

## PROGRAMMATIC APPROACHES TO REALISING SOCIO-ECONOMIC RIGHTS: DEBATES, DEFINITIONS AND TRENDS

PÁDRAIG MCAULIFFE\*

*The now obsolete 'justiciable versus programmatic' debate in socio-economic rights discourse was important in establishing the salience of these rights, given the tendency on the part of state actors to falsely assert their exclusively programmatic nature to the detriment of properly grasping legal obligations that attached in the here and now. Now that the justiciability of socio-economic rights is firmly established, scholars acknowledge that the distinction between the justiciable and the programmatic is an artifact of explanation, not an aspect of legal reality. We readily accept that socio-economic rights are both justiciable and programmatic. Nevertheless, in the past, debate revolved largely around refuting an unhelpfully pejorative understanding of the programmatic, undermining systematic analysis and inhibiting practical discussion of the policy frameworks necessary to make them a reality. In the present, the now-discarded debate continues to echo — judicialisation and litigation-based strategies remain the perceived lodestar of socio-economic rights realisation, implicitly (and at times explicitly) marginalising programmatic approaches. This is to be regretted — defining, explaining and justifying these programmatic aspects serves to improve the practical operationalisation of these rights. It helps us understand the underlaps and overlaps between these aspects, why familiar touchstones of the justiciability debate (like the respect-protect-fulfil framework, maximum available resources and minimum core) seldom find purchase at the policy level and why human rights actors might consciously eschew litigation. A programmatic approach shifts focus from the undoubtedly important, but crucially limited, arena of courts to the policymaking process where state bureaucrats, donors and civil society become involved in campaigning, deliberating and deciding on how to realise socio-economic rights. Three areas — national human rights action plans, human rights-based approaches to development and civil society mobilisation — are explored as arenas where programmatic approaches consciously marginalise litigation-based strategies.*

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\* Professor Pádraig McAuliffe works at the University of Liverpool. He is a graduate of University College Cork (LLM, PhD). This article benefitted greatly from stringent criticism in review. Thanks to all anonymous reviewers for their helpful comments on earlier drafts.

## I INTRODUCTION

The argument in this article proceeds in three parts. Part II outlines the ‘justiciable versus programmatic’ debate in economic and social rights (‘ESR’) theorisation. The valorisation of justiciability in contrast with an unhelpfully pejorative understanding of the programmatic in this conceptual debate has had a complexity-flattening effect on our understanding of what is needed to realise socio-economic rights. This has inhibited practical discussion of those essentially programmatic institutional and policy frameworks necessary to realise the duties contained in the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’).<sup>1</sup> It has furthermore prevented a constructive understanding of both the overlaps and (more pertinently) the underlaps between the justiciable and programmatic aspects of ESR. Now that ESR theorisation has emerged from its defensive crouch, no longer the second-class ‘Cinderella of the international human rights corpus’,<sup>2</sup> there is greater scope to fully acknowledge those programmatic implications. The debate has moved beyond justiciability, not merely towards remedies or enforcement, but towards the practical operationalisation of ESR.<sup>3</sup>

Part III draws on this idea of practical operationalisation to outline a fairly capacious definition of the ‘programmatic’ in ESR, namely all strategies to realise ESR, excluding immediate judicial enforcement, that are deliberately targeted to progressively achieve certain human rights objectives operating via a series of policy instruments (legislation, administration, budget, macroeconomics, subsidies, promotion) implemented by actors primarily but not exclusively in the public sphere. It argues that ESR are the product of a wide range of processes and institutions that mediate a people’s experience with the state, entitlements and public well-being, not all of which are justiciable. The violations approach foregrounded in arguments for justiciability is too circumscribed when we conceive of state responsibilities primarily in terms of those elements of ESR that are amenable to legally justiciable claims by groups or individuals. The duties outlined in the ICESCR ‘speak to a broader state responsibility’ to create and maintain a facilitative environment for self-determination and welfare ‘that cannot be reduced to individual entitlement’.<sup>4</sup> Programmatic approaches therefore draw upon what Paul Hunt refers to as the policy approach to ESR, in so far as it (a)

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<sup>1</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (‘ICESCR’). A number of other conventions contain economic and social rights (‘ESR’), such as the *Convention on the Rights of the Child*, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination against Women*, as do the eight core International Labour Organization conventions. The European Social Charter also guarantees fundamental ESR. To the extent there are controversies over their justiciable and/or programmatic aspects, they are distinct in scope, content and context from those attending the ICESCR and so are not considered here.

<sup>2</sup> Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) 2.

<sup>3</sup> Paul Hunt et al, ‘Implementation of Economic, Social and Cultural Rights’ in Scott Sheeran and Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge, 2013) 545, 550.

<sup>4</sup> Daniel J Whelan, ‘Indivisible Human Rights and the End(s) of the State’ in Kurt Mills and David Jason Karp (eds), *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors* (Palgrave Macmillan, 2015) 69, 76, at least when viewed through the lens of the Maastricht Principles.

emphasises ‘techniques and tools that are not usually in a lawyer’s brief case or repertoire’, (b) depends upon cooperation across a range of disciplines and policy experts, and (c) demands vigilant monitoring and accountability, though these do not have to be judicial.<sup>5</sup> As such, it marks a shift in emphasis from identifying violations of ESR in courts towards the emerging focus on mainstreaming ESR protection into the daily work of government.<sup>6</sup>

Consequently, Part IV explains the deliberate eclipse of litigation- or violation-based strategies by programmatic approaches across three contemporary sites of ESR promotion, namely (a) national human rights action plans (‘NHRAP’), (b) human rights-based approaches to development (‘HRBAD’) and (c) civil society mobilisation for ESR. These new forms of ESR planning and advocacy consciously depart from litigation or ‘naming and shaming’ techniques to instead seek more structural solutions to rights deprivation. This article does not qualify, minimise or deny the justiciable status of ESR. The argument here is an empirical one about how socio-economic rights are used, not a normative statement about their legal status. It does, however, per Charles Beitz, ‘underscore how substantially the repertoire of measures of implementation [can] diverge from the judicial paradigm’.<sup>7</sup>

## II THE ‘JUSTICIABLE VERSUS PROGRAMMATIC’ PARADIGM

Advocates of ESR have always been locked in a battle with sceptics over their nature, scope and justiciability. For decades, it was common to posit that ESR were not absolute in the sense that civil and political rights were because their realisation was progressive and dependent on the existence of sufficient resources.<sup>8</sup> It was argued that their alleged vagueness meant that they could not offer comprehensible standards for what they required and hence could not constitute the basis for a judicial determination of a violation.<sup>9</sup> It was contended that only those rights amenable to immediate implementation qualified as human rights — where this was not the case, they amounted to moral ideals.<sup>10</sup> This was augmented by democratic legitimacy and separation of powers arguments to the effect that, while ESR established legitimate objectives to be discharged by the executive and legislative branches of the state, enforcement was not subject to review by judges as it would usurp the proper role of government. Fighting this battle was important for advocates of ESR. It was doubts over justiciability that crystallised ESR’s apparent relegation to the position of second-class rights.<sup>11</sup> These doubts served as a synecdoche for some of the simplistic dichotomies (eg

<sup>5</sup> Paul Hunt, *Using All the Tools at Our Disposal: Poverty Reduction and the Right to the Highest Attainable Standard of Health* (Special Report, June 2006) 19.

<sup>6</sup> Rory O’Connell et al, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge, 2014) 12.

<sup>7</sup> Charles R Beitz, *The Idea of Human Rights* (Oxford University Press, 2011) 40.

<sup>8</sup> Marc Bossuyt, ‘La Distinction Juridique Entre les Droits Civils et Politiques et les Droits Économiques, Sociaux et Culturels’ (1975) 7(1) *Revue des Droits de l’Homme* 783, 790.

<sup>9</sup> An argument sketched and rejected, for example, in Jackbeth K Mapulanga-Hulston, ‘Examining the Justiciability of Economic, Social and Cultural Rights’ (2002) 6(4) *International Journal of Human Rights* 29, 41–2.

<sup>10</sup> Maurice Cranston, ‘Human Rights, Real and Supposed’ in DD Raphael (ed), *Political Theory and the Rights of Man* (Indiana University Press, 1967) 43, 52–3.

<sup>11</sup> Anthony Woodiwiss, ‘Human Rights and the Challenge of Cosmopolitanism’ (2002) 19(1–2) *Theory, Culture and Society* 139, 146.

resource-intensive versus cost-free, complex versus manageable) that characterised discourse surrounding the field. Objections to the status of socio-economic rights qua rights was believed to inhibit the use of litigation where breaches of obligations occurred.<sup>12</sup> Enforcing rights judicially has a significance beyond the individual case in so far as it bolsters the legitimacy of these ESR in their translation from rhetoric into a tangible policy reality.<sup>13</sup>

In rights-based theorisation and in *some* jurisdictions, the battle over the theoretical justiciability of ESR has largely been won, ‘perhaps not yet dead and buried’ but most apparent today ‘as a quiet echo from the past’.<sup>14</sup> Non-justiciability arguments have been largely rebutted in the scholarly literature through strong conceptual analysis in the last thirty years,<sup>15</sup> while the self-evident success of various courts in Europe, Latin America, South Africa and South Asia in surmounting the philosophical concerns of rights sceptics ‘makes it difficult to argue against the possibility of social rights justiciability’.<sup>16</sup> The adoption of the Optional Protocol to the *ICESCR* rendered arguments of non-justiciability otiose, while the trend across the globe of enshrining ESR alongside civil and political rights in constitutions has attenuated the ostensibly sharp distinction between civil and political rights, on the one hand, and socio-economic rights on the other.<sup>17</sup> At the level of theory the question of justiciability no longer addresses the issue of whether or not judges can enforce socio-economic rights, but rather which layer in the tripartite respect–protect–fulfil obligation applies. Contemporary critiques of ESR instead address the emerging jurisprudence in various national jurisdictions, while issues of post-judgment implementation and compliance issues are increasingly to the fore.<sup>18</sup>

Of course, contemporary cynicism about the status and worth of ESR lies not in theory, as it did in the past, but rather in the manner by which individual states deprecate socio-economic rights to shield themselves against assertions at the

<sup>12</sup> International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Human Rights and Rule of Law Series No 2, 2008) 103–4 <<https://www.icj.org/wp-content/uploads/2009/07/Courts-legal-enforcement-ESCR-Human-Rights-Rule-of-Law-series-2009-eng.pdf>>, archived at <<https://perma.cc/5CZL-GP55>>.

<sup>13</sup> Gerd Oberleitner, ‘Does Enforcement Matter?’ in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press, 2012) 249, 249–50.

<sup>14</sup> Martin Scheinin, ‘Justiciability and the Indivisibility of Human Rights’ in John Squires, Malcolm Langford and Bret Thiele (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre, 2005) 17, 17.

<sup>15</sup> Mashood A Baderin and Robert McCorquodale, ‘The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development’ in Mashood A Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007) 3, 14.

<sup>16</sup> Malcolm Langford, ‘The Justiciability of Social Rights: From Practice to Theory’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) 3, 29.

<sup>17</sup> Evan Rosevear, Ran Hirschl and Courtney Jung, ‘Justiciable and Aspirational Economic and Social Rights in National Constitutions’ in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 37, 62.

<sup>18</sup> See, eg, Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi, ‘Introduction: From Jurisprudence to Compliance’ in Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge University Press, 2017) 3.

domestic or international level that they are failing in their obligations.<sup>19</sup> It remains the case that in many jurisdictions in the world, the justiciability of socio-economic rights is not firmly established. Rights to basic material interests like housing, food, education and healthcare may, at best, be directive principles of state policy to guide the executive and/or legislature, as opposed to something enforceable in a court of law. ESR are most likely to be considered justiciable in states where significant constitutional reform has occurred and where progressive judiciaries (most notably South Africa, Colombia and latterly Nepal) are willing to robustly enforce ESR provisions. In other states such as Ireland, the United Kingdom and the United States, courts have explicitly rejected the justiciability of ESR. There are two plausible, mutually compatible responses to this. The first is to patiently reiterate the justiciability of ESR in litigation, civil society campaigns and theory while awaiting a change in the constitution or in judicial attitudes. The second is to acknowledge that the failure to make ESR justiciable places a premium on those programmatic aspects of rights in institutions outside the judiciary. In a world polarised between jurisdictions, that is, those where development in jurisprudence of socio-economic rights is proceeding apace and those where resistance to justiciability becomes more entrenched, the ‘more useful intellectual question’, as Sabrina Singh puts it, ‘is how to make these rights realizable rather than to ask whether they are justiciable rights in the first place’.<sup>20</sup>

#### A *Moving beyond Justiciability*

The historic preoccupation with ESR justiciability meant that scholarship in the area has largely been defined by a ‘siege mentality’. Now that this siege is lifting, space has opened up to discuss matters (some might say doubts) that may hitherto have presented a challenge to the consensus generated by this defensive solidarity.<sup>21</sup> As Matthew Craven notes, scholars have historically been keener to assert the undoubted validity of adjudication in legitimating ESR claims than they have been to critically grapple with the more uncertain centrality of adjudication to the real-world realisation of ESR.<sup>22</sup> The enthusiastic promotion of the judicialisation of human rights has largely proceeded without due regard to its actual efficacy.<sup>23</sup> The more frequent turn to judicial remedies for ESR violations has drawn attention to the limitations with which we are now familiar — procedural difficulties faced by poor litigants, the consequent bias in favour of

<sup>19</sup> Caroline Omari Lichuma, ‘In International Law We (Do Not) Trust: The Persistent Rejection of Economic and Social Rights as a Manifestation of Cynicism’ in Björnstjern Baade et al (eds), *Cynical International Law?: Abuse and Circumvention in Public International and European Law* (Springer, 2021) vol 296, 195, 198.

<sup>20</sup> Sabrina Singh, ‘Realizing Economic and Social Rights in Nepal: The Impact of a Progressive Constitution and an Experimental Supreme Court’ (2020) 33 *Harvard Human Rights Journal* 275, 283.

<sup>21</sup> Bruce Porter, ‘The Crisis of ESC Rights and Strategies for Addressing It’ in John Squires, Malcolm Langford and Bret Thiele (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre, 2005) 43, 43.

<sup>22</sup> Matthew Craven, ‘Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights’ in John Squires, Malcolm Langford and Bret Thiele (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre, 2005) 27, 27–8.

<sup>23</sup> John Tasioulas, ‘Saving Human Rights from Human Rights Law’ (2019) 52(5) *Vanderbilt Journal of Transnational Law* 1167, 1179.

middle-class litigants, the privileging of retrospective remedies over prospective provision, the focus on individual litigation over collective suffering, judicial deference to state authorities. More pertinently for the focus of this paper, it seems clear that progress in establishing the justiciability of ESR has not been matched with commensurate success in the area of politics and public policy, creating a gap that increasingly concerns policymakers.<sup>24</sup> Scholars, NGOs and the Committee on Economic, Social and Cultural Rights ('CESCR') have tended to focus more on those justiciable immediate obligations related to rights that are not dependent on resource availability at the expense of progressive realisation, 'severely constrain[ing] the ability of the human rights movement to address broader issues of public policy that have a huge impact on the realization of ESC rights'.<sup>25</sup> It is for this reason that scholars are beginning to argue that human rights study is often too legalistic, emphasising case law to the exclusion of other factors that affect the achievement of rights outcomes.<sup>26</sup> Most rights, after all, are realised through 'active respect' (whereby the duty bearer takes a right into account during policymaking, even where judicial enforcement has never been activated) than via the 'assertive exercise' by a rights holder making a claim.<sup>27</sup> Even those who advocate justiciability most strongly acknowledge that litigation alone is inadequate to fully secure rights. Courts have limitations in terms of planning and implementation of public policy relative to the executive and legislative branches of the state.<sup>28</sup>

The strong emphasis on the justiciability of socio-economic rights might have come as a surprise to the drafters of the *ICESCR*. The initial impetus underpinning the development of the Covenant emphasised the state's executive, legislative and administrative duty to intervene to ameliorate the experience of collectivities like the unemployed, the homeless and the starving, with justiciability something of an afterthought.<sup>29</sup> The main objective of the state reporting process has always been to ensure that governments have undertaken 'principled policymaking' that draws on the Covenant.<sup>30</sup> For some, the domain of the courts is best approached as a 'secondary consideration' in realising ESR, ceding analytical and practice-based primacy to the use of ESR in the political realm as regulatory principles by which

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<sup>24</sup> Ignacio Saiz, 'Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis' (2009) 1(2) *Journal of Human Rights Practice* 277, 277.

<sup>25</sup> Eitan Felner, 'A New Frontier in Economic and Social Rights Advocacy? Turning Quantitative Data into a Tool for Human Rights Accountability' (2008) 5(9) *Sur: International Journal on Human Rights* 109, 110–11.

<sup>26</sup> David P Forsythe, 'Human Rights Studies: On the Dangers of Legalistic Assumptions' in Fons Coomans, Fred Grünfeld and Menno T Kamminga (eds), *Methods of Human Rights Research* (Intersentia, 2009) 59, 62. Legalism, in Judith N Shklar's classic formulation, refers to 'the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules': Judith N Shklar, *Legalism* (Harvard University Press, 1964) 1.

<sup>27</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 3<sup>rd</sup> ed, 2013) 9.

<sup>28</sup> International Commission of Jurists (n 12) 73.

<sup>29</sup> Matthew Craven, 'The UN Committee on Economic, Social and Cultural Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, 2<sup>nd</sup> rev ed, 2001) 455, 458–9.

<sup>30</sup> Office of the High Commissioner for Human Rights, *CESCR General Comment No 1: Reporting by States Parties*, 13<sup>th</sup> sess, UN Doc E/1989/22 (27 July 1981) [4] ('*General Comment No 1*').

governments are held to account in terms of policy drafting, deployment of physical and human capital, and redistribution of resources.<sup>31</sup> However, as Mary Dowell-Jones argued fifteen years ago, it would seem that the justiciability debate that emerged in the battle over the status of ESR has directed effort away from these programmatic implications of the *ICESCR*, obscuring the broader contextual complexity and policy challenges of Covenant implementation.<sup>32</sup> Changes since (explored in Part IV) have been partial. There should be little surprise here — to shift from the legalistic suppositions of the human rights world to the world of classic planning and programming means a ‘move away from its traditional and therefore comfortable positions into territories that are unfamiliar and perhaps unsettling’.<sup>33</sup> This discomfort is most evident in the ‘justiciable versus programmatic’ debate that surrounded the Covenant.

### B *The Terms of the Debate*

It should be clear from the foregoing that only by understanding these programmatic implications can the considerable gap between the near-universal consensus regarding ESR’s general importance, on the one hand, and its conspicuously thin record of policy accomplishment on the other, be closed. However, the idea that ESR are significantly programmatic is redolent of the ‘siege’ that has just been relieved. Traditionally, to describe ESR as ‘programmatic’ has been interpreted as implying that they should *only* be understood as guidelines for legislative or administrative action but not as justiciable rules applied by the bench.<sup>34</sup> The classic iterations of this argument by ESR-sceptics drew on the language of ‘undertakes to take steps’, ‘to the maximum of available resources’, and progressive realisation to cast ESR as something less than fully legal. Ian Brownlie, for example, contrasted the ‘programmatic and promotional’ essence of the *ICESCR* with the ‘more specific delineation of rights’ in the *International Covenant on Civil and Political Rights* (*ICCPR*),<sup>35</sup> while Egbert Vierdag argued that the right to food was merely a broadly formulated programme for governmental policies and not an individual right.<sup>36</sup> The ‘programmatic’ versus ‘judicial’ dichotomy remains a feature of state rhetoric and

<sup>31</sup> Katharine G Young, ‘Waiting for Rights: Progressive Realization and Lost Time’ in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 654, 657.

<sup>32</sup> Mary Dowell-Jones, *Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit* (Martinus Nijhoff Publishers, 2004) 186–7.

<sup>33</sup> William O’Neill and Vegard Bye, *From High Principles to Operational Practice: Strengthening OHCHR Capacity to Support UN Country Teams to Integrate Human Rights in Development Programming* (Report, March 2002) 19–20.

<sup>34</sup> An argument outlined but not shared by Christian Courtis, ‘Standards to Make ESC Rights Justiciable: A Summary Exploration’ (2009) 2(4) *Erasmus Law Review* 379, 379.

<sup>35</sup> Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 5<sup>th</sup> ed, 1998) 576–7.

<sup>36</sup> EW Vierdag, ‘The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights’ (1978) 9 *Netherlands Yearbook of International Law* 69.

CESCR Concluding Observations.<sup>37</sup> Notwithstanding the general sense that the debate over justiciability has been won, engagement with the programmatic aspects of ESR still carries a residual connotation that *ICESCR* obligations are somehow “softer” obligations that do not carry the same force of legal justiciability as civil and political rights’.<sup>38</sup>

It should be noted from the outset that the vast majority of ESR scholars have always accepted that ESR are both justiciable *and* programmatic.<sup>39</sup> Justiciability has never been regarded as the only, or even primary, means of realising ESR. Judicial approaches that use courts and tribunals to direct the state apparatus to redress ESR violations coexist unproblematically with policy-based approaches that bring ESR to bear upon policymaking processes that put programmes in place to promote and fulfil human rights. In this schema, the courts are generally envisaged as a last resort where other institutions of implementation responsible for realising human rights (executives, legislatures, civil services, private bodies) fail and must be held to account.<sup>40</sup> The fulfilment of many programmatic obligations has been found susceptible to judicial enforcement and/or oversight.<sup>41</sup> Judicial enforcement often has a distinctly programmatic aspect — the seminal *Government of the Republic of South Africa v Grootboom* (*‘Grootboom’*) decision did not confer any direct individual claim to delivery of goods immediately but instead conferred the right to require the South African government to adopt a reasonable programme.<sup>42</sup> For socio-economic rights advocates, the emphasis of ESR-sceptics on the distinction between ‘justiciable’ and ‘programmatic’ is overdrawn because both aspects denote different facets of the same set of phenomena, namely the branching, variable and interlocking institutions and practices that help ESR move from promise to actuality.

As such, the dispute regarding the status of ESR has always been less a contest internal to those who theorise and advocate ESR than one against external critics who reject their equivalence to civil and political rights. However, even among those who reject the idea that ESR are non-justiciable, denying the sceptic’s equation of ‘programmatic’ with ‘non-justiciable’ is a recurrent feature of the

<sup>37</sup> For example, in its concluding observations on the United Kingdom, the Committee restated its ‘concern about the State party’s position that the provisions of the Covenant, with minor exceptions, constitute principles and programmatic objectives rather than legal obligations that are justiciable’: Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories*, UN ESCOR, 28<sup>th</sup> sess, UN Doc E/C.12/1/Add.79 (5 June 2002) [11].

<sup>38</sup> Whelan (n 4) 69.

<sup>39</sup> For example, Kitty Arambulo argues that a violations approach is problematic in the context of rights with a ‘programmatic character’: Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects* (Intersentia, 1999) 250. Meanwhile, Mary Dowell-Jones argues that ‘[t]he obligation to fulfil a right encapsulates the programmatic dimensions of socio-economic rights’: Dowell-Jones (n 32) 31.

<sup>40</sup> Katie Boyle, *Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication* (Routledge, 2020) 2–3, 7.

<sup>41</sup> Alicia Ely Yamin, ‘The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda’ (2005) 27(4) *Human Rights Quarterly* 1200, 1217 (*‘Future in the Mirror’*).

<sup>42</sup> *Government of the Republic of South Africa v Grootboom* [2001] 1 SA 46 (Constitutional Court) [39]–[43].



literature, seemingly a battle no advocate of ESR can avoid fighting. For example, the International Commission of Jurists contrasts the justiciability of ESR with the mistaken belief in their merely programmatic nature,<sup>43</sup> Ida Koch points to the adoption of the tripartite division in case law across the world as affirming the legal as opposed to purely programmatic nature of ESR,<sup>44</sup> and Scott Leckie posits that the identification of violations of socio-economic rights challenges their purported programmatic nature.<sup>45</sup> To be clear, neither the International Commission of Jurists nor Koch nor Leckie agree with this rigid distinction between the programmatic and the judicial but nevertheless feel compelled to employ this analytic heuristic. The ‘justiciable versus programmatic’ argument was usually phrased by scholars as a rejection of an apparently widespread misconception by critics and states that ESR are *exclusively* programmatic. Consequently, very few explicitly denied that ESR have a programmatic aspect. Instead, there is a subtle rhetorical sleight of hand that does not reject the programmatic nature of ESR (or some parts thereof) per se but rather rejects the idea put forward by *others* that any argument that rights are programmatic automatically precludes justiciability.<sup>46</sup> Craven puts it best when he points to ‘the somewhat overextended claim that ESC rights were, in their very nature, non-justiciable rights, that they were programmatic goals, incapable of enforcement by means of adjudication’.<sup>47</sup>

One of the most notable features of this dichotomy was that few scholars ever defined precisely what they meant by ‘programmatic’ (a couple of rare examples are highlighted in Part III). Instead, what emerges are a number of distinct, if somewhat mutually contradictory, misunderstandings on the part of ESR-sceptics which in turn are assailed in the literature by ESR advocates. The first misunderstanding equates positive programmatic duties with indeterminacy. Here, ESR scholars reject the suggestion that ESR are too multifaceted and vague a concept to operate as a guiding value in jurisprudence.<sup>48</sup> The second misunderstanding assailed by ESR theorists associates the programmatic with an ‘aspirational’<sup>49</sup> or ‘promotional’<sup>50</sup> view of ESR, a characterisation rejected by supportive ESR theorists lest it suggest non-justiciability. Though they accept that

<sup>43</sup> International Commission of Jurists (n 12) 101.

<sup>44</sup> Ida Elisabeth Koch, ‘Dichotomies, Trichotomies or Waves of Duties?’ (2005) 5(1) *Human Rights Law Review* 81, 81.

<sup>45</sup> Scott Leckie, ‘Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights’ (1998) 20(1) *Human Rights Quarterly* 81, 88.

<sup>46</sup> See, eg, Rodrigo Uprimny, Sergio Chaparro Hernández and Andrés Castro Araújo, ‘Bridging the Gap: The Evolving Doctrine on ESCR and “Maximum Available Resources”’ in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 624, 625; Mónica Fera Tinta, ‘Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions’ (2007) 29(2) *Human Rights Quarterly* 431, 439.

<sup>47</sup> Craven (n 22) 30.

<sup>48</sup> Fredman (n 2) 70–3.

<sup>49</sup> See, eg, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Poland*, UN ESCOR, 43<sup>rd</sup> sess, UN Doc E/C.12/POL/CO/5 (2 December 2009) 2 [8]; O’Connell et al (n 6) 9; M Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) 311.

<sup>50</sup> Dowell-Jones (n 32) 3.

viewing ESR as a standard of aspiration is valuable as a basis for political criticism or as a shared moral language,<sup>51</sup> scholars have argued that presenting ESR in this light ‘discredits the very idea of human rights’, fostering a sense of laxity that is detrimental to compliance.<sup>52</sup> The third misunderstanding, by contrast, comprehends the programmatic as an obligatory instruction to states to promote realisation of the guarantees contained in the *ICESCR*; that is, ‘directive’, but not ‘binding’.<sup>53</sup> As such, there is an acceptance that governments are not permitted to satisfy themselves with making a vague general commitment to take steps to secure a given right but are instead obliged to adopt a precise programme for its implementation.<sup>54</sup> This approach comprehends ‘programmatic’ as actual plans to be pursued in good faith. However, for some, these plans are limited or qualified as amounting to ‘a political matter, not a matter of law’.<sup>55</sup> This equation of the ‘programmatic’ with the status of public policy goals not giving rise to legal duties troubles ESR advocates.<sup>56</sup> The underlying suspicion about such a view of ESR is that the greater the extent to which a right is equated with goal-type qualities, the greater the discretion enjoyed by the addressees about when to do something and how much to do.<sup>57</sup> The flexibility that flows from art 2(1)’s wide margin of discretion creates an unwanted risk that ESR will be seen as in some way less binding or less right-like than their civil and political equivalents, which are assumed to need more concrete steps.<sup>58</sup> As Bruce Porter argues, ‘any interpretation of domestic law which downgrades ESC rights to mere policy objectives and thereby deprives affected constituencies of an effective remedy is clearly incompatible with the *ICESCR*’.<sup>59</sup> The resistance to equating ESR with policymaking reflects a consensus in the field’s scholarship that access to housing, welfare and education are secured with greater efficacy as rights issues than as welfare issues, and that citizens should be rights holders, as opposed to passive beneficiaries. Domestic judicialisation is considered essential if full realisation of the rights is not to be ‘purely superficial and vacuous’ given the apparently wide freedom of choice and action as to how the rights should be implemented.<sup>60</sup>

Of course, as Ron Dudai points out, the idea that human rights are non-negotiable rules, delineating what is impermissible in policy terms, positions ESR above the political fray. This approach makes a virtue of being (as he puts it) ‘non-

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<sup>51</sup> Beitz (n 7) 43, 164.

<sup>52</sup> Tasioulas (n 23) 1199.

<sup>53</sup> A position explored but not endorsed in Tinta (n 46) 439.

<sup>54</sup> On the issue of precision, see below Part III(B).

<sup>55</sup> Vierdag (n 36) 103.

<sup>56</sup> A position explored but not endorsed in Shareen Hertel and Lanse Minkler, ‘Economic Rights: The Terrain’ in Shareen Hertel and Lanse Minkler (eds), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge University Press, 2007) 1, 23; Audrey R Chapman, ‘Core Obligations Related to the Right to Health’ in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia, 2002) 185, 193.

<sup>57</sup> James Nickel, ‘Human Rights’, *Stanford Encyclopedia of Philosophy* (Web Page, 2019) <<https://plato.stanford.edu/entries/rights-human/>>, archived at <<https://perma.cc/VKJ2-UK3M>>.

<sup>58</sup> Sepúlveda (n 49) 188.

<sup>59</sup> Bruce Porter, ‘Justiciability of ESC Rights and the Right to Effective Remedies: Historic Challenges and New Opportunities’ (Conference Paper, Chinese Academy of Social Sciences, 31 March 2008).

<sup>60</sup> Matthew CR Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press, 1995) 5, 128.

programmatic’ but fosters a sense of distance from making these rights real in practice, consciously eschewing the difficult task of taking sides in choosing between different policy paths.<sup>61</sup> This is problematic if we accept that a wide margin of appreciation in matters of economic and social policy is an inevitable consequence of seriously pursuing obligations under the *ICESCR*. States are, after all, usually presented with difficult choices regarding the resources to be apportioned to competing economic or social policy priorities within extant budgetary constraints.<sup>62</sup> These choices will inevitably be made by politicians, economists and bureaucrats, though this is not to deny a role for the courts in deciding whether their choices fall within the framework of international human rights obligations. However, the move from ‘antipolitics to program’, from legalism to the world of hard choices and political compromise, remains partial.<sup>63</sup> Attention to the justiciable aspects of ESR has tended to obscure discussion of what programmatic obligations mean. This may reflect a natural disciplinary bias of international human rights lawyers in favour of litigation. However, given the terms under which the ‘justiciable versus programmatic’ debate was undertaken, it also reflects a fear that any acknowledgment that some ESR obligations are not easily made justiciable, even where they have efficacy as a mandatory priority for state policy,<sup>64</sup> might in fact undermine the legal status of ESR. The ‘justiciable versus programmatic’ debate is a textbook example of how, in polarised human rights debates, each aspect is ‘understood in such compromising terms that the price of one prevailing is the exclusion or marginalisation of the other’.<sup>65</sup> Acknowledging the fact that ESR are programmatic, even if ‘only in some respects’, may carry *for others* the misleading connotation that these rights ‘are implemented through social programs rather than via the courts’.<sup>66</sup> This reluctance to fully accept the programmatic aspects of ESR has had an inhibiting effect on ESR within the field, given that many of the most meaningful aspects of ESR realisation are not justiciable, as section B of Part III goes on to examine.

### III TRACING THE CONTOURS OF THE PROGRAMMATIC

Now that scholars are beginning to consider the justiciable and programmatic in less artificially binary terms, Dowell-Jones’s aforementioned invitation to more fully explore the programmatic implications of the *ICESCR* should now appear less threatening. However, to date, there has been little attempt even to define the ‘programmatic’. The few attempts to do so communicate something of its essence but border on the tautologous (see, for example, Philip Alston and Ryan

<sup>61</sup> Ron Dudai, ‘Introduction — Rights Choices: Dilemmas of Human Rights Practice’ (2014) 6(3) *Journal of Human Rights Practice* 389, 393.

<sup>62</sup> Ignacio Saiz, ‘Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, 2013) 77, 81.

<sup>63</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010) 218.

<sup>64</sup> See Beitz (n 7) 32.

<sup>65</sup> To adapt an argument made in Neil Walker, ‘Universalism and Particularism in Human Rights’ in Cindy Holder and David Reidy (eds), *Human Rights: The Hard Questions* (Cambridge University Press, 2013) 39, 40.

<sup>66</sup> Ben TC Warwick, ‘A Hierarchy of Comfort? The CESCR’s Approach to the 2008 Economic Crisis’ in Gillian MacNaughton and Diane F Frey (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge University Press, 2018) 127, 145.

Goodman's definition of the programmatic as those 'obligations to be fulfilled incrementally through the ongoing execution of a programme'<sup>67</sup> or Sandra Fredman's elaboration of the programmatic as 'the sense that the duty requires the state to "roll out" its programme progressively over time').<sup>68</sup> Elsewhere it is situated at the rhetorical level of discursive practices, presented in an 'I know it when I see it' fashion, a self-evident notion that requires no definition, let alone elaboration. This may be a function of the way the *ICESCR* is phrased in implicitly programmatic terms. Article 2(1), with its references to taking steps and achieving progressively, makes it incumbent on states to transform the Covenant's norms 'into specific policy objectives, for the short-term and medium-term'.<sup>69</sup> CESCR's *General Comment No 3* holds that states party have an immediate obligation to 'devise strategies and programmes' for the promotion of ESR, bearing in mind that the enjoyment of rights in the Covenant can only be promoted 'in part' through the provision of judicial remedies.<sup>70</sup> The Limburg Principles make clear that judicial remedies must be supplemented by the vaguely worded 'administrative' and 'economic, social and educational' measures.<sup>71</sup> Above all, the obligation to fulfil in the tripartite respect–protect–fulfil is implicitly programmatic in so far as it requires states to take appropriate legislative, budgetary, administrative and other measures towards the full realisation of *ICESCR* rights. It might therefore be assumed that the duty to fulfil encapsulates or condenses the programmatic. However, the way the duty to fulfil is elaborated in General Comments (and to a lesser extent in Concluding Observations) means it serves more as a list of normative expectations than any roadmap for getting there. The emphasis is more 'on determining criteria for clear violations of economic and social rights' than on the public policies, social infrastructures and material conditions needed to realise them.<sup>72</sup> Notwithstanding its implicit presence in the *ICESCR* and related doctrinal developments, the programmatic serves more as a heuristic marker among ESR theorists than as a descriptive concept, more a method to illustrate the significance of justiciability by means of contrast than a set of principles and institutions underlying the policy content of ESR.

How then might we understand the programmatic? If, as scholarly discourse consistently does, we distinguish the judicial from the programmatic, then the latter might be said to involve a variety of actions on a spectrum of specificity —

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<sup>67</sup> Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context: Law, Politics and Morals: Text and Materials* (Oxford University Press, 2013) 285.

<sup>68</sup> Fredman (n 2) 103.

<sup>69</sup> Leckie (n 45) 106.

<sup>70</sup> Office of the High Commissioner for Human Rights, *CESCR General Comment No 3: The Nature of State Parties Obligations (Art 2, Para 1 of the Covenant)*, 5<sup>th</sup> sess, UN Doc E/1991/23 (14 December 1990) [5], [11] ('*General Comment No 3*').

<sup>71</sup> Principles 17 and 18 were adopted in 1986 in Maastricht. See Commission on Human Rights, *Note Verbale Dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva Addressed to the Centre for Human Rights*, UN ESCOR, 43<sup>rd</sup> sess, Agenda Items 8 and 18, UN Doc E/CN.4/1987/17 (8 January 1987) annex ('*The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*').

<sup>72</sup> Mátyás Bódig, 'Doctrinal Innovation and State Obligations: The Patterns of Doctrinal Development in the Jurisprudence of the UN Committee on Economic, Social and Cultural Rights' in Kurt Mills and David Jason Karp (eds), *Human Rights Protection in Global Politics: Responsibilities of States and Non-State Actors* (Palgrave Macmillan, 2015) 49, 54.

entitlement-based legislation judicable in the courts being the most obviously specific, but encompassing administrative and budgetary activity, plus the more amorphous but essentially limitless demand for promotional and other measures within the rubric of ‘appropriate means’ under art 2(1). All of these activities can be said to satisfy the injunction in art 2(1) to ‘take steps’ towards the realisation of the rights contained in the *ICESCR*. The state has significant discretion in the conduct it pursues towards these ends, provided those steps are ‘deliberate, concrete, [and] targeted as clearly as possible towards’ realisation of the rights.<sup>73</sup> It is in this idea that action be targeted that the essence of the programmatic is to be found. This is also what distinguishes the programmatic from largely aspirational directive principles of state policy like those found in the Irish and Indian constitutions, which lack this degree of detail and instead operate merely as interpretative assumptions that cannot compel the executive or legislature to implement provisions or aims contained within that set of principles.

#### A *Towards a Definition*

In so far as they impose tightly defined and immediate obligations, duties of immediate effect like non-discrimination and the minimum core are clearly not programmatic.<sup>74</sup> We might define the programmatic, therefore, as all strategies (primarily, but not exclusively, state-based) for the practical operationalisation of ESR that are deliberately targeted to achieve certain human rights objectives progressively, operating via a series of policy instruments (legislation, administration, budget, macroeconomics, subsidies, promotion) implemented by actors (primarily but not exclusively) in the public sphere. This is an undoubtedly capacious definition. It captures the idea that rights realisation by states and non-state actors involves active, often lengthy and complex operational interventions to meet those four criteria — availability, accessibility, acceptability and quality — with which we evaluate their attainment.<sup>75</sup> The programmatic means permanent or semi-permanent policy frameworks that give effect to allocative priorities and take into account questions of capacity, implementation and the fiscus — ‘[c]onstant endeavours to reach a better level of protection’ over a period of years across all layers of government (most notably sector ministries) as opposed to ‘passively awaiting’ better conditions.<sup>76</sup> The success or failure of these endeavours may manifest in the realisation or violation of an individual’s rights, but will be most apparent in statistical measures, benchmarks and aggregate welfare.

Sandra Liebenberg distils from *Grootboom* a coherent set of standards for what a ‘reasonable’ programme for ESR realisation should encompass. Any programme must be (a) ‘comprehensive, coherent, coordinated’, (b) ‘balanced and flexible, and make appropriate provision for short, medium and long-term needs’, and (c)

<sup>73</sup> *General Comment No 3* (n 70) [2].

<sup>74</sup> International Commission of Jurists (n 12) 26.

<sup>75</sup> Office of the High Commissioner for Human Rights, *CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)*, 22<sup>nd</sup> sess, UN Doc E.C.12/2000/4 (11 August 2000) [12] (‘*General Comment No 14*’).

<sup>76</sup> Ida Elisabeth Koch, ‘Good Governance and the Implementation of Economic, Social and Cultural Rights’ in Hans-Otto Sano, Gudmundur Alfredsson and Robin Clapp (eds), *Human Rights and Good Governance: Building Bridges* (Martinus Nijhoff Publishers, 2002) vol 9, 73, 77.

‘reasonably conceived and implemented’.<sup>77</sup> Principled, *potentially* effective domestic policymaking where states ‘regularly and consciously consider the best possible way under the circumstances to advance the protection of rights’<sup>78</sup> marks the programmatic. Fulfilment of rights like that to education is secured primarily through the administrative functions of the state embodied in resource allocations and service delivery. The same is true of the right to an adequate standard of living. To take but one example, in a survey of twenty developing countries,

increasing the poorest quintile’s access to piped water from its dismally low 3 percent level to the level of the richest quintile at 55 percent would eliminate more than a quarter of the difference in infant mortality between these two groups, and more than a third of the difference in child mortality.<sup>79</sup>

Rights to livelihood and housing are typically secured less by direct provision than by the creation through policy of an enabling environment for people to attain and retain such minima themselves.<sup>80</sup> It reflects the reality that most rights are enjoyed as passive beneficiaries of regulation or of bureaucratically managed programme delivery, as opposed to as active claimants through the legal system.

### B Programmatic Aspects of the ICESCR

*General Comment No 9* on the domestic application of the Covenant confirms that ‘by all appropriate means’, the ICESCR ‘adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account’.<sup>81</sup> Of course, where legislation and supplementary administrative regulations define the content of a right, its financing and its responsibilities at different levels of government, this offers the most propitious opportunity for judicial enforcement. Most social benefits become operative after the legislature enacts implementing laws. The CESCR recognises that ‘in many instances legislation is highly desirable and, in some cases, may even be indispensable’ in areas like non-discrimination,<sup>82</sup> forced eviction<sup>83</sup> or protecting workers in the informal economy.<sup>84</sup>

<sup>77</sup> Sandra Liebenberg, ‘Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review’ in John Squires, Malcolm Langford and Bret Thiele (eds), *The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre, 2005) 73, 80, citing *Grootboom* (n 42) [39]–[42].

<sup>78</sup> Philip Alston and Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’ (1987) 9(2) *Human Rights Quarterly* 156, 221.

<sup>79</sup> Danny Leipziger et al, ‘Achieving the Millennium Development Goals: The Role of Infrastructure’ (World Bank Policy Research Working Paper No 3163, November 2003) 10.

<sup>80</sup> Caroline Moser et al, ‘To Claim Our Rights: Livelihood Security, Human Rights and Sustainable Development’ (Concept Paper, Overseas Development Institute, January 2001) 22.

<sup>81</sup> Committee on Economic, Social and Cultural Rights, *Draft General Comment No 9: The Domestic Application of the Covenant*, UN ESCOR, 19<sup>th</sup> sess, Agenda Item 3, UN Doc E/C.12/1998/24 (3 December 1998) [1].

<sup>82</sup> *General Comment No 3* (n 70) [3].

<sup>83</sup> *Ibid* [9].

<sup>84</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Initial Report of Guinea*, UN ESCOR, 67<sup>th</sup> sess, UN Doc E/C.12/GIN/CO/1 (30 March 2020) [25], [27].

However, not all human rights can be realised through prolix, detailed legislative requirements amenable to adjudication. At the micro or day-to-day level, rights to health, education and/or welfare cannot be legislated for with absolute precision, given the variety of mechanisms required to secure a right. Significant discretion, therefore, must be left to administrative bodies across different levels as to the recipients, character and size of provision.<sup>85</sup> In terms of macro-level realisation of ESR, targeted legislation often plays second fiddle to indirect policy interventions that address broader socio-economic or cultural factors and are carried out across multiple ministries. Any strategy for poverty reduction cannot be purely legislation-based, requiring ‘a multi-sectored approach in order to undertake a whole set of macroeconomic, structural and social policies and programmes’.<sup>86</sup> The right to food is realised best where the state fosters enabling market conditions that make prices affordable in relation to average wages and low incomes, or where those who produce their own food enjoy unimpeded access to the means of production.<sup>87</sup> As Part IV(B) goes on to demonstrate, CESCR often recommends that states develop strategies and action plans to protect, promote and fulfil rights that transcend the legislative. Programmatic understandings of ESR are therefore valuable in so far as they treat these rights as continuing obligations where design, implementation and impacts must be managed in light of contingencies like economic growth, increased labour demand or natural disasters. Courts are undoubtedly capable of resolving some of the polycentric problems in the allocation of resources these obligations give rise to. However, as Fredman argues, goal-oriented duties like ESR ‘are challenging for legal regulation because effective compliance defies a monolithic solution. Instead, compliance with positive human rights duties necessitates problem-solving and continuing review by the actors themselves’.<sup>88</sup> There is, therefore, significant but insufficiently acknowledged underlap between the justiciable and programmatic aspects of ESR.

The programmatic aspects of ESR, and their evident risk of underlap with justiciable aspects, are best understood by using examples of how the *ICESCR* recognises the polycentric problems that the realisation of socio-economic rights inevitably gives rise to. A number of Convention articles, most notably arts 6(2), 11(2), 12(2), 13(2) and 15(2) establish duties that are primarily ‘programme and policy-based, not legislative’.<sup>89</sup> Article 6(2) on the right to work is the most obviously programmatic right in so far as the steps to be taken by a state party to achieve its full realisation include ‘policies and techniques to achieve steady economic, social and cultural development and full and productive employment.’ This is essentially a mandate to the state to develop programmes to stimulate employment (eg public works) and on a broader level to regulate a national economy such that employment opportunities became available to all jobseekers. While, for example, failure to provide unemployment assistance or prevent forced

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<sup>85</sup> Ida Elisabeth Koch, ‘The Justiciability of Indivisible Rights’ (2003) 72(1) *Nordic Journal of International Law* 3, 33.

<sup>86</sup> Felner (n 25) 126.

<sup>87</sup> Sakiko Fukuda-Parr, ‘Developmental States, Neoliberalism, and the Right to Food: Brazil and South Africa’ in Gillian MacNaughton and Diane F Frey (eds), *Economic and Social Rights in a Neoliberal World* (Cambridge University Press, 2018) 217, 217–18.

<sup>88</sup> Fredman (n 2) 151.

<sup>89</sup> Dowell-Jones (n 32) 43.

labour might be a justiciable breach of art 6, this general obligation to stimulate employment does not refer to any individual claim to the aforementioned policies and techniques to achieve full and productive employment. This ‘promotional obligation’ (as Christian Tomuschat puts it) ‘still connotes a genuine legal obligation’ even if aspects of it might not be contestable in a court of law by an individual deprived of their rights.<sup>90</sup> Shareen Hertel and Lanse Minkler, likewise, reject the idea that ESR are mere statements of public policy goals but at the same time accept there are some elements of labour rights that are readily justiciable and some that are not.<sup>91</sup>

The right to health has been that which has generated the most successful litigation and hence most obviously proved the justiciability of ESR. However, the drafters deliberately chose not to define health. Instead, art 12 operates to a significant extent by setting out the steps parties must take to progressively realise the highest attainable standards thereof.<sup>92</sup> *General Comment No 14* requires states to adopt and implement a national health strategy and plan of action with health indicators and benchmarks.<sup>93</sup> Multi-sectoral, cross-departmental steps to put in place adequate preventative and corrective measures for the enhancement of people’s health like reduction of infant mortality, increase of life expectancy and elimination of malnutrition are (in Alicia Yamin’s words) distinctly ‘programmatically obligations’.<sup>94</sup> Though some of these obligations are clearly justiciable,<sup>95</sup> products of a national health strategy, like educating communities about health, addressing geographic access to health centres, training doctors or promoting medical research, ‘for the most part [require] an entirely different set of strategies from litigation’<sup>96</sup> and may not be enforceable by it. The integration of human rights principles into programmes at national levels can facilitate non-discriminatory treatment, inform the mechanics of community participation and inform analysis of reform.<sup>97</sup> However, human rights experts who speak to state officials primarily in the language of laws, litigation and court orders ‘are likely to be heard with polite mystification’.<sup>98</sup>

Article 14, likewise, has a distinctly programmatic element in so far as it obligates states to adopt a time-defined, ‘detailed plan of action’ for the progressive implementation of the principle of compulsory primary education free of charge within two years, a requirement which requires at a minimum a national education strategy.<sup>99</sup> Failure to adopt such a plan of action is a violation of the *ICESCR* and potentially justiciable domestically. However, the plan itself will be

<sup>90</sup> Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, 3<sup>rd</sup> ed, 2014) 141.

<sup>91</sup> Hertel and Minkler (n 56) 23.

<sup>92</sup> Alicia Ely Yamin, ‘The Right to Health: Where Do We Stand and How Far Have We Come?’ (2013) 35(2) *Human Rights Quarterly* 509, 512–13.

<sup>93</sup> *General Comment No 14* (n 75) [43].

<sup>94</sup> Yamin, ‘Future in the Mirror’ (n 41) 1219.

<sup>95</sup> *Ibid* 1222.

<sup>96</sup> *Ibid* 1221.

<sup>97</sup> LP Freedman, ‘Using Human Rights in Maternal Mortality Programs: From Analysis to Strategy’ (2001) 75(1) *International Journal of Gynecology and Obstetrics* 51, 51.

<sup>98</sup> Paul Hunt et al (n 3) 545.

<sup>99</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 13 (Twenty-First Session, 1999): The Right to Education (Article 13 of the Covenant)*, UN ESCOR, 21<sup>st</sup> sess, UN Doc E/C.12/1999/10 (8 December 1999) [32].



written in the programmatic language of objectives, targets, benchmarks and time frames, the identification and mobilisation of resources, the coordination of activities of different actors and monitoring, while at the same time retaining flexibility as a continuing obligation.<sup>100</sup> Likewise, the right to housing in art 11 again establishes a programmatic state duty to adopt a national housing strategy which

defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time frame for the implementation of the necessary measures.<sup>101</sup>

Some public policies with an obvious bearing on the supply of housing, like those on eviction or compulsory purchase orders, are clearly justiciable. However, others, like addressing the commodification of housing or the use of housing as an investment asset, are necessary to give effect to the right but again may not be justiciable. In many instances, the government becomes ‘the facilitator of the actions of all participants in the production and improvement of shelter’ through a range of policies, strategies and programmes that can be significantly abstracted from judicialisation or legislation.<sup>102</sup>

As noted earlier, the reluctance to explicitly emphasise the programmatic aspects of socio-economic rights realisation is based on an understandable belief that the fundamental interests secured by these rights ‘should not be at the mercy of changing governmental policies and programmes, but should be defined as entitlements’.<sup>103</sup> However, we know that not all state duties can be defined as entitlements. The right to food is again programmatic in that it requires states to

improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.<sup>104</sup>

As such, the right to food security again requires aggregated, multi-sectoral policy instruments that cut across numerous national policies and projects like public investment in irrigation, subsidies for agricultural inputs and strategies to address all aspects of food production, processing, distribution and marketing of

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<sup>100</sup> Committee on Economic, Social and Cultural Rights, *General Comment 11 (1999): Plans of Action for Primary Education (Article 14 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 20<sup>th</sup> sess, Agenda Item 7, UN Doc E/C.12/1999/4 (10 May 1999) [10].

<sup>101</sup> Office of the High Commissioner for Human Rights, *CESR General Comment No 4: The Right to Adequate Housing (Art 11 (1) of the Covenant)*, 6<sup>th</sup> sess, UN Doc E/1992/23 (13 December 1991) annex III [12].

<sup>102</sup> Office of the United Nations High Commissioner for Human Rights and UN Habitat, ‘The Right to Adequate Housing’ (Fact Sheet No 21, November 2009) 6.

<sup>103</sup> Asbjørn Eide and Allan Rosas, ‘Economic, Social and Cultural Rights: A Universal Challenge’ in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, 1995) 15, 18.

<sup>104</sup> ICESCR (n 1) art 11(2)(a).

food.<sup>105</sup> Failure to do so progressively may constitute a breach of the state's duty, but it is unlikely that every such breach (eg failure to improve methods of production or to conduct national agrarian reform) is justiciable. There are limitless theories about how to eradicate starvation, and it is the government's duty to choose among them. Courts will be reluctant to interfere with rational programmes sincerely pursued to realise ESR even if it may not appear to a court to be the most efficacious course of action.<sup>106</sup>

### C *Proactive Policymaking and the Limitations of Violation-Based Approaches*

As argued earlier, those who emphasise justiciability as a core feature of ESR argue that the term 'violations' is generally preferable to phrases such as 'failure to give effect to obligations' on the basis that such phrases carry the mistaken implication that socio-economic rights are 'exclusively programmatic in nature and thus lacking any individual rights components'.<sup>107</sup> Any such implication is false, however. It should be clear from the foregoing that recognising some aspects of ESR are programmatic does not mean that ESR are exclusively programmatic. Recognising that some programmatic aspects of ESR may not be justiciable does not imply that all, or most ESR, are non-justiciable. The rights contained in the *ICESCR* are potentially as valuable in setting standards by which state policies should be assessed politically as they are when manifest in constitutional welfare rights or statute adjudicated in a court of law.<sup>108</sup> It is for this reason that Katherine Young argues ESR 'are meaningful even when they are judicially unenforceable', exerting pressure as objects of state policy, guiding statutory interpretation by judges and bureaucrats.<sup>109</sup>

To argue that some aspects of ESR are programmatic and not fully justiciable is not to argue that these aspects (let alone the ESR overall) are open-ended, contingent, subjective, non-committal, vague, subordinate to cost-benefit decision-making, lacking in obligatory structure or any of the other descriptions and epithets typically associated by ESR scholars with any suggestion that ESR justiciability might be qualified. While the alleged indeterminacy of ESR is what typically gave rise to scepticism about the status and justiciability of these rights, there is nothing inherently imprecise about a programmatic approach to realising them. The adoption of budgeted, prioritised and sequenced programmes of action, the setting of time-bound objectives and monitoring of implementation measures provide strong starting points for defining appropriate measures for governments

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<sup>105</sup> Committee on Economic, Social and Cultural Rights, *General Comment 12 (Twentieth Session, 1999): The Right to Adequate Food (Art 11)*, UN ESCOR, 20<sup>th</sup> sess, Agenda Item 7, UN Doc E/C.12/1999/5 (12 May 1999) [15].

<sup>106</sup> Etienne Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8(4) *South African Journal on Human Rights* 464, 471.

<sup>107</sup> Leckie (n 45) 95.

<sup>108</sup> Beitz (n 7) 162.

<sup>109</sup> Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press, 2012) 13 ('*Constituting ESR*').

to take towards progressive realisation.<sup>110</sup> Whereas art 9, for example, merely recognises the right to social security but does not specify steps towards its implementation, national human rights action plans (examined in Part IV) and Poverty Reduction Strategy Papers make apparent that strategies can be results-focused, tailored to emerging constraints and contingencies, endorsed at the level of the executive, and typically encompass the responsibilities of the multiple agencies that need to be engaged if any programme is to be realised. The CESCR increasingly calls for benchmarks on which a state's achievement in relation to a given right can be assessed.<sup>111</sup> Achievements can be measured using standard indicators such as, inter alia, risk, vulnerability and social capital indicators.

It should be clear at this point that nothing about considering aspects of rights as programmatic precludes an extensive or inclusive interpretation of the right in question. Why then has there been a reluctance by advocates and theorists of ESR to fully acknowledge the programmatic nature of these rights? As Part II suggested, the perceived importance of justiciability to the status of ESR lies in the assumption that a violationist approach inoculates these rights against charges that they are aspirational, indeterminate or merely directive, which scholars associate with purely programmatic views of ESR. However, as suggested in Part I, contemporary ESR theorisation is beginning to systematically question whether adjudication of ESR deprivations on the established model for civil and political rights violations actually works. Some of this concern is empirical and based on the limited success of judicial intervention. The solutions available in a number of legal systems do not fit many of the most pressing ESR dilemmas like fiscal crises, underdevelopment and climate change. As one scholar puts it, 'one must look high and low outside the field of public and international law to find policy makers in the health field who think day-to-day constitutional litigation driven by the better off will make the overall system more equitable'.<sup>112</sup>

Justiciability also struggles to take cognisance of progressive realisation. At the core of the violations approach is a premise that rectifying individual abuses constitutes a 'higher priority' than does promoting progressive realisation more broadly.<sup>113</sup> It is undoubtedly easier to establish a violation when looking at immediate duties like non-discrimination between men and women (art 3) or trade union membership (art 8) than it would be to prove breaches in relation to failures to progressively realise, given that the latter are related to multidimensional public policies, structural issues and resource allocations. This difficulty of identifying clear breaches had led to progressive realisation being 'sidelined' in approaches

<sup>110</sup> See, eg, Committee on Economic, Social and Cultural Rights, *General Comment No 15 (2002): The Right to Water (Arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 29<sup>th</sup> sess, Agenda Item 3, UN Doc E/C.12/2002/11 (20 January 2003) [47]–[49].

<sup>111</sup> Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Serbia and Montenegro*, UN ESCOR, 34<sup>th</sup> sess, UN Doc E/C.12/1/Add.108 (23 June 2005) [35].

<sup>112</sup> Jeff King, 'The Future of Social Rights: Social Rights as Capstone' in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 289, 319.

<sup>113</sup> Audrey R Chapman, 'A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18(1) *Human Rights Quarterly* 23, 37–38.

that emphasise justiciability.<sup>114</sup> Indeed, concepts that underpin justiciability like the minimum core and non-retrogression are emphasised *because* they are immune from progressive realisation.<sup>115</sup> This has caused alarm in so far as it signals a primarily reactive ‘acceptable moderation’ or a ‘manageable legal impetus’<sup>116</sup> in place of more proactive programmatic and multidimensional approaches to ESR.

A corollary of this position is the argument that a violations approach is unduly narrow, overlooking broader state responsibilities for ESR. Fredman, for example, argues that viewing rights and duties primarily in terms of their enforceability has the tendency to skew our attempts to understand and elaborate positive duties. Instead of attending to the proactive function of ESR in guiding political and executive decision-making to ensure legislation, policy and administration address human rights demands, scholarship tends to concentrate more on what happens when those rights are violated.<sup>117</sup> By contrast, a programmatic view of ESR allows scholars, policymakers and the international community to take fuller cognisance of progressive realisation given that advances in areas like health, welfare and education are achieved when standards of living, pensions or access to schooling improve incrementally over time, usually via systematic state planning and/or market regulation. It should be obvious from the foregoing that some positive obligations increasingly acknowledged as being essential to the realisation of rights under the *ICCPR* (eg to maintain a police force, to conduct judicial training) are also programmatic in this sense.<sup>118</sup>

Far from implicitly undermining the status of ESR, therefore, accepting that some *ICESCR* duties are mostly programmatic vindicates the idea that Covenant obligations require an ‘activist, committed State’ that elaborates a calibrated set of public policies relating to rights.<sup>119</sup> Multidimensional programmatic approaches are necessary if ESR are to operate as claims to a set of social arrangements like institutions, laws and an overall enabling environment that best secures their enjoyment.<sup>120</sup> In areas like education, a programmatic approach compels attention to demand factors (like the cost of schooling) and supply factors (the number of schools), direct policy intervention (scholarships to aid school attendance) and indirect policy intervention (adopting macroeconomic policies that reduce poverty).<sup>121</sup> Similarly, we understand that health, schooling and housing status reflect a wide range of underlying non-medical, non-educational- and non-shelter-related economic factors like levels of development, inflation, structural adjustment programmes and external debt that require wideranging policy approaches that condition ESR realisation. Taking ESR seriously as programmatic can comprehensively answer allegations that ESR advocates ‘duck hard decisions’

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<sup>114</sup> Eitan Felner, ‘Closing the “Escape Hatch”: A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights’ (2009) 1(3) *Journal of Human Rights Practice* 402, 405.

<sup>115</sup> Porter (n 21) 48.

<sup>116</sup> Young, *Constituting ESR* (n 109) 72.

<sup>117</sup> Fredman (n 2) 90.

<sup>118</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>119</sup> Chapman (n 56) 205.

<sup>120</sup> Philip 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’ (2005) 27(3) *Human Rights Quarterly* 755, 789.

<sup>121</sup> Felner (n 25) 124.

between competing goods or rejects the discipline of working with limited resources.<sup>122</sup>

There is little revelatory about these ideas. Most advocates of ESR would support the position that the *ICESCR* is about more than the atomised realisation of individual rights and that ESR should function as a framework for macroeconomic and social policy.<sup>123</sup> The question of whether to label failed good faith attempts to rectify ESR deprivations through these frameworks as violations is one that troubles some scholars,<sup>124</sup> and cannot be addressed here. However, programmatic understandings of ESR still provide that ‘determinate yardstick’<sup>125</sup> for subjecting state policy to critical non-judicial accountability, not only by the *CESCR* but also by voters and civil society, to say nothing of bureaucratic accountability within ministries and the public sector. As David Forsythe reminds us, a political view of human rights obligations emphasises their role as a matter of formalised public policy, looking beyond legal text and legal reasoning to incorporate a broader range of factors relating to how the state is really managed and how services are really provided.<sup>126</sup> Part IV explores this using three examples.

#### IV THE ASCENT OF THE PROGRAMMATIC IN CONTEMPORARY ESR PRACTICE

Deprivations of rights, or the failure to progressively realise them, stem not from clear, isolated or time-bound events that are most readily justiciable, but rather from broader systemic failings of socio-economic policy.<sup>127</sup> A programmatic approach emphasises the duty of the executive, legislature and state bureaucracy to proactively identify problematic situations and provide social minima through rules-driven policymaking, regulation and macroeconomic arrangements. Decisions about how to secure appropriate levels of housing, health, shelter etc go to the heart of the political process, involving negotiation and compromise over costs and trade-offs that courts are institutionally less equipped to engage in,<sup>128</sup> even if the justiciability debate and jurisprudence from across the world clearly demonstrate that such engagement is neither impossible nor illegitimate.<sup>129</sup> Even the most wideranging decisions of ESR claims on a case-by-case basis produce piecemeal policymaking at an ‘interstitial’ (as opposed to macro) level.<sup>130</sup> It should come as no surprise that some human rights actors focus more on the upstream planning stage of ESR policymaking (defining the scope of provision, allocating resources for its realisation and establishing structural

<sup>122</sup> Robert Archer, ‘Linking Rights and Development: Some Critical Challenges’ in Sam Hickey and Diana Mitlin (eds), *Rights-Based Approaches to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009) 21, 24–5.

<sup>123</sup> Dowell-Jones (n 32) 18.

<sup>124</sup> See, eg, Leckie (n 45) 96.

<sup>125</sup> Tasioulas (n 23) 1192.

<sup>126</sup> Forsythe (n 26) 61.

<sup>127</sup> Allison Corkery and Sally-Anne Way, ‘Integrating Quantitative and Qualitative Tools to Monitor the Obligation to Fulfil Economic, Social and Cultural Rights: The OPERA Framework’ (2012) 30(3) *Nordic Journal of Human Rights* 324, 330.

<sup>128</sup> Aryeh Neier, ‘Social and Economic Rights: A Critique’ (2006) 13(2) *Human Rights Brief* 1, 2.

<sup>129</sup> King (n 112) 319.

<sup>130</sup> *Ibid* 319 n 119.

mechanisms for monitoring and enforcement) than on downstream rectification in inevitably ‘compartmentalized’ and ‘reactive’ decisions by the courts that can remain distanced from broader questions of justice.<sup>131</sup>

This emphasis on the programmatic over the judicial is manifest in three distinct areas of human rights-based practice explored in the remainder of this article: national human rights action plans, human rights-based approaches to development and civil society mobilisation. These examples are not exhaustive. One could point to the work of the CESCR. State reports are primarily submitted in terms of the improvement of existing conditions by executive, legislative and administrative means. The Committee, in response, increasingly employs the core obligations doctrine to elaborate steps necessary to operationalise rights, consciously circumventing ‘the difficult questions of the outcome-oriented content of legal entitlement’.<sup>132</sup> The primary aim of rights-based macroeconomic analysis is to influence the executive’s mixture and sequencing of policies. It is consciously adopted as an alternative (albeit a complementary one) to legal adjudication given the latter’s inability to fully incorporate solidarity and collective action.<sup>133</sup> Likewise, the increasingly prevalent practice of ESR-related budget analysis prioritises ‘governance, law, policy and practice’ over judicialisation, and targets politicians, administrators and civil society as the most influential actors.<sup>134</sup> None of these approaches deny the justiciability of ESR, but all are framed by a conscious marginalisation of the judicial as relatively peripheral to making the rights practically operational.

#### A National Human Rights Action Plans

Perhaps the most obviously programmatic approach to ESR realisation is found in the area of NHRAPs, which are national strategies to identify and undertake appropriate measures for realising certain or all provisions contained in the various international human rights instruments. While the *Vienna Declaration and Programme of Action* of 1993 notably recommended that each state develop a NHRAP for implementing human rights in general,<sup>135</sup> Azadeh Chalabi convincingly argues that the earliest inspiration for them comes from art 14, the *ICESCR*’s aforementioned call for ‘a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all’ in states that heretofore have not secured this.<sup>136</sup> This obligation has been deemed by the CESCR to be implicit in all other articles of the Covenant.<sup>137</sup> Indeed, in accordance

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<sup>131</sup> Katherine G Young, ‘Introduction’ in Katherine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 12.

<sup>132</sup> Young, *Constituting ESR* (n 109) 75.

<sup>133</sup> Radhika Balakrishnan, Diane Elson and Raj Patel, ‘Rethinking Macro Economic Strategies from a Human Rights Perspective’ (2008) 53(1) *Development* 27, 29.

<sup>134</sup> Aoife Nolan, Rory O’Connell and Colin Harvey, ‘Introduction’ in Aoife Nolan, Rory O’Connell and Colin Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, 2013) 1, 4.

<sup>135</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/Conf.157/23 (12 July 1993) para 71.

<sup>136</sup> Azadeh Chalabi, *National Human Rights Action Planning* (Oxford University Press, 2018) 65.

<sup>137</sup> *General Comment No 1* (n 30) [4].

with the argument outlined in Part III, NHRAPs are argued to be ‘particularly relevant’ to *ICESCR* rights, given the obligation to achieve them progressively and their link to the everyday governmental domains of development, social protection and service delivery.<sup>138</sup> Because NHRAPs articulate standards to improve the availability, accessibility, acceptability and adaptability of goods and services relevant to the Covenant, General Comments have characterised the need to adopt them as non-derogable minimum core obligations.<sup>139</sup> While NHRAPs can be ‘global’ (incorporating many rights) or specific, the Committee consistently urges states to develop plans of action for individual socio-economic rights or issues related thereto. For example, in March/April 2020’s 67th Session, the Committee’s Concluding Observations

- called upon Ukraine to adopt a new comprehensive national strategy and action plan for the integration of internally displaced persons and their access to ESR<sup>140</sup>
- called upon Guinea to foster the right to work by adopting action plans ‘that include specific objectives and identify the financial and technical resources required for their implementation’,<sup>141</sup> and
- welcomed the adoption by both Belgium and Norway of national action plans for the implementation of the Guiding Principles on Business and Human Rights<sup>142</sup>

The Committee seldom suggests specific policy content of NHRAPs, which are usually left to the discretion of the state party, reflecting art 2(1)’s inherent context-specificity and gradualness. However, target-setting, time frames, establishment of institutional responsibility and identification of resources available are usually recommended.

NHRAPs are distinctly programmatic in the sense defined earlier in this article. They are inherently action-oriented, top-down policy planning tools for states to translate legal commitments into robust legislative and non-legislative operationalisation activities. Far from outlining the ‘vague promises’ associated with aspirational rights, the Office of the High Commissioner for Human Rights (‘OHCHR’) argues NHRAPs must (i) indicate clearly the current level of rights achievement, (ii) identify what problems need to be overcome, (iii) specify what action will be taken via benchmarks for evaluation of progress, (iv) specify agents obligated to take that action, (v) establish a firm time frame in which action will be taken and (vi) effectively monitor and evaluate what has been done.<sup>143</sup> NHRAPs are an acknowledgement of a number of principles outlined in Part III

<sup>138</sup> Office of the United Nations High Commissioner for Human Rights, *Handbook on National Human Rights Plans of Action* (Professional Training Series No 10, 29 August 2002) 73 (‘*Handbook on NHRAPs*’).

<sup>139</sup> See, eg, *General Comment No 14* (n 75) [43].

<sup>140</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Seventh Periodic Report of Ukraine*, UN Doc E/C.12/UKR/CO/7 (2 April 2020) [13].

<sup>141</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Initial Report of Guinea*, UN Doc E/C.12/GIN/CO/1 (30 March 2020) [25].

<sup>142</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Belgium*, UN Doc E/C.12/BEL/CO/5 (26 March 2020) [3]; Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Sixth Periodic Report of Norway*, UN Doc E/C.12/NOR/CO/6 (2 April 2020) [8].

<sup>143</sup> *Handbook on NHRAPs* (n 138) 18.

that should underpin any putative programmatic turn in ESR: that genuine improvements require resources and forms of long-term effort that are conditional on institutional strengthening,<sup>144</sup> that planning for ESR must begin with comprehensive needs analysis<sup>145</sup> and end with incremental programme proposals, and that ESR realisation must converge with modern governance principles.<sup>146</sup> The most effective NHRAPs identify the available resources, adjust plans in light of circumstances, adopt effective performance indicators and lay foundations for successor plans.<sup>147</sup>

What is striking about NHRAPs is how irrelevant questions of justiciability are. The OHCHR is explicit in recommending NHRAPs as a response to the limitations of denunciations, identification of wrongdoers and exhortation,<sup>148</sup> adopting a deliberately ‘non-confrontational’ approach in contradistinction to litigation-based strategies.<sup>149</sup> NHRAPs are ‘based on the view that lasting improvements in human rights ultimately depend on the government and people of a particular country deciding to take concrete action to bring about positive change’ through programmes that engage all relevant sectors of government.<sup>150</sup> The Office’s *Handbook on National Human Rights Plans of Actions* (‘*Handbook on NHRAPs*’) is explicitly targeted at ministerial officials, parliamentarians, bureaucrats, donors and civil society. Judges are also targeted, not in their adjudicatory capacity, but insofar as they are ‘working on, or interested in’ the Plans.<sup>151</sup> Though NHRAPs more often have the status of government policy than an enforceable legal status domestically,<sup>152</sup> action planning of this sort is understood as a ‘more proactive and systemic move than merely enacting bills of rights and offering judicial remedies’.<sup>153</sup>

NHRAPs manifest a number of the advantages associated with programmatic approaches. Above all, they integrate human rights objectives with general objectives of the state. As Patrick Twomey notes, ‘central to an NHRAP’s success or failure has been the extent to which it is linked to any over-arching development process such as a state’s National Development Plan’.<sup>154</sup> Where this occurs, factors with a likely bearing on a particular plan’s effectiveness like level of political support, realistic prioritisation, clear success criteria and adequate commitment of resources are more likely to be forthcoming.<sup>155</sup> Furthermore, programmatic links to policy planning and budget decisions in relevant ministries help ensure that ESR ‘are not “quarantined” as a distinct sector’.<sup>156</sup> Finally,

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<sup>144</sup> Ibid 1.

<sup>145</sup> Ibid 8.

<sup>146</sup> Ibid 1.

<sup>147</sup> Chalabi (n 136) 145–9.

<sup>148</sup> *Handbook on NHRAPs* (n 138) 1.

<sup>149</sup> Ibid 10.

<sup>150</sup> Ibid 8.

<sup>151</sup> Ibid 4. The Handbook also recommends that ‘members of the judiciary and jurists’ be consulted in drafting action plans: at 43.

<sup>152</sup> Chalabi (n 136) 133.

<sup>153</sup> Ibid 1.

<sup>154</sup> Patrick Twomey, ‘Human Rights-Based Approaches to Development: Towards Accountability’ in Mashood A Baderin and Robert McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (Oxford University Press, 2007) 45, 59.

<sup>155</sup> *Handbook on NHRAPs* (n 138) 2.

<sup>156</sup> Twomey (n 154) 59.



NHRAPs give effect to the principle of progressive realisation. They undoubtedly accelerate the process of human rights-based development through roadmaps for concrete steps,<sup>157</sup> but also help policymakers draw ‘a distinction between objectives that are achievable within a limited time frame and others that may be desirable in the long term’ in a way that judicial approaches seldom can.<sup>158</sup>

### B *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. Because the modernisation theory and neoliberal development toolboxes failed to deliver individual well-being, models of development that made the individual the focus of development strategy became more attractive for United Nations agencies, international financial institutions, NGOs and bilateral aid agencies operating on behalf of the poor. 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 and 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.<sup>159</sup> On this view, accountability is what distinguishes rights from capabilities or needs. It has therefore emerged as the cardinal virtue of HRBAD, now anchored in human rights obligations and not, as heretofore, in ad hoc goals.<sup>160</sup>

Scholars of ESR have primarily understood this accountability in a fundamentally legalistic way, focussing on how right-holders act as empowered claimants and consistently reiterating the justiciability of rights contained in the *ICESCR*.<sup>161</sup> At the most basic level, HRBAD amount to a demand for state compliance with international conventions like *ICESCR* that imply there are identifiable standards of quality for services states should provide.<sup>162</sup> Taking rights seriously implies the creation of a culture of litigation that makes the induction of ‘newer’ ESR easier.<sup>163</sup> As the OHCHR put it,

[f]or people to be enabled to assert a legally binding claim that specific duty-bearers provide free and compulsory primary education (International Covenant on Economic, Social and Cultural Rights, art 13) is more empowering than it is to rely

<sup>157</sup> Azadeh Chalabi, ‘The Nature and Scope of States’ Obligation to Adopt a National Human Rights Action Plan’ (2014) 18(4–5) *International Journal of Human Rights* 391, 403.

<sup>158</sup> *Handbook on NHRAPs* (n 138) 19.

<sup>159</sup> See generally Diana Mitlin and Sam Hickey, ‘Introduction’ in Sam Hickey and Diana Mitlin (eds), *Rights-Based Approaches to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009) 3, 16–17.

<sup>160</sup> Paul J Nelson and Ellen Dorsey, ‘Who Practices Rights-Based Development? A Progress Report on Work at the Nexus of Human Rights and Development’ (2018) 104(C) *World Development* 97, 98.

<sup>161</sup> Jakob Kirkemann Boesen and Hans-Otto Sano, ‘The Implications and Value Added of a Human Rights-Based Approach’ in Bård A Andreassen and Stephen P Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (Intersentia, 2<sup>nd</sup> ed, 2010) 45, 61.

<sup>162</sup> Jean Grugel and Nicola Piper, ‘Do Rights Promote Development?’ (2009) 9(1) *Global Social Policy* 79, 80.

<sup>163</sup> Langford (n 16) 10.

on ‘needs’ alone or to observe the high economic returns on investment in education.<sup>164</sup>

Direct engagement with the legal system can take a number of forms like seeking recognition for claims to institutionalise ESR in law, testing the parameters of an already-legislated right and challenging the legality of state policies on the basis of the Convention.<sup>165</sup>

However, neither norms of justiciability nor the high degree of legal specificity in terms of the substance of ESR from General Comments or Concluding Observations since the late 1980s play much role in conceptualising accountability. 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, as Paul Gready observes, the ‘legal reflex which automatically and unthinkingly resorts to the law as remedy’ has been conspicuous by its absence in HRBAD.<sup>166</sup> This is largely because HRBAD is rooted less in specific rights that can be *claimed* through a specific institutional process than it is in principles derived in an undifferentiated manner from international human rights treaties like equality, participation, empowerment, transparency and accountability that are to be integrated into all stages of rights programming.<sup>167</sup> *Process* here matters as much as *outcome*.<sup>168</sup> Human rights emerge more as principles that serve as guidance for processes in states’ development policies or values against which development programmes should be checked than they do as a respect–protect–fulfil framework of legal obligations. Accountability in HRBAD is therefore understood primarily as variegated *political* accountability, which revolves around participation of the poor in policymaking at the input stage of planning and democratic accountability at the output stage of implementation.<sup>169</sup> A legal remedy may not be explicitly precluded, but it is merely one form of accountability among many others, such as ‘monitoring, reporting, public debate and greater citizen participation in public service delivery’, in addition to the ballot box.<sup>170</sup>

Consequently, HRBAD as practised by development agencies tend to emphasise procedural rights like participation and voice over substantive rights like those to food, health or housing.<sup>171</sup> In addition, development bodies like the United Nations Development Programme view HRBAD as a new approach which ‘focuses on the realisation of human rights through human development rather

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<sup>164</sup> Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (Report, 2006) 7.

<sup>165</sup> Anuradha Joshi, ‘Do Rights Work? Law, Activism, and the Employment Guarantee Scheme’ (2010) 38(4) *World Development* 620, 622.

<sup>166</sup> Paul Gready, ‘Rights-Based Approaches to Development: What is the Value-Added?’ (2008) 18(6) *Development in Practice* 735, 737.

<sup>167</sup> See, eg, World Health Organization, *A Human Rights-Based Approach to Health* (Policy Paper, 2010) 2 <[https://www.who.int/hhr/news/hrba\\_to\\_health2.pdf](https://www.who.int/hhr/news/hrba_to_health2.pdf)>, archived at <<https://perma.cc/A22E-ACT3>>.

<sup>168</sup> Twomey (n 154) 49.

<sup>169</sup> Dan Banik, ‘Human Rights for Human Development: The Rhetoric and the Reality’ (2012) 30(1) *Nordic Journal of Human Rights* 4.

<sup>170</sup> Mac Darrow and Amparo Tomas, ‘Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation’ (2005) 27(2) *Human Rights Quarterly* 471, 488.

<sup>171</sup> Nelson and Dorsey (n 158) 101.

than through a violations policy’, emphasising the mainstreaming of human rights concerns ‘into national legislation and governance programs’.<sup>172</sup> Development actors generally prefer the ‘cooperative mode’ where they interact productively with ministerial offices and government agencies over the confrontational naming-and-shaming tactics associated with human rights bodies.<sup>173</sup> Alicia Yamin and Rebecca Cantor, in a study of HRBAD as it relates to health, conclude that policymakers in the area tend to ‘be wary of judicializing health-related rights’ and that governments ‘can become hostile to [human rights-based approaches] when they believe it means involving courts’, and so both concentrate instead on programming.<sup>174</sup>

The centrality of ESR to HRBAD is found therefore not in the judicial realm, but as ‘a central frame of reference in policy-making and political choices’, making enjoyment of ESR an explicit objective of development via integration of ‘minimum standards into all plans, policies, budgets, processes and institutions’.<sup>175</sup> As Sheela Patel and Diana Mitlin argue, these are ‘programmatic responses’ that go beyond claiming rights or status to instead attempt to develop effective solutions that address needs.<sup>176</sup> It means engaging in the ‘nitty-gritty of social policy formulation’, framing goals and targets while differentiating responsibilities and establishing parameters for resourcing, implementation and monitoring.<sup>177</sup> There must be a detailed, rational framework for the realisation of rights like education, housing, pensions or healthcare that

provide[s] 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.<sup>178</sup>

Programmatic approaches translate ESR into institutional practices, identifying and mapping areas of deprivation and drawing on internationally enunciated standards to guide policymaking. For example, in health policy, Lynn Freedman argues ESR standards have functioned as a planning tool, setting a standard against which to evaluate actions by the state and development agencies, dovetailing with health-related disciplines like epidemiology that supply technical rationales for applying these standards.<sup>179</sup> The aspiration of rights-based actors here is to make

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<sup>172</sup> Stephen P Marks, ‘The Human Rights Framework for Development: Seven Approaches’ in Arjun Sengupta, Archana Negi and Moushumi Basu (eds), *Reflections on the Right to Development* (Sage Publications, 2005) 23, 28–9.

<sup>173</sup> *Ibid.* 52.

<sup>174</sup> Alicia Ely Yamin and Rebecca Cantor, ‘Between Insurrectional Discourse and Operational Guidance: Challenges and Dilemmas in Implementing Human Rights-Based Approaches to Health’ (2014) 6(3) *Journal of Human Rights Practice* 451, 458.

<sup>175</sup> Twomey (n 154) 49.

<sup>176</sup> Sheela Patel and Diana Mitlin, ‘Reinterpreting the Rights-Based Approach: A Grassroots Perspective on Rights and Development’ in Sam Hickey and Diana Mitlin (eds), *Rights-Based Approaches to Development: Exploring the Potential and Pitfalls* (Kumarian Press, 2009) 107, 111.

<sup>177</sup> Center for Economic and Social Rights, *A Matter of Justice: Securing Human Rights in the Post-2015 Sustainable Development Agenda* (Report, 2013) ii <[https://cesr.org/sites/default/files/matter.of.\\_justice.pdf](https://cesr.org/sites/default/files/matter.of._justice.pdf)>, archived at <<https://perma.cc/ZGC2-R3FZ>>.

<sup>178</sup> Twomey (n 154) 67.

<sup>179</sup> Freedman (n 97) 55.

‘programmatic recommendations at the national or sub-national level’ in relation to policies the state should be pursuing, informed by process indicators on issues like obstetric care from the World Health Organization or the United Nations Population Fund.<sup>180</sup> ICESCR art 12, with the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *United Nations Convention on the Rights of the Child*, have helped to shape national and sub-national plans for sexual and reproductive health education, information, and services.<sup>181</sup> Justiciability is not the metric by which the relevance of ESR is judged in HRBAD. As Mac Darrow and Amparo Tomas argue, it is the ‘programmatic application’ of these applicable standards that best indicates development effectiveness, ie the extent to which necessary improvements have been achieved in the lives of those enjoying rights.<sup>182</sup>

### C Civil Society and Grassroots Mobilisation

The greater emphasis on the programmatic aspects of ESR over the legal are apparent beyond the top-down frameworks of NHRAPs and HRBAD. It is also visible in the way ESR are used as an articulating schema by bottom-up social movements to legitimise demands by drawing on an internationally legitimised discourse to identify who ought to respond to social deprivation. As Varun Gauri and Daniel Brinks note, modernisation, urbanisation, democratisation and development have produced large-scale mobilisation for social minima, translating the historic demand of ‘I want’ to ‘I am entitled to’.<sup>183</sup> Justiciability has therefore been a touchstone of civil society mobilisation for ESR. The institutionalisation of legalised venues or judicial review is dependent on the rights-consciousness and demand aggregation that NGOs and civil society organisations can catalyse.<sup>184</sup> A violations approach that ‘sidesteps’ progressive realisation has often proved attractive to social movements who concentrate on egregious discriminations and denials of immediate ESR obligations through testimony-gathering as a prelude to legal actions.<sup>185</sup> Indeed, this adherence to law and judicial processes is believed by some to be what keeps rights activism from becoming ‘vague and blurry’ and maintains the leverage and coherence successful activism needs.<sup>186</sup> Beyond the obvious attractions of legally binding judgments, courts essentially ‘ally with the organized public’ by serving as a national forum

<sup>180</sup> Yamin, ‘Future in the Mirror’ (n 41) 1208.

<sup>181</sup> Jane Cottingham, Adrienne Germain and Paul Hunt, ‘Use of Human Rights to Meet the Unmet Need for Family Planning’ (2012) 380(9837) *Lancet* 172, 177; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>182</sup> Darrow and Tomas (n 170) 522.

<sup>183</sup> Varun Gauri and Daniel M Brinks, ‘Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights’ in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008) 1, 14, quoting Hannah Pitkin, ‘Justice: On Relating Public and Private’ (1981) 9(3) *Political Theory* 327, 347.

<sup>184</sup> Varun Gauri, ‘Redressing Grievances and Complaints regarding Basic Service Delivery’ (2012) 41 *World Development* 109, 111.

<sup>185</sup> Felner (n 114) 430.

<sup>186</sup> Dudai (n 61) 393.

for testing the feasibility of specific social and economic claims.<sup>187</sup> A number of examples are familiar (perhaps overly so) to ESR scholars. Litigation on the right to food in combination with a social movement emphasising this right led to the introduction of cooked midday food in a number of Indian states.<sup>188</sup> South Africa's Treatment Action Campaign used rights-based litigation to secure significant reform in HIV/AIDS treatment.<sup>189</sup> Ghana's Legal Resources Centre used the language of ESR to secure a ruling on the unconstitutionality of detaining mothers and children for failure to pay medical bills.<sup>190</sup> Even where unsuccessful, litigation can strengthen a movement by changing public discourse and building broader support. The *Mazibuko v City of Johannesburg* decision in South Africa may not have been implemented, but, by defining electricity as a human rights issue, litigation catalysed forms of bottom-up mobilisation that effectively prevented local government in Johannesburg from disconnecting water.<sup>191</sup> More generally, where judgments are not enforced, social mobilisation tends to increase the political costs of non-enforcement for recalcitrant authorities.<sup>192</sup>

However, justiciability is not the primary factor that attracts civil society to ESR. Human rights have always been understood and practised by social movements more as a cultural practice than a form of law that merely imposes rules.<sup>193</sup> Understandings of the legal derived from social theory tend to focus on law as a 'social process' in contradistinction to approaching it primarily as a text or formal legal structures.<sup>194</sup> As a result, litigation coexists with other strategies to secure ESR, like information politics (using documents/statistics to strengthen campaigns), leverage politics (pressuring compliance by leaders), accountability politics (holding officials electorally accountable for promises) and symbolic politics (framing issues to foster support).<sup>195</sup> Tasks traditionally associated with

<sup>187</sup> Daniel M Brinks and Varun Gauri, 'A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World' in Varun Gauri and Daniel M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2008) 303, 348.

<sup>188</sup> Poorvi Chitalkar and Varun Gauri, 'India: Compliance with Orders on the Right to Food' in Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge University Press, 2017) 288, 298.

<sup>189</sup> Mark Heywood, 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' (2009) 1(1) *Journal of Human Rights Practice* 14.

<sup>190</sup> Raymond A Atuguba, 'The Right to Health in Ghana: Healthcare, Human Rights, and Politics' in José M Zuniga, Stephen P Marks and Lawrence O Gostin (eds), *Advancing the Human Right to Health* (Oxford University Press, 2013) 101, 104.

<sup>191</sup> *Mazibuko v City of Johannesburg* [2010] 4 SA 1 (Constitutional Court), discussed in Jackie Dugard and Malcolm Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27(1) *South African Journal on Human Rights* 39.

<sup>192</sup> Daniel M Brinks, 'Solving the Problem of (Non)Compliance in Social and Economic Rights Litigation' in Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge University Press, 2017) 475.

<sup>193</sup> Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press, 2006) 228–9.

<sup>194</sup> Moser et al (n 80) 21.

<sup>195</sup> LaDawn Haglund and Rimjhim Aggarwal, 'Test of Our Progress: The Translation of Economic and Social Rights Norms into Practice' (2011) 10(4) *Journal of Human Rights* 494, 501.

social movements like analysis, education, lobbying, advocacy, campaigning and monitoring are compatible with litigation, but can be separated entirely from it when social movements use law as a political resource to frame demands or articulate a broader causal story about ESR violations. When used like this, ESR operate as a ‘transformative political practice’ to challenge unjust distributions of power,<sup>196</sup> a Gramscian exercise in discourse transformation,<sup>197</sup> a redistributive challenge to market orthodoxy shared with other emancipatory agendas.<sup>198</sup>

The distinction between legal-constitutionalist mobilisation and political campaigning should not be over-drawn — both retain continuities of people, methods and principles. However, under the political approach to mobilisation, ESR is invoked in deliberately partisan and ideological fashion, which can be contrasted instructively with the neutrality that underpins justiciability arguments.<sup>199</sup> Advocacy and lobbying approaches ‘can be interpreted politically to formulate a particular claim that carries the symbolism of the human rights texts without necessarily having to take the case to court’.<sup>200</sup> For example, Jean Drèze convincingly argues that the courts may not be the optimal avenue for pursuing the right to food.<sup>201</sup> While not dismissing a role for selective litigation, the right to food is more successfully pursued in the democratic public sphere through the demand for protective legislation.<sup>202</sup> Particularly in the developing world, litigation strategies are ‘unlikely to be the first strategy of choice for activist organizations’ where it imposes high costs for the poor, atomises social struggles, where legal aid is minimal and implementation is weak.<sup>203</sup> In the Asian context, Yash Ghai has argued that, while litigation is welcome, explicitly political social mobilisation can do more to secure grassroots change.<sup>204</sup> Likewise in Latin America, grassroots ESR movements concentrate on projects like popular education and organisational development, ‘often with a marked distrust of legal procedures’.<sup>205</sup> A preference for social mobilisation over the limited gains of ESR-adjacent judgments has long been a feature of Western states like the post-*Brown* United States.<sup>206</sup>

While for some groups ESR is primarily a language of aspiration in the process of socialisation and learning over the long term, a more concrete purpose to this discourse change can be discerned. Much social mobilisation involves framing

<sup>196</sup> Ariadna Estévez, ‘Human Rights in Contemporary Political Sociology: The Primacy of Social Subjects’ (2011) 33(4) *Human Rights Quarterly* 1142, 1152–3.

<sup>197</sup> Alan Hunt, ‘Rights and Social Movements: Counter-Hegemonic Strategies’ (1990) 17(3) *Journal of Law and Society* 309.

<sup>198</sup> Young, *Constituting ESR* (n 109) 239, 244.

<sup>199</sup> Michael Goodhart, ‘Human Rights and the Politics of Contestation’ in Mark Goodale (ed), *Human Rights at the Crossroads* (Oxford University Press, 2013) 31, 31.

<sup>200</sup> Ariadna Estévez, ‘A Latin American Sociopolitical Conceptualization of Human Rights’ (2008) 7(3) *Journal of Human Rights* 245, 255.

<sup>201</sup> Jean Drèze, ‘Democracy and the Right to Food’ in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, 2005) 45, 56–64.

<sup>202</sup> *Ibid* 45–64.

<sup>203</sup> Joshi (n 165) 621.

<sup>204</sup> Yash Ghai, ‘Yash Ghai’ in William Twining (ed), *Human Rights: Southern Voices* (Cambridge University Press, 2009) 104, 149.

<sup>205</sup> Yamin, ‘Future in the Mirror’ (n 41) 1239.

<sup>206</sup> See generally Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago Press, 1991).

policy failures in terms of an accepted discourse of non-retrogression or progressive realisation. For many civil society groups, ESR advocacy is oriented towards programmatic responses to these failures — making claims through securing ‘space at the table’ for policy dialogue, most notably rights provision in sector or macro policy arenas.<sup>207</sup> As the UN Research Institute for Social Development puts it,

[s]ocial movements and social contestation are important determinants of social policy. Such movements have affected social policies in direct and indirect ways. In the most direct way, social mobilization has placed certain items on the policy agenda. In many cases, elite understanding of what is required to pre-empt or forestall social unrest may have driven social reform.<sup>208</sup>

Of course, because social movements emphasise public goods like healthcare and education, they depend on constructive relations with institutions of governance. Like HRBAD, contemporary ESR mobilisations sometimes consciously eschew ‘adversarial, dyadic’ relations with the state to instead ‘advocate more effectively for what programmatically relevant actions could be undertaken’.<sup>209</sup> Law reform is a central component of most human rights struggles in the developing world, but, beyond this, social movements increasingly emphasise ‘the need to develop new programmatic responses’ to crises ‘that go beyond simply claiming the right to this or that resource or status, and that create very different kinds of solutions that are more effective in addressing needs’.<sup>210</sup> Young is correct when she argues that understanding this aspect of social movements ‘break[s] the assumed link between rights talk and ... litigiousness’.<sup>211</sup> However, in so doing, it also draws attention to the core theme explored in this article — the limits of the justiciable and the promise of the programmatic.

## V CONCLUSION

This article began by outlining how the debates over justiciability and, in particular, an unhelpfully pejorative understanding of the programmatic undermined serious and systematic analysis of the latter. The debate was necessary given the regrettable tendency on the part of state actors to (speciously) stress the purely programmatic nature of ESR to the detriment of properly grasping legal obligations that attached in the here and now.<sup>212</sup> There is little doubt that early insistence by ESR-sceptics on the exclusively or primarily programmatic nature of ESR served as ‘an independent brake on the opportunities’ for judicial consideration of these rights.<sup>213</sup> These arguments have been put to bed, for reasons explored in Part II. This dichotomised debate positing an absolute division between a ‘correct’ view of ESR as legal rights attaching legal remedies, on the one hand, and an ‘incorrect’ view of ESR as mere goals whose fulfilment requires

<sup>207</sup> Moser et al (n 80) 35.

<sup>208</sup> UN Research Institute for Social Development, *Transformative Social Policy: Lessons from UNRISD Research* (UNRISD Research and Policy Brief No 5, September 2006) 5 <<https://www.unrisd.org/rpb5>>, archived at <<https://perma.cc/8KGW-69BG>>.

<sup>209</sup> Yamin, ‘Future in the Mirror’ (n 41) 1204, 1207.

<sup>210</sup> Patel and Mitlin (n 176) 111.

<sup>211</sup> Young, *Constituting ESR* (n 109) 225.

<sup>212</sup> O’Connell et al (n 6) 198.

<sup>213</sup> Young, *Constituting ESR* (n 109) 296.

economic and strategic policymaking, on the other, was an artefact of explanation, not an aspect of legal reality.<sup>214</sup> Scholars recognise there is a contrapuntal sympathy between the two — some aspects of ESR are both justiciable and programmatic, some are justiciable but not programmatic, while some are programmatic but not justiciable. However, there remained a residual reluctance to fully acknowledge that some aspects of ESR realisation were programmatic lest it undermined these claims for justiciability.

This article has attempted to define and elaborate the meaning of these programmatic obligations. They are understood as clear, specific, ambitious (but manageable) operational principles that delineate what governments and other duty-bearers are responsible for in realising the obligations of the *ICESCR*. The concept draws on the breadth of the obligation to ‘take steps’ and gives meaningful effect to the reality of progressive realisation in order to shape laws, policies, programmes and projects. A programmatic approach in this sense would vindicate the notion that the primary purpose of the *ICESCR* and its monitoring apparatus is to galvanise governments into undertaking the necessary domestic policy and legislation to ensure citizens the protection of their rights in practice,<sup>215</sup> with adjudication in a court of law as a residual imperative. In a more assertive era for ESR theorisation, unshackled from old debates about the absolute or relative status of ESR, it will be interesting to see to what extent the programmatic aspects of ESR are foregrounded. There is an incipient move from retrospective violation- or fault-based approaches to ESR premised on identifying breaches by governments or agencies towards more prospective, synergistic forms of planning, execution and implementation that draw on a broad range of state, sub-state and private actors.<sup>216</sup> The salience of familiar touchstones from the justiciability debate like minimum core or the respect–protect–fulfil framework will not always appear self-evident in these processes and must therefore be argued for.

A mainstream scholarship that foregrounds questions of justiciability has yet to follow and inform programmatic discourse as much as it should. A programmatic approach requires us to shift the theoretical focus from the undoubtedly important, but crucially limited, arena of courts and claims-making to the policymaking process where state bureaucrats, donors, academics and civil society become involved in campaigning, deliberating, negotiating and deciding on ESR-based outcomes. This is not only because it helps us think in new ways about the polycentric problems that the realisation of ESR inevitably gives rise to. It is also because this is already an empirical reality of ESR practice in areas as diverse as national human rights action planning, human rights-based approaches to development and social mobilisation for ESR.

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<sup>214</sup> To draw on the presentation of the dichotomy in Koch (n 76) 85.

<sup>215</sup> David Beetham, ‘What Future for Economic and Social Rights?’ (1995) 43 *Political Studies* 41, 44.

<sup>216</sup> Fredman (n 2) 5, 150.