HRBAD remains mere lip-service, a rhetorical ‘fig leaf for the continuation of status quo’ in Uvin’s memorable formulation.[[62]](#footnote-62) It does, however, inhere in the very mutability a human rights-based approach. In the context of HRBAD, human rights can be interpreted either as *standards* defining the minimum acceptable level of achievement, or as *principles* specifying criteria for an acceptable process to secure these results (eg universality, equality, indivisibility inclusion).[[63]](#footnote-63) The World Health Organisation, for example, holds that ‘Human rights standards and principles - such as participation, equality and non-discrimination, and accountability - are to be integrated into all stages of the health programming process.’[[64]](#footnote-64) WaterAid, similarly, applies the human rights principles of ‘participation, non-discrimination, transparency and accountability’ to all development activity.[[65]](#footnote-65) An approach premised on these principles need not necessarily be framed in terms of defined obligations within instruments like the ICCPR or ICESCR.[[66]](#footnote-66) Yeshanew, for example, argues that mainstreaming the right to food need not also lead to radical changes in, or the replacement of, existing development efforts towards hunger eradication – it is enough that the right ‘brings new dimensions’ to fighting malnutrition.[[67]](#footnote-67) On such a view, HRBAD serves more as a valued complement to traditional approaches than as a thoroughgoing reform.[[68]](#footnote-68)

We have long known that rights provide legitimate language of claim-making that inhabits the space between legal and ethical argument.[[69]](#footnote-69) In HRBAD, however, the accent tends to be on the latter. For many, therefore, the attractiveness of rights-based approaches to development lies in the moral force they enjoy beyond that enjoyed by any other development discourse, something ‘highly persuasive for development thinkers who seek to move beyond the often disabling relativism of contemporary thought.’[[70]](#footnote-70) If we understand development as an arena of anonymous macro-level policies directed towards entire sectors of the citizenry and aimed at influencing a general institutional framework, this can lead to an emphasis on the more holistic system of interconnected rights-adjacent institutional development in the state concerned, rather than those individual rights with which more court-based approaches are concerned.[[71]](#footnote-71) This is something even the strongest of ESR advocates concede. For example, Katerina Tomasevski (former Special Rapporteur on the right to education) acknowledges that poverty is a structural phenomenon that requires a broad policy framework, arguing that ‘the focus on individual entitlements is not an appropriate conceptual basis because of the simple fact that structural problems require structural remedies; individual entitlements – or individual remedies for that matter – are insufficient.’[[72]](#footnote-72)

There is also something of a recognition that the solution to these structural phenomena may not be understood, or presented, primarily as rights issues, even if those solutions conduce to the realisation of rights. In developing states, basic services can be understood by international and domestic actors as tools for state- and nation-building, for enabling the state’s penetration of territory, or for the creation of a common
culture binding critical populations to the state.[[73]](#footnote-73) States may pursue poverty alleviation, education, healthcare and housing as formative social contracts to underpin their legitimacy[[74]](#footnote-74) without ever engaging in the idiom of rights. Even if development actors embrace rights, ESR are just one of aspect of a crowded development agenda along with approaches like poverty reduction, Sustainable Development Goals, social protection and inclusive growth, with which HRBAD generally accords to varying extents. An agenda of rights-based application of universal principles (what’s right) will inevitably overlap, and be shaped by, technocratic concerns with what is feasible in a given context (what works) and a political concern with interests (what’s popular).[[75]](#footnote-75) As Hickey and Mitlin argue:

‘[R]econceptualising development as a problem of rights or their lack can be seen as putting the cart before the horse …..Viewing development in these terms alone leads analysis of development issues down a certain path, whereby all problems are essentially failures to realise a certain set of rights….. Surely it makes more sense as a method of analysis to leave open the question of how current problems of uneven development have emerged, rather than to frame them from the outset as reflecting a particular type of institutional deficiency.’[[76]](#footnote-76)

One final (and for the purposes of this article, most important) way the sheer mutability of human rights in HRBAD generally affects the reception of socio-economic rights particularly is the manner in which the actual domain of law itself can be downplayed. As Vandenhole and Gready argue, for many official and non-state actors, human rights are primarily envisioned more ‘as a struggle rather than as pre-conceived legal rules.’ Though this does not prevent use of human rights as a legal strategy to affect legislation and the judiciary, it means very different starting points (the political realm of local/national struggle, as opposed to the judicial) and incorporates different end-goals, namely altered power relations as opposed to implementation of international standards.[[77]](#footnote-77) Social ‘counter-power’ often enjoys greater emphasis than legal remedy.[[78]](#footnote-78) This tendency affects the very meaning of accountability, as section 4 goes on to explore.

**4.The Meaning of Accountability in HRBAD**

It should be clear that a human-rights based approach revolves as much around empowering rights-holders to claim the rights as it does capacity development for duty bearers to meet their obligations. A critical test in both regards is the extent to which HRBAD succeeds or fails in reinforcing state accountability. As Gaventa and McGee argue, there is a general consensus that accountability imports both ‘answerability’ (understood as the requirement for duty-bearers to provide information and justification for their actions) and enforceability (the presence of penalties or consequences where these actions fail).[[79]](#footnote-79) In strictly doctrinaire terms a human rights-based approach implies a foundation in legal accountability, connoting use of legal instruments in defence of the most vulnerable, poor or discriminated-against groups who can seek and obtain a remedy for grievances in a court of law or via established administrative procedures.[[80]](#footnote-80) As Section 2 argues, justiciable socio-economic rights inform, if not dominate, this interpretation of accountability. However, Section 3 makes clear that court-based approaches are but one way of achieving HRBAD. *Empowerment* approaches derived from the idea of social counter-power have also proven popular. Different civic actors and NGOs, to say nothing of states and donors, will manifest either or both approaches to a greater or lesser extent.[[81]](#footnote-81)Legalist approaches are premised on a violation-based approach to existing respect/protect/fulfil frameworks derived from international human rights law, while empowerment or social counter-power approaches base their claims on the use of rights language to inspire and mobilise marginalised groups regardless of whether those claims have an explicit legal basis.[[82]](#footnote-82)

One notable consequence of this division between court-based and empowerment approaches is that accountability is understood in two different (though by no means incompatible) ways. The former approach understands accountability as accessible, affordable, timely and effective measures applied by the judiciary to repair specific harms suffered by victims. The empowerment approach roots its understanding of accountability in participation, whereby development must be built on the active involvement and advocacy of marginalised people.[[83]](#footnote-83) This emphasis stemmed from a concern that participation without a rights-based grounding usually took the form of watered down consultation amidst elite monopolisation.[[84]](#footnote-84) A rights-based approach sees participation in democratic terms, connoting (*inter alia*) macro-level participation rights associated with the ICCPR like free elections, free speech, and free association.[[85]](#footnote-85) As such, the concept of HRBAD became consistent with the broader good governance discourse, even if the normative and ethical imperatives towards fostering participation have other alternative roots in domestic culture and/or political economy. A primary focus on those ‘governance dimensions’ of underdevelopment, i.e the power dynamics that cause and reinforce exclusion and discrimination, are understood to ensure the efficiency, effectiveness and sustainability of development programmes.[[86]](#footnote-86)

This emphasis on participation and good governance is underpinned by a political economy approach that identifies lack of political will (as opposed to bureaucratic capacity, human capital, financial resources and/or global inequalities) as a key cause of underdevelopment. Participation is generally understood as empowering networks and constituencies for mobilisation through elections, lobbying, advocacy and day-to-day interactions with local or state authorities, thereby increasing their ability to take part in governance and to claim rights as groups or as individuals. The UK’s Department for International Development’s 2000 strategy paper *Realising Human Rights for Poor People* set a template for many national donor agencies over the next 20 years with its insistence that that rights become meaningful only as citizens are engaged in the decisions and processes which affect their lives.[[87]](#footnote-87) The rationale at play is that development actors must improve ‘the interactions between people’s “voice” and the institutional structures that enable their priorities, views and perspectives to be translated into real outcomes’.[[88]](#footnote-88) Better citizen voice should conduce to better state responsiveness.

None of this departs from mainstream ESR theorisation on the indivisibility of all types of rights. The CESCR has long accepted that the right of individuals to participate must be an ‘integral component’ of any policy or practice that seeks to meet the state obligation to ensure enjoyment of all human rights.[[89]](#footnote-89) Programmatic benchmarks derived from the ICESCR could and should be identified and legitimised on the basis of local participation.[[90]](#footnote-90) However, there seems little doubt that inasmuch as it prioritises voice, respect and democracy, the empowerment/participation pillar of development policy-making ‘emphasizes civil and political rights’[[91]](#footnote-91) and pursues outcomes that are ‘intrinsic to the ICCPR’.[[92]](#footnote-92) Indeed, on such a view, analytical criteria like poverty, vulnerability, exclusion could be seen as denials of civil and political rights in and of themselves without any necessary link to any right in the ICESCR.[[93]](#footnote-93) While there is nothing inherently incompatible about using good governance as a means to support and facilitate the implementation of ESR, Koch reminds us that good governance concepts like participation, transparency and empowerment were developed as much as managerial terms as they are legal concepts.[[94]](#footnote-94)

Accountability is therefore understood more in democratic (in the form of elections, consultation and national review processes) and social (community-led or cause-based movements generating pressure on authorities to provide public goods as obligations) terms[[95]](#footnote-95) than judicial. Democracy, participation and civil society empowerment are explicitly seen as the key ‘accountability relationships’ to secure effective and inclusive services.[[96]](#footnote-96) Justiciable legal remedies may not be explicitly precluded, but form just one avenue for accountability amidst ‘monitoring, reporting, public debate and citizen participation in public service delivery’, as well as the ballot box.[[97]](#footnote-97) Surveys of NGO activists reveal they are less likely to pursue litigation strategies to seek judicial decisions in their favour than they are to seek change in public discourse.[[98]](#footnote-98) While the Partnership for Maternal, Newborn & Child Health (the world’s largest alliance for women’s and children’s health) affirms accountability, independent judicial remedies are largely eschewed in favour of other remedies like policy change, training and freedom of information.[[99]](#footnote-99) HRBAD as practiced by development agencies ‘tend to emphasize procedural rights over substantive rights – that is, participation and voice over the right to food, health or housing,’ at least in part because analysis of housing or education violations is ‘more complex and challenging’ than familiar emphases like participation.[[100]](#footnote-100)

None of this is necessarily surprising. For many in the human rights community, HRBAD emerged at least in part as a conscious departure from the limitations of ‘violationist’ identification and denunciation of breaches to instead focus on the building of capacities of individuals, institutions and societies. On this view, legal redress was merely one of many potential ways in which human rights ‘added value’ to development.[[101]](#footnote-101) UNDP, for example, viewed HRBAD as a new approach which ‘focusses on the realization of human rights through human development rather than through a violations policy’, emphasising instead the mainstreaming of human rights concerns ‘into national legislation and governance programs.’[[102]](#footnote-102) UNICEF in East and Southern Africa adopted community development programmes that consciously elevated empowerment over what it termed ‘human rights accountability.’[[103]](#footnote-103) Indeed, Mander suggests that with HRBAD should mark a reconceptualisation of rights outside the absolutist paradigm of legal rights to instead be seen more amorphously as a standard-bearer of struggle from below.[[104]](#footnote-104) ESR are specifically invoked during these campaigns, but usually ‘in the abstract,’ a rhetorical citation rooted loosely in covenants like the ICESCR and omitting reference to formal investigation or adjudication.[[105]](#footnote-105)

For some development actors and grassroots organisations, violations-based litigation has inherent and obvious limitations. The cost of legal strategies may exceed the capacities of civil society.[[106]](#footnote-106) Even where finance is not at issue, marginalised groups find it difficult to recruit lawyers or navigate courts to vindicate their entitlements.[[107]](#footnote-107) As Gauri and Gloppen note, the extent of litigation depends on four factors, namely (i) the accessibility of the courts through legal assistance, (ii) the cultural receptiveness of courts to rights claims, (iii) the responsiveness of litigation targets to court rulings, and (iv) the capacity for litigant follow-up.[[108]](#footnote-108) In most developing countries, these factors are entirely absent. Cultural traditions of judicial deference to the executive are strong. Resolution of legal problems tends to occur outside the conventional justice sector via non-judicial dispute resolution, civil society campaigning and other processes.[[109]](#footnote-109) Lawyers at best end up ‘playing a supportive rather than lead role and the courts often not a part of the equation.’[[110]](#footnote-110)

Court-based approaches can also alienate those in executive or administrative authority on whom development actors rely for policy implementation. Even they do not completely disavow drawing attention to violations, development actors generally prefer the ‘cooperative mode’ where they interact productively with ministerial offices and government agencies to the confrontational naming-and-shaming tactics associated with human rights bodies.[[111]](#footnote-111) Yamin and Cantor, in a study of HRBAD as it relates to health, conclude that policy-makers in the area tend ‘to be wary of judicializing health-related rights’ and that governments ‘can become hostile to HRBAs when they believe it means involving the courts’, and so both concentrate instead on programming.[[112]](#footnote-112) Likewise, as Banik argues, where the state as duty-bearer fails in the provision of a right, the redesign of programmes and policies may be a more attractive corrective than judicial reprimand.[[113]](#footnote-113) Notwithstanding consistent doctrinal development in ESR theory and refinement of rights-based situation analysis for identifying violations and redress duty-bearers, there remains a sense among development actors that the standards and processes for monitoring ESR like core minimum and progressive realisation are insufficiently determinate to make a violations-based approach useful.[[114]](#footnote-114)

1. **Programmatic Uses of Socio-Economic Rights in HRBAD**

What role then for ESR if rights-based approaches to development eschew confrontational litigation-based accountability in favour of collaborative work with governments? A review of practice and the theoretical literature in rights-based approaches reveals that ESR enjoy their greatest utility not as a source of rigid standards for legal accountability, but in programming practice. As such, it supplies substantive content to social counter-power, incorporated to some degree in all phases of the programming process, from assessment and analysis to goal-setting, and from there to implementation, monitoring and evaluation.[[115]](#footnote-115) In so doing, it helps remedy the essential vacuity of empowerment-based approaches. Valuable as participation is, empowerment is often promoted in extremely abstract terms, a far cry from actually viable or usable responses to exclusion.[[116]](#footnote-116) As Evans reminds us, the association of human rights with principles such as social inclusion, participation and democratic rule-making does not guarantee that a coherent or integrated approach is actually articulated.[[117]](#footnote-117) The gap between increasing community participation in service delivery and the actual protection of a substantive right is significant.[[118]](#footnote-118) It is by bringing ESR into these types of development policy discussions and programming that donors and states can bridge the gap between the process values of participation, transparency, empowerment, on the one hand, and a concrete set of policy frameworks for rights like health, housing and food on the other.[[119]](#footnote-119) We therefore observe a role for ESR not so much in establishing or monitoring strict justiciable standards, but rather in supporting government and donors in understanding and realising their responsibilities. The language of respect/protect/fulfil is frequently employed in policy documents as HRBAD attempts to enshrine human rights as a central frame of reference in policy-making and political choices.[[120]](#footnote-120) After surveying the set of rights that are being violated or at risk thereof, programme and policy processes will typically include most or all of the following: assessment, analysis, planning and design, implementation and delivery, monitoring and evaluation.[[121]](#footnote-121)

Genuinely pursuing HRBAD means ESR should positively influence the formulation and implementation of policies in areas like food security.[[122]](#footnote-122) Whereas once it might have been plausible to say that programming could not be guided by such standards because these are insufficiently precise to inform development programming concretely,[[123]](#footnote-123) it was the doctrinal evolution in ESR in relation to specific rights since the 1990s that fuelled optimism that ICESCR could become an explicit objective of development via integration of ‘minimum standards into all plans, policies, budgets, processes and institutions.’[[124]](#footnote-124) The CESCR’s General Comments and Concluding Observations, strategic agendas from international conferences, as well as reports by special Rapporteurs yield objective performance standards to guide change strategies. These recommendations potentially provide a rational framework for realisation of rights like education, housing, pensions or healthcare ‘providing a common template for coherence between all aspects of state responsibility and action ….from the processes and content of macro policy priorities, strategic plans, and fiscal allocation to training and performance assessment of state employees.’[[125]](#footnote-125)

Grounding ESR in legislation is the best way of giving them the ‘political and policy traction’ they might not otherwise enjoy.[[126]](#footnote-126) Bilateral donors advocate for the alignment of national legislation with the pertinent provisions of the international human rights framework. The Austrian Development Agency, for example, assists donee states in codifying the right to water and sanitation in legislation and regulations.[[127]](#footnote-127) Applying human rights to health implies engagement in the ‘nitty-gritty of policy formulation’, framing goals and targets while differentiating responsibilities and establishing parameters for resourcing, implementation and monitoring.[[128]](#footnote-128)

Of course, where states are underdeveloped, immediate and universal fulfilment of rights to welfare, education or health is not feasible. However, ESR standards do provide resilient models for the organisation of public services. Systematically bringing ESR into the policy discussion can ‘problematise policy trade-offs that are harmful to the poorest’ that might prove tempting if these duties were not foregrounded.[[129]](#footnote-129) Rights-based approaches do not attempt to redress all rights deprivation. Given the scope of problems and the need for selectivity, almost all development activity involves identifying the biggest problems and then breaking them down into smaller ones or more manageable issues.[[130]](#footnote-130) For the most part, therefore, HRBAD operates less as a holistic approach to development through progressive realisation than a targeted approach to a single issue, such as education or food, and applying to the rights implicated a clear understanding of the state’s general obligations under the ICESCR. Analysis of the current status of rights provision should serve as the ‘primary tool’ for identifying where donor support is best directed.[[131]](#footnote-131) As such, ESR represent the best route for leavening policy options premised on technocratic target-setting with those which emphasise norms.

A sample of the varied literature on HRBAD from multilateral organisations, donor development programmes and NGOs shows how socio-economic rights are applied to generate technically feasible and politically supportable processes of planning and delivery.

* In health policy, standards found in Article 12 ICESCR function as a planning tool, setting a standard against which to evaluate actions by states and development agencies, dovetailing with health-related disciplines like epidemiology that supply technical rationales for applying these standards.[[132]](#footnote-132) The aspiration of rights-based actors here is to make ‘programmatic recommendations at the national or subnational level’ in relation to policies states should be pursuing, informed by process indicators on issues like obstetric care from the WHO or the UN Population Fund.[[133]](#footnote-133)
* ICESCR Article 12 has helped to shape national and sub-national plans for sexual and reproductive health education, information, and services. International human rights law has informed design plans for providing universal access to family planning encompassing a spectrum of public, private, national, and international actors based on targeted objectives, firm timeframes, a detailed budget, financing, reporting and benchmark measures.[[134]](#footnote-134)
* ICESCR Article 11 and doctrinal developments like General Comment No. 12 on the Right to Food have been integrated into food security and nutrition programming by outlining how duty bearers can and should carry out their obligations.[[135]](#footnote-135) For NGOs like FoodFirst Information and Action Network, a rights-based approach required aligning their projects so as to become ‘fully supportive of the right to adequate food.’[[136]](#footnote-136)
* UNICEF integrates ESR human rights standards to ‘develop assessments, checklists and indicators’ for assessing interventions.[[137]](#footnote-137)
* Two NGOs in Uganda worked with the national water ministry to design a framework to monitor corruption in the areas of safe drinking water and sanitation drawing on the duties to respect/protect/fulfil outlined in General Comment no. 15 on the Right to Water.[[138]](#footnote-138)

While nothing in this wide variety of approaches precludes enforcement through litigation, accountability is usually envisaged as human rights impact assessments applied at the level of strategies, budgets, and programmes. Saiz and McDonald argue that this type of analysis can help development actors assess root causes, trace impacts of policies on inequalities and reveal systemic obstacles to inform policy-making across many areas crucial to the implementation of Sustainable Development Goals.[[139]](#footnote-139) There are few ICESCR standards that cannot be converted to national or regional benchmarks for measuring progressive realisation. As Darrow and Tomas argue, it is the programmatic application of internationally articulated standards that best indicates development effectiveness, i.e the extent to which necessary improvements have been achieved in the lives of those enjoying rights.[[140]](#footnote-140) However, use of the Covenant does not always lend such precision. As noted earlier, establishing baselines for measuring fulfilment of ESR is often impaired by the difficulties of establishing *how much is enough* and *what is appropriate* over a given timespan.[[141]](#footnote-141) Marx *et al* observe that ‘The policy documents of donors and development agencies in which a HRBA is adopted are often aspirational and prescriptive, remaining vague about operational and organizational changes they imply’ – rights-based approaches seldom imply an ‘all or nothing choice’ as there are ‘many degrees and levels of engagement.’[[142]](#footnote-142)

As a result, understanding the programmatic nature of how ESR applies in HRBAD means also acknowledging ‘the difficulty in keeping a strictly legally centred approach.’[[143]](#footnote-143) Application of ICESCR standards by donor agencies or NGOs seldom demonstrates sustained engagement with concepts like progressive realisation, minimum core, non-retrogression and maximum available resources. While these key analytical concepts are well-defined, carefully differentiated and usefully disaggregated, the way they are used tends to provide for generic, one-dimensional analysis. Many organisations that explicitly commit to rights-based approaches do so only in general terms, others neglect to specify operational aspects and others fail to mention implementation processes.[[144]](#footnote-144) Standards derived from General Comments can point in the general direction for policy-making, but are not analytically sharp enough to guide fine-grained policy-making. They do not permit policy-makers to define the detailed inner politics that might shape political reform or help identify governance strategies for a clear theory of change. Instead, programmatic commitments to ESR provide a ‘source of leverage’ for citizens to potentially hold their government politically accountable.[[145]](#footnote-145) For example, for the Swedish International Development Cooperation Agency (SIDA), raising the standard of living of the poor was always less about directly ensuring non-retrogression in supply of housing stock or identifying the maximum available resources for improving water supply, but was instead a more indirect process of ‘contributing to the identification of the people who are discriminated against and the power structures in society that affect poor people's lives.’[[146]](#footnote-146)

1. **Conclusion**

This article has explored the initial foundational assumptions and later functional logics of HRBAD as they relate to socio-economic rights. As Section 1 argued, when HRBAD was elaborated two decades ago, it was assumed that classic needs-based theorists of development and ESR advocates would both ‘converge on a minimum core of rights such as the following: the right to food of an adequate nutritional value, to clothing, to shelter, to basic (or primary) health care, clean water and sanitation, and to education to at least primary level.’[[147]](#footnote-147) There was optimism that rendering ESR in doctrinal terms with clearly identifiable obligations, duty-bearers and rights-holders is what would lend rights-based approaches credibility and determinacy.[[148]](#footnote-148) It was assumed that progressive realisation would inform the anonymous, long-term macro-level objectives of development, while those aspects of ESR that underpin justiciability like maximum available resources, non-retrogression and minimum core could underpin a culture of rights claiming. This focus on socio-economic rights would be supplemented by the attachment of political rights and responsibilities to fundamental aspects of human need and well-being. This mutually reinforcing combination of ESR and civil-political rights would give effect to the indivisibility of rights.

Twenty years of rights-based approaches suggests more ambivalence on the part of donors, NGOs and governments in relation to ESR. This is less a reflection of ESR’s status than the indeterminacy with which rights as a whole are pursued. As Section 2 outlined, observers of development note that bodies ostensibly committed to HRBAD seldom invest in the institutional transformation, change of ethos or processes of checklisting to ensure systematic implementation of human rights.[[149]](#footnote-149) Some development practitioners therefore express concern that the language of HRBAD amounts to a superficial repackaging of pre-existing development discourse in new language.[[150]](#footnote-150) This may go too far, but it would seem clear that HRBAD has always been a loosely conceptualised set of process and policy principles that de-emphasised clear legal obligations.[[151]](#footnote-151)

Consequently, Section 3 demonstrates that those core aspects of ESR doctrine underpinning justiciability and violations-based approaches like maximum available resources, non-retrogression, minimum core and the respect/protect/fulfil framework are mentioned cursorily or not at all in policy documents. Litigation on these bases is seen by many as ‘hyper-legalistic-literalist and pedantic’ in a world where courts are both inaccessible and manifest little by way of a cultural tradition of responsiveness to rights claims. [[152]](#footnote-152) Antagonistic claims-making through courts is even seen by some as a potential danger to collaborative relationships with genuinely developmental governments that donors and NGOs rely on.

This position is distinct from, and by no means in agreement with, the familiar scepticism of ESR justiciability in the Global North that insists that the rights are unmanageable through the judicial process and an impermissible interference with the separation of powers.[[153]](#footnote-153) However, it demonstrates the salience of Ball’s argument that the advantage many see in HRBADs is that they allow for multiple avenues of approach, where social and political *modi operandi* enjoy parity of esteem with legal ones.[[154]](#footnote-154) HRBAD frequently elevates values rooted in civil and political rights like popular participation, empowerment, democracy and good governance over a legalist emphasis rooted in ESR legal standards and enforcement mechanisms.[[155]](#footnote-155) This is most apparent in the understanding of accountability, which is envisaged primarily as participatory and democratic, as opposed to judicial.

This is not necessarily a bad thing, and nor does it mean ESR has no role. Debates on ESR have long moved beyond justiciability, not merely towards remedies or enforcement but towards the practical operationalisation of ESR.[[156]](#footnote-156) Rights to health, education, welfare, water and housing are asserted because they lend legitimacy and moral urgency to the undertakings of donors, NGOs and governments. HRBAD in this sense fosters increased ‘rationality, principle, and objectivity’ in development policy-making.[[157]](#footnote-157) The persistent demand on the part of states, donors and communities is for ‘specific interventions related to ESCR, which must be provided for in policies and programmes.’[[158]](#footnote-158) As such, they remedy some of the vacuity we see in participation and empowerment-based approaches. However, in very difficult developing world contexts, development actors emphasise these rights in terms of discrete projects or macro-level and anonymous policies directed to whole categories of the population, in contradistinction to emphasising them as individual rights of excluded claimants.[[159]](#footnote-159) Development actors are more interested in how social policies in areas like health, social protection and education are designed and implemented by the state’s political branches (and, indeed, donor agencies) than their justiciability. Campaigns on individual socio-economic rights have been adopted for the purpose of increasing political leverage through the appeal to obligations of stated duty bearers. Appeals to the right to water, housing or sanitation are manifested not only in familiar forms like laws and policies, but also in the less obviously justiciable domain of societal behaviours and grassroots campaigning.

Familiar touchstones of ESR doctrine like progressive realisation, the respect/protect/fulfil framework, maximum available resources, minimum core and non-retrogression are never irrelevant in policy formulation or social mobilisation, but they do not enjoy the centrality they have in debates over justiciability in ESR theorisation. The essentially retrospective, judgment- and monitoring-centred character of these standards is eclipsed by a looser use of ICESCR provisions to guide policy. The rights found in the Covenant on occasion directly influence legislative assistance by donors, multilateral agencies and NGOs. More frequently, they find a definite but ambivalent application as a policy aspiration for morally acceptable development.

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