

SCHOLARLY ARTICLE

Beyond Buzzwords: Mandatory Human Rights Due Diligence and a Rights-Based Approach to Business Models

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Abstract

This article argues that the trend to zoom into mandatory human rights due diligence (mHRDD) as the sole solution to corporate abuse is misleading. In fact, it might risk missing entirely the main point which, as set out in this article, should be creating economic systems that enable rights-based and rights-driven business models. A small, but growing number of scholarly articles address the economic, fiscal and regulatory institutions needed to create an enabling environment for the fulfilment of human rights. These policy areas constitute what some of us understand as a ‘rights-based economy’ or ‘rights-enabling economies’. State-level efforts would be much more effective in promoting substantive equality if driven by a rights-based approach rather than a market logic. This article contends that while ensuring comprehensive mHRDD is in place as a preventative and mitigation tool, states must also push for transformative macroeconomic policies based on human rights principles as a way to fundamentally change business models.

Keywords: Macroeconomic policies; rights-based economy; rights-enabling economies; transformative business models

1. Introduction

This article argues that the trend to zoom into mandatory human rights due diligence (mHRDD) as the sole solution to corporate abuse is misleading. Mandatory HRDD must be recognized as only one element of the ‘corporate responsibility equation’, but definitely not the ‘beacon of hope’ or the ‘magic bullet’. In fact, this mHRDD focus might risk missing entirely the main point which, as set out in this article, should be creating economic systems that enable rights-based and rights-driven business models.

A small, but growing amount of scholarly literature addresses the economic, fiscal and regulatory institutions needed to enable such a rights-based economy.¹ This includes rethinking tax systems to promote rights, developing ways to deal with both private debt and sovereign debt crisis, tackling global tax abuse by the wealthy and large corporations, creating shared pools of collectively managed investment capital including local development funds and co-operative and mutual banking to circulate capital to socially and environmentally useful objectives, and regulating private enterprises in such a way

¹ See, for instance, Reuven Avi-Yonah and Gianluca Mazzoni, ‘Taxation and Human Rights: A Delicate Balance’, in Philip Alston and Nikki Reisch (eds), *Tax, Inequality, and Human Rights* (New York: Oxford Academic, 2019) 259, 278; Ignacio Saiz and Kate Donald, ‘Tackling Inequality through the Sustainable Development Goals: Human Rights in Practice’ (2017) 21:8 *International Journal of Human Rights* 1029, 1049.

through mandatory disclosure and access to remedy that prevents them from doing harm to local communities. These policy areas constitute what some of us understand as a ‘rights-based economy’ (RBE) or ‘rights-enabling economies’.² This body of literature affirms that state-level efforts would be much more effective in promoting substantive equality if driven by a rights-based approach rather than a market logic. Building on this scholarship, this article argues that, while ensuring comprehensive mHRDD has a role as a preventative and mitigation tool, states must also push for transformative macroeconomic policies as a way to fundamentally change business models.

Section II outlines the challenges with narratives that fails to deliver comprehensive outcomes and looks at the pitfalls of having mHRDD as a development ‘buzzword’. Section III then looks at neoliberalism and the market logic and section IV critiques the market logic underpinning mHRDD and the limitations inherent to that logic. Section V discusses previous work done on rights-enabling economic model(s). Section VI explains why that is relevant and what that should entail in terms of alternative business models. Section VII concludes with a silver lining: it affirms that comprehensive mHRDD laws must be seen as part of a wider transformative process towards a rights-based approach to business models. This, the article argues, is key in pushing the boundaries of this field of work and moving towards substantive equality in outcomes.

II. Beyond Buzzwords

As Andrea Cornwall and Deborah Eade rightly noted in 2010, the ‘development’ sector has an almost obsessive tendency of creating and promoting ‘buzzwords and fuzzwords’ that ultimately distract from the transformative power of a particular initiative; at times doing more harm than good.³ Thus, the construction of new discourse tends to ignore its primary task which must be to transform society and not to reform institutional development practice.⁴ Appropriation leading to depoliticization changes the meaning of key terms and reframes political strategizing by legitimizing the mainstream and de-legitimizing the creators of these terms.⁵ That is when, in the words of Leal,⁶ buzzwords (i.e., words normally portrayed as the ‘magic bullet’) become fuzzwords (i.e., depleted of political meaning). Within this scenario, policy success becomes dependent on policy networks’ ability to include their demand on the mainstream agenda and also on their capacity to exclude others.

This article argues that the trend to zoom into mHRDD as the sole solution to corporate abuse (i.e., as ‘the corporate buzzword’) is misleading. This is because there is an urgent need to unpack terms and deconstruct discourses. Language matters. The use of specific

² See Kate Donald et al, ‘A Rights-Based Economy: Putting People and Planet First’, Christian Aid and CESR, Briefing Paper 10/2020, <https://www.cesr.org/rights-based-economy-putting-people-and-planet-first/> (accessed 21 February 2023). See also Rhadika Balakrishnan and Diane Elson (eds), *Economic Policy and Human Rights: Holding Governments to Account* (London: Zed Books, 2011); Rhadika Balakrishnan, James Heintz and Diane Elson, *Rethinking Economic Policy for Social Justice: The Radical Potential of Human Rights* (London: Routledge, 2016); Bruno De Witte, ‘Balancing of Economic Law and Human Rights by the European Court of Justice’, in Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press: Oxford, 2009) 197.

³ Andrea Cornwall, ‘Introductory Overview – Buzzwords and Fuzzwords: Deconstructing Development Discourse’ in Andrea Cornwall and Deborah Eade (eds), *Deconstructing Development Discourse: Buzzwords and Fuzzwords* (Oxford: Practical Action Publishing/Oxfam, 2010) 1, 18.

⁴ Pablo Alejandro Leal, ‘Participation: The Ascendancy of a Buzzword in the Neo-liberal Era’ in Cornwall and Eade (eds), note 3, 89, 100.

⁵ Doreen Massey, ‘Vocabularies of the Economy’ in Stuart Hall, Doreen Massey and Michael Rustin (eds), *After Neoliberalism? The Kilburn Manifesto* (London: Soudings, 2013) 24, 36.

⁶ Leal, note 4, 90.

language carries concepts that legitimate and/or advance the interests of certain fields and networks.⁷ Language, therefore, serves to advance the power of particular discursive fields (i.e., development, legal or corporate). Language limits or advances the power of particular discourses over others within discursive fields. It also serves to create legitimacy by creating threads of discursive practice that reaffirm one another. For example, particular concepts may gain hold within fields (which will also be divided to varying degrees) and then penetrate to the wider population without much deconstruction or challenge. Expertise in field knowledge and participation in policy networks controlling the use and spread of concepts require control over the key concepts (and all their variations and transformations over time) and over the way these concepts are used to further a particular political agenda. In this sense, concepts used in policy making – and certainly in development – dictate the hegemonic culture through the persuasive mainstream of values as facts, which in short initiates and installs support for interventions based on a particular ideology.⁸

As soon as new words are developed or assigned new meaning, they are appropriated by particular policy networks, becoming intelligible to others.⁹ Words are awarded with an arguably ‘scientific’ and ‘technocratic’ status in discourse which shields it from any questioning or unpacking.¹⁰ This is particularly acute in neoliberal times.¹¹ The process of creating, disseminating, appropriating, transforming and re-appropriating discourses is key to the regulation of corporate abuse and solutions proposed to mitigate and potentially end it.¹² The analysis of discursive processes considers key policy positions that shape certain policy interventions in terms of their approach to a particular issue and their capacity to promote change.¹³ Development policy intends to persuade through the means of ‘polar words’ artificially dividing opinions in binaries.¹⁴ The use of binaries suggests certitude when in fact dealing with highly complex issues and contexts.¹⁵ The analysis of the processes creating, disseminating, appropriating, transforming and reappropriating particular discourses contends that paradigms are deliberately constructed in terms of carefully framed concepts and sophisticated rhetoric supporting each choice.¹⁶

The theoretical framing above can be applied to the concept of HRDD. For example, Deva notes that there is a danger in approaches that uncritically embrace the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the ideas that underpin them.¹⁷ This is because the UNGPs may create unintended results by treating human rights

⁷ Rosalin Petchesky, *Global Prescriptions: Gendering Health and Human Rights* (London: Zed Books, 2003).

⁸ Massey, note 5, 24.

⁹ Cornwall, note 3, 5.

¹⁰ Leal, note 4, 91. Peter Uvin, ‘From the Right to Development to the Rights-Based Approach: How “Human Rights” Entered Development’ in Cornwall and Eade (eds), note 3, 163, 174.

¹¹ Leal, note 4, 94.

¹² Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (translated by Colin Gordon et al) (New York: Pantheon Books, 1980); Michel Foucault, ‘Politics and the Study of Discourse’ in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentability with two lectures and an interview with Michel Foucault* (Chicago: University of Chicago Press, 1991) 56.

¹³ Massey, note 5, 26.

¹⁴ Des Gasper and Raymond Apthorpe, ‘Introduction: Discourse Analysis and Policy Discourse’ in Raymond Apthorpe and Des Gasper (eds), *Arguing Development Policy: Frames and Discourses* (London: Frank Cass, 1996) 1, 15.

¹⁵ Leal, note 4, 98.

¹⁶ Foucault (1980, 1991, 1994), note 12; Gasper and Apthorpe, note 14, 7.

¹⁷ Surya Deva, ‘Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013) 78, 104.

too lightly.¹⁸ For instance, the concept of HRDD proposed by the UNGPs may enable companies to create a false narrative of operating in compliance with the human rights norms.¹⁹ Similarly, Landau argues that the institutionalization and/or legalization of the concept of HRDD may not necessarily bring about widespread and significant improvements in corporate behaviour.²⁰ This is because companies may adopt internal policies and compliance structures to formally abide by HRDD, while failing to lead to genuine and substantial improvements in practice.²¹ In short, (m)HRDD may become a buzzword depleted of transformative meaning and incapable of delivering equal outcomes for all.

III. Neoliberalism and the Market Logic

We live in capitalist times. All capitalist projects make use of a political rhetoric that uses cultural images that rely on fear as one of the many instruments used to support a particular discourse and practice that increase economic dependency and the poverty gap.²² Modern capitalist projects are mostly known and classified in the form of the cluster loosely named neoliberalism.²³ The neoliberal project represents the continuity of an exclusive way of policy-making and implementation that is run by an elite that is alienated and disconnected from reality.²⁴ This policy praxis results in a lack of commitment to people's experiences and needs, and in a discriminatory and delusional perception of the reasons and the purpose of programmatic targeting and retrenchment.²⁵ Neoliberalism uses discourse (as mere rhetoric) for the promotion of cuts, privatization and widespread contempt for the poor.²⁶ It means shifting the mainstream political discussion from the ethical dimensions of austerity measures to moralistic values of socially constructed roles.²⁷ It purposefully exposes individuals to criticism to protect the corporate determinism embodied in the shift of paradigm performed by policies under neoliberal governments.²⁸ Usually, this does not occur in a visible and transparent manner (and this is perhaps one of the main problems of its rhetorical appropriation).²⁹

Although dominating in the 1980s and 1990s and reinforced in 1998 as the formalized Washington consensus and the World Trade Organization (WTO) rules, neoliberalism's

¹⁸ Ibid.

¹⁹ Ibid, 98–101. See also Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' (2023) *Leiden Journal of International Law*, <https://doi.org/10.1017/S0922156522000802> (accessed 24 March 2023).

²⁰ Ingrid Landau, 'Human Rights Due Diligence and the Risk of Cosmetic Compliance' (2019) 20:1 *Melbourne Journal of International Law* 221.

²¹ Ibid, 222.

²² Massey, note, 5, 27.

²³ Stuart Hall, Doreen Massey and Michael Rustin, 'Framing Statement: After Neoliberalism: Analysing the Present' in Stuart Hall, Doreen Massey and Michael Rustin (eds), *After Neoliberalism? The Kilburn Manifesto* (London: Soudings, 2013) 9, 23.

²⁴ David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005).

²⁵ Jelke Boesten, 'Free Choice or Poverty Alleviation? Population Politics in Peru under Alberto Fujimori' (2007) 82 *European Review of Latin American and Caribbean Studies* 3, 20.

²⁶ Teresita de Barbieri, 'Derechos reproductivos y sexuales. Encrucijada en tiempos distintos' (2000) 62:1 *Revista Mexicana de Sociología* 45, 59; Alfredo Saad Filho, 'Towards a Pro-Poor Development Strategy for Middle-Income Countries: a Comment on Bresser-Pereira and Nakano' (2004) 24:1 *Brazilian Journal of Political Economy* 130, 135.

²⁷ Chritina Ewig, *Second-Wave Neoliberalism: Gender, Race and Health Sector Reform in Peru* (University Park, PA: Pennsylvania State University Press, 2010).

²⁸ Harvey (2005), note 24.

²⁹ Marianna Leite, '(M)Othering: Feminist Motherhood, Neoliberal Discourses and the "Other"' (2013) 5:2 *Studies in the Maternal* 1, 23.

'project' can be traced back to the 1920s.³⁰ Peck, Theodore and Brenner³¹ understand it as a political economy theory that proposes the achievement of individual well-being through the increase of entrepreneurial freedoms and correlated institutional framework pushing for free markets and free trade. After the introduction of neoliberalism as an ideology, the role of the welfare state as a promoter of well-being to its population was replaced by an enabling, rather directive government in search of good business.³² In this sense, neoliberal purists may argue that the role of the state is to create and preserve an institutional framework appropriate to such practices.³³ Limited government intervention and the diffusion of independent regulatory agencies with the purpose of liberalizing and privatizing utilities and trade are inherent to neoliberalism.³⁴

This article contends that one of the problems with HRDD, and therefore mHRDD, lies with the theoretical underpinnings of the UNGPs. The UNGPs, as proposed by John Ruggie, are based on the theory of embedded liberalism which aims to fix the neoliberal order rather than propose a complete overhaul.³⁵ While relying on the work of Polanyi, Ruggie affirmed that embedded neoliberalism would be a compromise to ensure the economic order is embedded in the social order.³⁶ Such embedding would arguably provide a pathway to overcome key global governance challenges like 'the widening gaps between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences'.³⁷ However, as clearly recognised by Ruggie, '[t]he essence of embedded liberalism [...] is to devise a form of multilateralism that is compatible with the requirements of domestic stability'.³⁸ That is, embedded neoliberalism is not looking at social interests and human rights from an intrinsic and meaningful way but rather instrumentalizing them to correct the pitfalls of post-war liberalism. In a forthcoming chapter, Deva and Kaur contend that 'the UNGPs are only aiming for a softer embedding of human rights in the market because the responsibility is not legally binding and thus may not ensure that human rights trump over profit considerations in the free market economy'.³⁹

The (neo)liberal underpinnings of mHRDD align with mainstream economics. The mainstream economic practice – both in terms of its policy and academic origins – is mainly focused on individual utility maximization with a distinct bias in its work towards policy proposals concerning reducing taxes, relaxing labour legislation and other types of rules and regulation that restrict business actors from harming wider society and environment. This limited view is then codified in jargon, econometric formulae, and made inaccessible to the vast majority of people to debate or challenge. Any new terms and approaches that are created to counter negative impacts on human rights can be easily

³⁰ Ben Fine, Costas Lapavistas and Jonathan Pincus, *Development Policy in the Twenty-First Century: Beyond the post-Washington Consensus* (London: Routledge, 2001); David Harvey, 'Neoliberalism as Creative Destruction' (2006) 88:2 *Geografiska Annaler* 145, 158.

³¹ Jamie Peck, Nik Theodore and Neil Brenner, 'Postneoliberalism and its Malcontents' (2009) 41:6 *Antipode* 1236, 1258.

³² Mitchell Dean, 'Liberal Government and Authoritarianism' (2002) 31:1 *Economy and Society* 37, 61.

³³ Harvey, note 30, 145.

³⁴ Hall et al, note 23, 9.

³⁵ John Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order' (1982) 36 *International Organization* 379.

³⁶ *Ibid.*, 385.

³⁷ John Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights' (2014) 20 *Global Governance* 5, 6.

³⁸ *Ibid.*, 393.

³⁹ Surya Deva and Harpreet Kaur, 'Business and Human Rights: From "Tokenism" to "Centring" Rights and Rightsholders' in Marianna Leite and Matti Kohonen (eds), *Righting the Economy: Towards a People's Recovery from Economic and Environmental Crisis* (London: Agenda Publishing, forthcoming).

appropriated and its meaning shifted, often depleted. This can be the case of mHRDD, particularly if a system-wide change does not take place.

Scholars that provide a critical understanding of capitalism, which overcomes the undoubted limitations of more orthodox Marxist thinking, argue that restrictive definitions of capitalism are insufficient. For instance, Nancy Fraser defines capitalism as a ‘cannibalistic’ ‘societal order that empowers a profit-driven economy to prey on extra-economic support it needs to function – wealth expropriated from nature and subject peoples; multiple forms of care work, chronically undervalued when not wholly disavowed; public goods and public powers, which capital both requires and tries to curtail; the energy and creativity of working people.’⁴⁰ Fraser and Raeggi affirm that capitalism is ‘fundamentally problematic’ as it operates across four dimensions – social reproduction, non-human nature, political power, and race, imperialism and expropriation – and involve three constitutive separations – production/reproduction, society/nature, economy/polity.⁴¹ According to Jason Hickel,⁴² capitalism is an expansionist model that fails to tackle the main problem of distribution created by production and surplus.

It is therefore no surprise that neoliberal economic models or neoclassical economics clash with a rights-based vision in which human rights have primacy and an intrinsic value. This was evident in the context of the COVID-19 vaccine apartheid – i.e., the divide in terms of access to COVID-19 vaccines between countries in the Global North and countries in the Global South – where the profits of big pharmaceutical companies have come before the fair and equitable distribution of vaccines.

As Nolan and Bohoslavsky explain,⁴³ historically there has been a growing deployment of human rights language to critique economic policy-making inputs, outputs and processes in terms of their impact on human rights. At the same time, there has been ever-greater recognition of the serious challenges with regard to leveraging human rights to enhance economic policy-making – be it in terms of standards, tools or impact. There have been a myriad of strategies deployed, including the balancing and/or matching economic goals with human rights principles such as non-retrogression, maximum available resources and extra-territorial obligations so as to address the effects of economic policy-making on human rights in the context of economic globalization.⁴⁴

Despite these advances, human rights’ impact on and traction in relation to economic policy-making remain weak.⁴⁵ This may be explained by the fact that neoliberal economics prioritize economic growth and profit over the realization of human rights; but also, by the fact that the neoliberal policy networks are capable of their own ‘counter-paradigm’ embodying a highly ethical and moral discourse that is depleted of political meaning and therefore rarely changing neoliberal policy prescriptions.⁴⁶

Human rights can be instrumentalized as a ‘smoke screen’ that invisibilizes the neoliberal ‘gap between rhetoric (for the benefit of all) and realisation (for the benefit of a small ruling class), increase over space and time’.⁴⁷ Samuel Moyn⁴⁸ explains that international human

⁴⁰ Nancy Fraser, *Cannibal Capitalism: How our System is Devouring Democracy, Care, and the Planet and What We Can Do About It* (London: Verso, 2022), xiv.

⁴¹ Nancy Fraser and Rachel Jaeggi, *Capitalism: A Conversation in Critical Theory* (Cambridge: Polity, 2018) 144.

⁴² Jason Hickel, *Less is More: How Degrowth Will Change the World* (London: Penguin Books, 2020).

⁴³ Aoife Nolan and Juan Pablo Bohoslavsky, ‘Human Rights and Economic Policy Reforms’ (2020) 24:9 *International Journal of Human Rights* 1247, 1267.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Leal, *note 4*, 90.

⁴⁷ Harvey, *note 30*, 169.

⁴⁸ Samuel Moyn, ‘A Powerless Companion: Human Rights in the Age of Neoliberalism’ (2014) 77:4 *Law and Neoliberalism* 147, 169.

rights law and the neoliberal phenomenon are too easily conflated. Susan Marks⁴⁹ explains that the way in which human rights law is constituted does not allow for the sort of structural critique eventually needed to target neoliberalism. In other words, human rights law and human rights terms run the danger of not countering neoliberalism or even helping to maintain the neoliberal *status quo*.

However, as Fraser notes, rights are not ‘inherently individualistic, bourgeois-liberal and androcentric; it only becomes so where societies establish the wrong rights, as, for example, when the (putative) right to private property is permitted to trump other rights, including social rights’.⁵⁰ For the appropriate rights to be front and centre, an enabling environment is needed. This is fundamental for the flourishing of a policy and praxis that is human rights-centred.

In the case of HRDD, the praxis may be susceptible to what Landau calls ‘cosmetic compliance’.⁵¹ This problem is twofold. First, by relying on neoliberal underpinnings inherent to the UNGPs, the theoretical framing of HRDD is too light-touch to warrant a more robust model of corporate responsibility.⁵² Second, the HRDD praxis is at the service of corporate interests rather than being centred on the realization of human rights.⁵³ Landau urged international and national lawmakers to not only look at the issue of how to encourage or mandate HRDD, but also with how regulatory initiatives should be designed to minimize the risk of companies performing HRDD cosmetically.⁵⁴ This article argues that minimizing cosmetic compliance is important as part of a wider package that looks at completely changing the neoliberal *status quo*.

IV. The Market Logic behind Mandatory Human Rights Due Diligence

The concept of HRDD as developed by John Ruggie, the former Special Representative of the Secretary General on business and human rights, is a core element of the second pillar of the UNGPs which focuses on the business responsibility to respect human rights.⁵⁵ Due diligence is a corporate concept that was initially solely focused on the financial analysis of assets coupled with a comprehensive legal appraisal usually requested by company buyers. It is, in this sense, and within the business context, a process of investigation aimed at identifying and managing commercial risks, including the potential for legal liability, ahead of a particular corporate transaction or activity.⁵⁶ This is fundamentally different from the aim of HRDD as advocated by Ruggie, who defined HRDD as ‘a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks’.⁵⁷

Although it is positive to see the move towards legally mandated HRDD, the pitfalls of using this as the sole tool to ensure the respect for human rights in a hyper-neoliberal

⁴⁹ Susan Marks, ‘Human Rights and Root Causes’ (2011) 74:1 *Modern Law Review* 57, 78.

⁵⁰ Fraser, note 40, 82.

⁵¹ Landau, note 20.

⁵² Deva, note 17.

⁵³ See Landau, note 20.

⁵⁴ *Ibid.*, 239–246.

⁵⁵ Gabriela Quijano and Carlos Lopez, ‘Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edge Sword?’ (2021) 6 *Business and Human Rights Journal* 241, 242.

⁵⁶ *Ibid.*

⁵⁷ Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: Summary of five multi-stakeholder consultations’, A/HRC/8/5/Add.1 (23 April 2008), para 152.

context is naive at best. Quijano and Lopez rightly noted that although strategies to embed the mHRDD concept into legislative proposals is laudable, there is a risk of ‘hollow laws which do little to change the status quo or, even worse, inadvertently provide a tool to further impunity for business-related human rights abuses’.⁵⁸ The different views about HRDD and its relation to core concepts such as liability have implications for its potential use and effects.⁵⁹ Moreover, the tendency towards ambiguity in the language used in the policies or regulations, leave businesses with discretion as to how to interpret and what is the legal threshold needed to comply with these policies.⁶⁰

The plurality of interpretation of the aims of mHRDD can be explained by the theory of legal pluralism. According to legal pluralism theory, in every society, two or more legal systems not belonging to a single ‘system’ coexist.⁶¹ It is, however, unknown to what extent non-state actors contribute to the ‘bending and breaking’ of rules in legal systems that are inherently pluralistic in the juristic sense. Although the use of the language of rights has grown rapidly amongst development policy and practice, the rhetoric of formal rights as advocated by international development bodies has not always improved the everyday reality. This is because public policies geared towards social justice have no effect if not inserted into a wider culture of political measures for positive change. This reflects a tendency of merging human rights terms with economic terms.

Another interesting tendency is the ‘humanization’ of economic terms or the ‘marketization’ of human rights terms. For example, due diligence is a particular tool used by corporate lawyers and auditors aimed at determining the net worth of a company during mergers and acquisition procedures. It is hardly the best way of analysing long-term, complex and ever-evolving issues. Even in the case when HRDD is ongoing and based on meaningful consultation with potentially affected groups and relevant stakeholders, it is still not enough to address these issues.⁶² Let us take the Samarco tragedy that took place in Brazil as an example. If environmental due diligence is quantified at US\$680 million, then there is not much room for inter-temporal impacts or risk uncertainties such as diseases that might be discovered and/or developed in the future by the local population due to the pollution of the Doce river.⁶³

In addition to that, even new mHRDD proposals, such as the European Commission’s Corporate Sustainability Due Diligence Directive (CSDDD), have considerable gaps and potential pitfalls. Initially, the CSDDD text included only large companies with more than 500 employees, with annual net turnover over EUR150 million, or companies with over 250 employees in listed sectors and turnover over EUR40 million (in total less than 0.2% of companies would be covered).⁶⁴ The draft limited value chain coverage by including only ‘established business relationships’, which excluded businesses and could have resulted in companies opting for other types of business relationships to avoid obligations and responsibility.⁶⁵

⁵⁸ Quijano and Lopez, note 55, 241.

⁵⁹ Ibid, 248.

⁶⁰ Ibid, 249.

⁶¹ Marianna Leite, ‘Pluralizing Discourses: Multinationals and Gender Equality’ (2019) 23:3 *Journal of International Women’s Studies* 120.

⁶² Landau, note 20, 243.

⁶³ Leite, note 61, 131.

⁶⁴ European Corporate Coalition for Justice, ‘Dangerous Gaps Undermine EU Commission’s New Legislation on Sustainable Supply Chains (28 February 2022), <https://corporatejustice.org/news/dangerous-gaps-undermine-eu-commissions-new-legislation-on-sustainable-supply-chains/> (accessed 24 March 2023).

⁶⁵ Human Rights Watch, ‘EU: Disappointing Draft on Corporate Due Diligence’ (28 February 2022), <https://www.hrw.org/news/2022/02/28/eu-disappointing-draft-corporate-due-diligence>. (accessed 24 March 2023).

In early December 2022, the European Council met in Brussels to adopt a general approach on the European Commission's CSDDD proposal.⁶⁶ France and Germany exerted strong pressure to water down the text and succeeded on several aspects.⁶⁷ The text proposed by the Council in late 2022⁶⁸ introduced a phase-in approach whereby the rules would first apply to 'very large companies that have more than 1,000 employees and EUR300 million net worldwide turnover or, for non-EU companies, EUR300 million net turnover generated in the EU, three years from the entry into force of the directive'.⁶⁹ It makes access to remedy only a sideshow and suggests a massive dilution of the definition of human rights impact.⁷⁰ The revised text introduced vague legal concepts like 'chain of activities' which many believe will create more challenges to individuals and communities affected by already complex value chains, particularly when it comes to access to remedies.⁷¹ Some understand this to mean corporations will not be held accountable for the harms their products and services cause, including 'pesticide harm to the environment and health, surveillance tech being used to spy on activists or journalists, and aviation fuel used in wars'.⁷² Additional gaps include the lack of liability for environmental harm and of climate due diligence, insufficient coverage of the arms trade and discretionary power given to each EU member state to decide whether to apply the new rules to the financial sector.⁷³

Moreover, most of these mHRDD laws do not seem to acknowledge situations of circumstances in which HRDD may not work. As Quijano and Lopez rightly note,⁷⁴ HRDD laws themselves, or their interpretive guidance, should also clarify the circumstances in which HRDD might not be the appropriate tool to ensure corporate respect for human rights.

As neoliberal policies seldom leave space for deep reflections and duties based on human rights principles, and as they rarely address the effects of economic policy-making on human rights in the context of economic globalization, mHRDD laws are bound to mimic the same distortions in neoliberal systems. Unless there is a wider move to promote transformative rules that fundamentally change economic principles and environments, such as the 2019 Guiding Principles on Human Rights Impact Assessments for Economic Reform Policies,⁷⁵ existing initiatives will be unable to avert and/or properly remedy human rights abuses in a comprehensive and meaningful way.

⁶⁶ For more, see 'Council Adopts Position on Due Diligence Rules for Large Companies', <https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/> (accessed 24 March 2023).

⁶⁷ Some civil society actors and civil society-led campaigns were highly critical of the compromised text. See, for instance, the reaction of CIDSE: 'The Council struck a serious blow to the proposal, it is now up to the Parliament to raise ambitions in view of the trialogue. The coming months will be crucial to ensure that MEPs in different parliamentary committees stand up for human rights over profit'. 'Catholic NGOs: Council Moves Forward With New Corporate Sustainability Rules But Member States Not "Up To The Task"', <https://www.cidse.org/2022/12/02/catholic-ngos-council-moves-forward-with-new-corporate-sustainability-rules-but-member-states-not-up-to-the-task/> (accessed 24 March 2023).

⁶⁸ Directive of the European Parliament and of the Council amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (16 November 2022), <https://data.consilium.europa.eu/doc/document/PE-35-2022-INIT/en/pdf> (accessed 24 March 2023).

⁶⁹ Ibid.

⁷⁰ Jill McCardle, Giuseppe Cioffo and Sylvia Obregon, 'How Berlin and Paris sold-out the EU corporate due diligence law', *EU Observer* (1 December 2022), <https://euobserver.com/opinion/156491> (accessed 23 February 2023).

⁷¹ CIDSE, note 67.

⁷² McCardle et al, note 70.

⁷³ CIDSE, note 67.

⁷⁴ Quijano and Lopez, note 55, 254.

⁷⁵ Nolan and Bohoslavsky, note 43, 1247.

V. A Rights-Based Approach to Business and Economic Models

Human rights have been called the dominant moral framework of our time, or the ‘lingua franca of justice’,⁷⁶ and there is strong consensus that economic systems and decisions have clear moral and ethical implications. For example, Birchall developed a framework to systematize understanding of corporate power over human rights looking at four aspects: corporate direct power over individuals’ human rights (like direct violations, structural power to reshape employment opportunities, and the discursive power to incentivize harmful choices through marketing); power over the materialities of human rights (such as housing, finance and the environment); power over institutions governing human rights (through lobbying, leverage, control or other forms of influencing); and power over knowledge around human rights (i.e., power to re-define the scope of their responsibilities and to legitimize corporations as human rights actors).⁷⁷ This scholarship furthers our understanding of the political economy of human rights and the actual breadth of business impacts on human rights.⁷⁸ This section focuses on the fourth aspect highlighted by Birchall, the power to re-define the scope of human rights responsibilities. That is, how a rights-based approach to business and economic models may avert the instrumentalization of human rights terms such as mHRDD.

There is no question that the economies we live in structure our daily experiences, opportunities and life outcomes, and represent systems which can profoundly affect our ability to enjoy our rights to decent work, to shelter, to adequate healthcare, political participation, a life free from violence and more.⁷⁹ However, until recently, human rights and economics were not often spoken about in the same breath.⁸⁰ Slowly, this has started to shift. Increasingly, human rights actors, including the UN High Commissioner for Human Rights, are calling for a shift towards a ‘rights-based’ or ‘human rights economy’,⁸¹ and human rights monitoring mechanisms are building up a steady stream of recommendations and jurisprudence on economic policy.⁸²

As former UN High Commissioner for Human Rights Michelle Bachelet states: ‘[a] human rights economy requires transparency, accountability and a broad space for social dialogue,

⁷⁶ Linda Barclay, *Disability with Dignity: Justice, Rights and Equal Status* (New York: Routledge, 2018).

⁷⁷ David Birchall, ‘Corporate Power over Human Rights: An Analytical Framework’ (2021) 6 *Business and Human Rights Journal* 42, 66.

⁷⁸ See, for example, Jedediah Britton-Purdy et al, ‘Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis’ (2020) 129:6 *Yale Law Journal* 1600; Anna Chadwick, ‘Human Rights, Poverty and Capitalism’ in Suzanne Egan and Anna Chadwick (eds), *Poverty and Human Rights: Multidisciplinary Perspectives*. (Cheltenham: Edward Elgar, 2021) 68.

⁷⁹ Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press: Oxford, 2005).

⁸⁰ Institute for Economic Justice, *Building a Field of Economics and Human Rights: Lessons from South Africa* (Johannesburg: IEJ, CESR and Section 27, 2021).

⁸¹ See, for instance, Human Rights Council, ‘Statement by Michelle Bachelet, UN High Commissioner for Human Rights, 47th session of the Human Rights Council’ (21 June 2021), <https://www.ohchr.org/en/2021/06/47th-session-human-rights-councilitem-2-human-rights-update-high-commissioner?LangID=E&NewsID=27178> (accessed 23 March 2023).

⁸² Following a joint submission and accompanying factsheet on the extra-territorial effects of Swiss-facilitated tax abuse – prepared by CESR with Alliance Sud, the Global Justice Clinic of NYU Law School, Public Eye and Tax Justice Network (TJN) – the UN Committee mandated to oversee compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) expressed concern in November 2016 at the potentially negative impact of Switzerland’s financial secrecy and corporate tax policies on the ability of other states, particularly those already short of revenue, to mobilize the maximum available resources for the fulfilment of women’s rights. ‘Submission to the Committee on the Elimination of Discrimination against Women 65th Pre-Sessional Working Group Geneva, March 7–11, 2016: Suggestions for the List of Issues: Switzerland to be considered in connection with the combined fourth and fifth periodic reports’, CEDAW/C/CHE/4-5.

scrutiny and participation.’⁸³ That is, ‘[w]e need a human rights economy; human rights-based development; and societies that, in all their diversity, share bedrock commitments to reduce inequalities and advance all human rights. We need to anchor our States in the sound foundation of justice – knowing that this effort will build the resilience and deep public trust all Governments seek to inspire.’⁸⁴

The purpose of a RBE can be delineated ‘to guarantee the material, social and environmental conditions necessary for all people to live with dignity on a flourishing planet.’⁸⁵ Human rights, some argue, are important to focus on discussions about the economy, not only because of the human rights impacts our economies have, but because they constitute an internationally agreed normative framework that applies to all areas of public policy, and are therefore of central relevance in framing the core objective of the economy and guiding how it is governed, nationally, regionally and globally.

Human rights and economic fields of study have been developed in parallel without any or much overlap. Slowly this is changing. Books edited by scholars such as Molyneux and Razavi,⁸⁶ Balakrishnan and Elson,⁸⁷ Balakrishnan, Heintz and Elson⁸⁸ and McNaughton, Frey and Porter⁸⁹ have broken new grounds.

The edited volume by Molyneux and Razavi reflects on the gains achieved by the international human rights movement and the many positive changes in women’s rights as well as in human rights more broadly in the 1990s.⁹⁰ This book brings the gender lens and the multicultural dimension to discussions around the social effects of economic policies and their ability to facilitate or deter the realization of human rights. The case studies presented by this edited volume demonstrated that there is a ‘wide gulf [...] between the articulation of global principles and their application in many national settings’,⁹¹ particularly across economic policies.

Balakrishnan and Elson’s edited volume looks at the cases of Mexico and the USA to test if and/or how far each country is conducting its macroeconomic policies in line with human rights obligations contingent upon the agreements that these nations have signed.⁹² It also determines what type of statistical and documentary evidence is needed for that analysis. The scholars particularly focus on the past three decades and look into five macroeconomic policy instruments, namely, fiscal and monetary policy, public expenditure, taxation, trade policy, and pension reforms.

McNaughton, Frey and Porter present an interdisciplinary analysis of economic inequalities and explore what role can human rights have in challenging these inequalities.⁹³ The compendium primarily aims at understanding the failings of human rights actors, bodies and institutions in tackling economic inequalities; how economics can help human rights actors address these challenges; and which normative framework they should be using when doing so. This builds on Samuel Moyn’s argument that human rights

⁸³ See Human Rights Council, [note 80](#).

⁸⁴ *Ibid.*

⁸⁵ Donald et al, [note 2](#), 2.

⁸⁶ Maxine Molyneux and Shahra Razavi (eds), *Gender Justice, Development, and Rights* (Oxford: Oxford University Press, 2002).

⁸⁷ Balakrishnan and Elson, [note 2](#).

⁸⁸ Balakrishnan, Heintz and Elson, [note 2](#).

⁸⁹ Gillian McNaughton, Diane Frey and Catherine Porter (eds), *Human Rights and Economic Inequalities* (Oxford: Oxford University Press, 2021).

⁹⁰ Molyneux and Razavi, [note 86](#), 4.

⁹¹ *Ibid.*, 3.

⁹² Balakrishnan and Elson, [note 2](#).

⁹³ McNaughton et al, [note 89](#), 14.

are unambitious in theory and ineffectual in practice in the face of market fundamentalism's success.⁹⁴

The subsequent book written by Balakrishnan, Heintz and Elson⁹⁵ builds on these arguments, particularly looking at the role of human rights principles in shedding light into often invisible human rights abuses which are rarely perceived as infringements, and instead seen as the consequences of inevitable economic policy decisions. They argue that economic policies must be developed and guided from the perspective of key principles such as the progressive realization of human rights and the use of the maximum available resources to do so. Balakrishnan, Heintz and Elson contend that the human rights approach constitutes an alternative evaluative and ethical framework for assessing economic policies and outcomes.⁹⁶ Their approach takes into account the interaction between individual rights, collective rights, and collective action, as well as encompassing a legal framework which offers formal mechanisms through which unjust policy can be protested.

The approach of Balakrishnan, Heintz and Elson is based on human rights principles of progressive realization; non-retrogression; minimum essential level/minimum obligations; non-discrimination and equality; accountability, transparency and participation; and maximum available resources. Within this framework, maximum available resources should be examined in terms of five types of policy: (1) government expenditure; (2) government revenue; (3) development assistance (both official development assistance and private resource flows); (4) debt and deficit financing; and (5) monetary policy and financial regulation.⁹⁷ These principles should then orient a new type of policy audit that would rely on the following steps: (i) selecting the economic policies to be considered; (ii) identifying the human rights principles that apply to the selected policies; (iii) identifying relevant indicators to assess how far obligations of conduct are being met; and (iv) identifying indicators of results in realizing economic and social rights, and crosscheck with indicators of conduct.⁹⁸ The purpose is to identify policies that are not consistent with obligations to realize human rights, and those that are.

The above-mentioned literature clearly demonstrate that neoliberal policies based on mainstream neoclassical economics are often conflicting with existing obligations and the full and effective realization of human rights. This is because '[n]eoliberalism is premised on the freedom of contract as the most basic value'.⁹⁹ This means that, under neoliberal policies, human rights are constrained to negative liberties, i.e., 'rights are primarily protections against state interference',¹⁰⁰ not the realization of rights by the state. However, as Balakrishnan and Elson rightly note, 'neoclassical economics are not the only kind of economics'.¹⁰¹

As long as mHRDD is inserted into a hyper-neoliberal system, it will be impossible for its pitfalls and limitations to be overcome. It would only have the potential of being a truly transformative tool if inserted into an economic system that is oriented by rights and not profit. At the same time, even the most ambitious mHRDD may be incapable of averting and solving all issues related to corporate responsibility. The solution would be to have human rights law and principles as a cornerstone of all monitoring and evaluation processes that

⁹⁴ Moyn, *note 48*, 169.

⁹⁵ Balakrishnan, Heintz and Elson, *note 2*.

⁹⁶ *Ibid.*, 2.

⁹⁷ *Ibid.*, 22.

⁹⁸ *Ibid.*, 23.

⁹⁹ Molyneux and Razavi, *note 86*, 8.

¹⁰⁰ *Ibid.*, 12, 29.

¹⁰¹ Balakrishnan and Elson, *note 2*, 2.

involve economic policy and practice. In fact, I contend that human rights should be used as a marker and as a threshold for all business and human rights rules as well as macroeconomic policies. This would in practice mean that new business and human rights standards and regulations, be they related to mHRDD or to the wider harmonization with the UNGPs, would need to be outcome oriented and focused on the realization of human rights.

VI. Righting Economies

The COVID-19 pandemic elevated the narrative of an alternative economy. For instance, there are now 13 hubs for a Wellbeing Economy Alliance, while the Doughnut Economy is being implemented at a city level in Amsterdam, Brussels and Copenhagen.¹⁰² Meanwhile, Chile has declared itself as the country where the neoliberal economic model died, aiming to create a welfare-state-led economy.¹⁰³ In South Africa, a Universal Basic Income (UBI) is gaining ground, building on the COVID-19 relief grants made to households during the pandemic.¹⁰⁴ This reflects a trend for a myriad of economic alternatives, some of which have been well documented by UNRISD's April 2022 *Encyclopaedia of Alternative Economic Models*.¹⁰⁵

This trend is welcome but wider change is needed. A rights-based approach to economic policies, or framing of the economy, is proposed as an alternative to analyse both the scale of the problem in terms of human rights and environmental crisis, while also understanding the emerging alternatives. A rights-based economy is based on a holistic understanding of human well-being, and supported by the widely agreed framework of values and obligations of human rights. It demands action to re-distribute resources, remedy inequalities, and re-balance power in our economies. That is, a rights-based economy framing provides a set of guideposts against which economic approaches and policies can be measured, assessed and benchmarked. It is plural by nature as it intends to 'crowd in' other rights-aligned and transformative approaches to the economy.

The RBE enables us to test and analyse economic policies from the perspective of human rights. It is normative by nature and therefore aims to address normative challenges and pitfalls. When one criticizes the economic paradigms (either neoliberal or alternative economic models), one must do it through a *litmus test* composed of three axes. First, an initial test on how close the tools are to paradigms and models, for example, how to mainstream human rights in assumptions and in practice; what kinds of assumptions each different paradigm has and how they measure against human rights assumptions, in terms of theory building. Second, a non-test on normative hierarchy of economic models, checking what types of normative hierarchies we have within the different kinds of economic models (i.e., how to check the human rights perspectives in micro-meso levels, and different economic models). Third, a test looking at which alternative economic models are more conducive to protecting human rights, being well aware that it depends on what human right we are talking about (for instance, some alternative models may be more conducive to economic, social and cultural rights, but other models may be more conducive to civil and political rights).

Economics, in the neoclassical tradition, is focused on efficiency, maximizing utility (social satisfaction measure) and superimposing all else to maximize 'social utility' and,

¹⁰² Wellbeing Economic Alliance, 'Local Hubs' <https://weall.org/hubs> (accessed 24 March 2023).

¹⁰³ 'Chile's new president promises to bury neoliberalism', *The Economist* (20 December 2021), <https://www.economist.com/the-americas/2021/12/20/chiles-new-president-promises-to-bury-neoliberalism> (accessed 24 March 2023).

¹⁰⁴ Kerrie Sadiq and Hanneke du Preez, 'The Case for a Universal Basic Income in South Africa: A Conceptual Approach' (2021) 35: 3 *South African Journal of Accounting Research* 167, 190.

¹⁰⁵ Ilcheong Yi (ed), *Encyclopaedia of the Social and Solidarity Economy* (London: Edward Elgar, 2022).

therefore, not to realize human rights. It is bereft of any normative/ethical orientation and, as a result, conducive to the violation of human rights. For example, the efficient allocation of resources, and an 'optimum equilibrium' in the housing market can leave 10,000 people homeless. The RBE attempts to solve this ethical dilemma faced by economists and policy makers. It instils a sense of hope and enables systematic learning and constant dialogue. This is a reflection of human rights as a project and a natural progression for the study and praxis related to the intersection between human rights and the economy. In this sense, the RBE is a normative orientation. It offers a set of economic alternatives with a social proposition and ethical parameters, focused on organizing the economy in terms of the social relationships and the realization of human rights.

The RBE departs from a communitarian approach but acknowledges that there are inherent tensions that will arise at the individual level. The RBE looks at the relationship between collective rights and individual rights, and the nuances of these tensions. However, most importantly, the RBE recognizes that, when it comes to economic policies, the main duty-bearer is still the state.

The RBE provides a normative framework that should hopefully orient all economic policies at micro, meso and macro levels. It is about enabling the full realization of human rights by putting people and planet at the centre. It is radical by nature as it proposes to dismantle neoliberal models and profit-seeking behaviours. That being said, it is important to highlight that a potential shift away from neoliberalism will be piecemeal. It will be incremental and through a set of parallel and independent tracks that may or may not reinforce one another. As with many human rights and many human rights terms such as mHRDD, there may be setbacks and backlashes which we take into account. This does not mean that the shift to the RBE is not possible; it only recognizes that the road ahead is difficult and challenging.

For instance, the RBE should be able to reach spaces and realize rights in a way mHRDD would never be able to do, even if operating in an optimal context with holistic rules and comprehensive praxis. The RBE looks at wider issues such as social protection, decent work and living wages, access to public services, tax and corporate regulation. It pushes for seismic shifts needed in global economic governance while fostering an enabling environment for alternative economic alternatives such as feminist economics valuing care work or social solidarity economies looking at the role of cooperative in strengthening and re-building the social fabric often corrupted or corroded by the effects of corporate abuse and exploitation.

Similarly, promoting the use of the 2019 Guiding Principles on Human Rights Impact Assessments for Economic Reform Policies¹⁰⁶ is a potential way forward, as they apply to short- and long-term cases and are to be considered and applied 'in coordination and conjunction' with other Guiding Principles. That is, they serve as a preventative and reactive function 'whenever economic reform policies may foreseeably result in impairment of human rights'.¹⁰⁷ The Guiding Principles for Economic Reform Policies also note the importance of transparent and participatory *ex ante* and *ex post* human rights impact assessments in the design of economic reform programmes attached to international loans.

VII. Conclusion

As shown by Deva, current mHRDD laws are incapable of overcoming systematic or structural challenges, e.g., business operations in authoritarian regimes, addressing

¹⁰⁶ Nolan and Bohoslavsky, note 43, 1250.

¹⁰⁷ *Ibid*, 1252.

poverty and various inequalities, dismantling business models of exploitation.¹⁰⁸ In fact, ‘the UNGPs alone are unlikely to be enough to challenge or confront the existing structure of irresponsibility and inequality’.¹⁰⁹ Pillar II was not ‘meant to be legally binding; rather, it was envisaged to operate as a supra-legal norm co-existing with other (legal) norms’ and should therefore, as Deva rightly argues, be a starting point rather than an end point.¹¹⁰ Although mHRDD has often been framed as a ‘beacon of hope’, as with other discreet solutions, it is not able to escape the fundamental conflicts and distortions inherent in neoliberal economic systems and policies. Therefore, this article contends that, while ensuring mHRDD laws are in place as a preventative and mitigation tool, states must also push for transformative macroeconomic policies based on human rights principles as a way to fundamentally change business models.

A call for a RBE or a rights-based framing of the economy is in the continuum of previous attempts to rewrite the rules of the economy towards rights and social justice in mind within a democratic society, but with an explicit focus on human rights. This focus on human rights is largely missing in any mainstream economic literature which interests itself in the distribution of economic assets or economic welfare of the population more widely.

Moreover, the potential for human rights norms, principles and obligations to shape economies has not been fully explored. Traditionally, human rights have been seen by scholars and practitioners as components external to economies.¹¹¹ Under this lens, human rights are perceived to be a tool that can be used to handle the distortions caused by neoliberalism,¹¹² or worse that they are a key component or ‘handmaiden’ of neoliberalism.¹¹³ Seldom, human rights have been seen as a fundamental axis and principled approach to (re)shape neoliberalism to avoid these distortions from taking place.¹¹⁴

A small, but growing body of research also addresses the broader economic and regulatory institutions needed to enable such a RBE, and focus on the revenue-raising side of fiscal policy or the issue of ‘fiscal space’ from a human rights perspective.¹¹⁵ This includes rethinking tax systems to promote rights;¹¹⁶ ways to deal with both private debt and sovereign debt crisis;¹¹⁷ global tax abuse by the wealthy and large corporations;¹¹⁸ creating shared pools of collectively managed investment capital including local development funds; co-operative and mutual banking to circulate capital to socially and environmentally useful objectives; and regulating private enterprises in such a way that prevents them from doing harm to local communities and the environment.

¹⁰⁸ Surya Deva, ‘The UN Guiding Principles’ Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface’ (2021) 6:2 *Business and Human Rights Journal* 336, 351. See also Deva, [note 19](#), 13–16.

¹⁰⁹ Deva, [note 113](#), 338.

¹¹⁰ *Ibid.*

¹¹¹ De Witte, [note 2](#).

¹¹² *Ibid.*

¹¹³ Moyn, [note 48](#), 169.

¹¹⁴ Balakrishnan and Elson, [note 2](#).

¹¹⁵ Ignacio Saiz, ‘Freeing Fiscal Space: A Human Rights Imperative in Response to COVID-19’, https://www.cesr.org/sites/default/files/2021/Freeing_Fiscal_Space.pdf (accessed 24 March 2023).

¹¹⁶ Avi-Yonah and Mazzoni, [note 1](#), 259.

¹¹⁷ See, for instance, e.g., Center for Economic and Social Rights, ‘Key Concept Series on Sovereign Debt and Human Rights’, <https://www.cesr.org/key-concepts/> (accessed 24 March 2023); Institute for Economic Justice, CESR and Section 27, ‘Impact of Public Debt on Human Rights during COVID-19’, <https://www.iej.org.za/the-impact-of-public-debt-on-human-rights-during-covid-19/> (accessed 24 March 2023).

¹¹⁸ See, e.g., the submission prepared by the Tax Justice Network, CESR, Berne Declaration, Public Eye and NYU CHRGJ before CEDAW on Switzerland’s responsibility for the extraterritorial impacts of tax abuse on women’s rights, https://www.cesr.org/sites/default/files/downloads/switzerland_cedaw_submission_2nov2016.pdf (accessed 24 March 2023).

Recent work by scholars such as Balakrishnan and Elson¹¹⁹ and UN human rights experts such as the UN Special Rapporteur on Adequate Housing¹²⁰ are enhancing our ability to analyse economic policies from a human rights perspective. Much research is still needed to fully develop approaches and standards that fundamentally equip human rights actors to challenge neoliberal thinking. For instance, it should be important to further explore the advantages and tools potentially created by the RBE. It would be equally important to go beyond the analysis of specific countries by providing a *litmus test* to determine the minimum threshold of human rights enabling economic policies. Such analysis should not only be aimed at providing a *litmus test* for new and existing economic policies but also investigating the possibility of replacing neoliberal systems with alternative economic systems that are human rights-centred. This should include the circumstances needed to make this happen. It should also explore the inherent tension between the need to promote more, not less, liberal individualism¹²¹ and the need to ensure a collective role of economic policies guided by human rights.¹²²

Competing interest. The author declares none.

¹¹⁹ Balakrishnan and Elson, *note 2*.

¹²⁰ For example, in a 2017, the UN Special Rapporteur on adequate housing issued a report focused on the 'financialization' of housing and its impact on human rights. 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-discrimination in this Context', A/HRC/34/51, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/009/56/PDF/G1700956.pdf?OpenElement> (accessed 24 March 2023). The report examines structural changes in recent years whereby massive amounts of global capital have been invested in housing as a commodity, as a means of accumulating wealth. This is a step towards recognizing the commodification of human rights which is fundamental in understanding how we shield human rights from this commodification trend.

¹²¹ Molyneux and Razavi, *note 86*.

¹²² Balakrishnan, Heintz and Elson, *note 2*.